



Marketing to Consumers

WHAT TO WATCH OUT FOR

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What is direct marketing?

Direct marketing is the targeted advertising of products or services to specific individuals.

Direct marketing channels can involve communication via:

- post
- email
- telephone calls (live and automated)
- text messages
- websites
- social media

Leaflets, billboards, television, newspapers and radio adverts are generally not regarded as direct marketing, as they target a wide more general audience.

Direct marketing is defined by Section 122(5) of the Data Protection Act 2018 as:

“the communication (by whatever means) of advertising or marketing material which is directed to particular individuals.”

This covers all advertising or promotional material, including that promoting the aims or ideals of not-for-profit organisations – for example, it covers a charity or political party campaigning for support or funds.

The marketing must be directed to particular individuals. In practice, all relevant electronic messages (e.g. calls, faxes, texts and emails) are directed to someone, so they fall within this definition.

Genuine market research does not count as direct marketing. However, if a survey includes any promotional material or collects details to use in future marketing campaigns, the survey is for direct marketing purposes and the rules apply.

Routine customer service messages do not count as direct marketing – in other words, correspondence with customers to provide information they need about a current contract or past purchase (e.g. information about service interruptions, delivery arrangements, product safety, changes to terms and conditions, or tariffs).

General branding, logos or straplines in these messages do not count as marketing. However, if the message includes any significant promotional material aimed at getting customers to buy extra products or services or to renew contracts that are coming to an end, that message includes marketing material and the rules apply.

UK GDPR overview

Many direct marketing activities involve processing personal data. To process personal data, there must be a lawful ground for doing so under the UK GDPR. In the case of direct marketing, there are two potential lawful grounds:

Potential lawful ground	Comment
<p>Legitimate Interests:</p> <p>The processing is necessary for the purpose of the marketer’s legitimate interests except where those interests are overridden by those of the data subject.</p> <p>Article 6(1)(f)</p>	<p>Recital 47 of the UK GDPR acknowledges that processing personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.</p> <p>This ground is usually not appropriate where consent is required under PECR 2003 in any event—primarily for automated telephone and electronic marketing (see: ICO guidance on legitimate interests).</p> <p>The ICO’s view is that using legitimate interests when PECR 2003 consent is required is an unnecessary exercise and is likely to cause confusion.</p> <p>If a data controller intends to rely on legitimate interests as the lawful ground for direct marketing, it will need to conduct a legitimate interest assessment.</p>
<p>Consent:</p> <p>The data subject has given their consent to processing for the purpose of direct marketing.</p> <p>Article 6(1)(a)</p>	<p>Consent must be freely given, specific, informed and unambiguous. Consent requests must be separate from other terms and conditions and require a positive action to opt in. Opt-out consent is not permitted under the UK GDPR.</p> <p>For this reason, many organisations will prefer to rely on legitimate interests as the lawful basis for direct marketing activities but, as explained above, legitimate interests is not appropriate as a lawful ground for any marketing which requires consent under PECR 2003.</p>

Irrespective of establishing a lawful ground for processing under the UK GDPR, data subjects have the right to object at any time to their personal data being processed for direct marketing purposes. The right to object also extends to profiling related to direct marketing.

Where the data subject objects, direct marketing to them must immediately stop.

People who objected must not be contacted at a later date to ask if they want to opt back in to receiving marketing. This would involve using their personal data for direct marketing purposes and is likely to breach the UK GDPR and will also breach PECR 2003 if the contact is by phone, text or email.

It can be acceptable to:

- send a message immediately after someone has opted out confirming they have unsubscribed and providing information about how to resubscribe; and
- remind individuals that they can opt back into marketing if the reminder forms a minor and incidental addition to a message being sent anyway for another legitimate purpose

However, this must be done sensitively, must not include marketing material in the message, and must never require an individual to take action to confirm their opt-out.

Privacy and Electronic Communications Regulations (PECR) 2003 overview

They give people specific privacy rights in relation to electronic communications.

There are specific rules on:

- marketing calls, emails, texts and faxes;
- cookies (and similar technologies);
- keeping communications services secure; and
- customer privacy as regards traffic and location data, itemised billing, line identification, and directory listings.

Some of the rules only apply to organisations that provide a public electronic communications network or service. But even if you are not a network or service provider, PECR will apply to you if you:

- market by phone, email, text or fax;
- use cookies or a similar technology on your website; or
- compile a telephone directory (or a similar public directory)

There is no restriction on sending solicited marketing, i.e. marketing material the recipient has specifically requested. This is because PECR 2003 only applies to unsolicited marketing messages.

PECR 2003 will not apply when contacting customers to conduct genuine market research or when engaging a research firm to do so. However, the UK GDPR will still need to be complied with in relation to any personal data being processed and a lawful ground will be needed for that processing.

PECR 2003 cannot be avoided by disguising marketing activities as market research, i.e. selling under the guise of research (a practice known as '*sugging*'). Any attempt to do so may result in enforcement action. Therefore, be aware that if a proposed market research call or message includes any promotional material, or the collection of data to use in future marketing exercises, it will be deemed to be for direct marketing purposes and PECR 2003 will apply.

What is permitted by PECR 2003 depends on whether the direct marketing activity is aimed at a business or an individual. Generally, it is not permitted to:

- make unsolicited marketing calls to numbers registered on the Telephone Preference Service (TPS) or corporate equivalent, to anyone who has stated that they do not want to receive calls or, for cold calls relating to claim management services, to anyone unless they have specifically opted in; and
- send texts or emails to individuals without their specific consent, save in limited situations when marketing similar products or services to existing contacts who have not objected

Postal and other non-electronic marketing

Non-electronic marketing activities that necessitate the processing of personal data are caught by the UK.

When initiating a postal marketing campaign, the first step is to consider whether a proposed marketing activity involves processing personal data and, if so, to identify a lawful ground for that processing under the UK GDPR.

The lawful ground for processing is likely to be legitimate interests or consent.

Telephone marketing (live calls)

There are different requirements for live calls and automated calls, and specific rules for cold calls relating to claims management services.

Before engaging in live telephone marketing of any kind, the first consideration is whether the proposed marketing activity involves processing personal data and, if so, a lawful ground for that processing should be identified.

Telephone marketing activities will usually involve processing personal data, i.e. the name and telephone number of the proposed recipient.

Even where individuals are called in their professional capacity, usually it will still constitute the processing information relating to an identified or identifiable natural person.

The lawful ground for processing the personal data under the UK GDPR is likely to be legitimate interests or consent.

Automated calls

Before engaging in this type of marketing, the first step is to consider whether a proposed automated calling activity involves processing personal data (likely) and, if so, to identify a lawful ground for that processing.

The rules on automated calls are stricter than those relating to live calls. Rather than screening to exclude potential recipients (screening out), it is necessary to screen to include potential recipients (screening in).

This is because an automated marketing must not be made to an individual unless they have specifically consented to receive this type of call.

General consent for marketing, or even consent for live calls, is not enough—it must specifically cover automated calls.

Email, text and social media messaging

Electronic mail means any text, voice, sound or image message sent over a public electronic communications network, which can be stored until it is collected by the recipient. It specifically includes messages sent by text.

Social media marketing will also fall within the definition provided it is directed at a particular individual.

The ICO considers that PECR 2003 applies to '*direct messages via social media or any similar message that is stored electronically*'. This means, for example, that direct messages sent to the inbox of a user of Facebook or Twitter, will be caught

It is likely that other methods of targeted advertising on social networking sites may also constitute electronic mail under PECR 2003. Some sites, for example, provide a facility under which advertisers can upload a list of names and email addresses (or other identifier such as a handle) to whom marketing messages can be delivered.

The messages may not necessarily be sent to the individuals' inboxes but through other means such as on their social media feed or timeline.

The first thing to do when doing an email marketing campaign is to consider whether the activity involves processing personal data and, if so, to identify a lawful ground for that processing.

Email marketing to individuals is highly likely to involve processing personal data.

The position is less clear for corporate prospects. Many employees have personal corporate email addresses, e.g. `firstname.lastname@org.co.uk`. This is very likely to be personal data, as it enables them to be identified (directly or indirectly) as a natural person.

Where an individual recipient can be identified from their email address, the UK GDPR applies, meaning there must be a lawful ground for processing the personal data.

Where a lawful ground for processing is required, most organisations will look to legitimate interests or consent.

PECR 2003 permits the marketing of similar services/goods to existing contacts via email. This can only be done where all of the following conditions are met:

- the contact details of the proposed recipient were obtained in the course of the sale (or negotiations for the sale) of a product or service to that recipient;
- the proposed direct marketing is in respect of similar products and services only;

- the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of their contact details for the purposes of such direct marketing:
 - when their details were initially collected, and
 - at the time of each subsequent communication (where they did not initially refuse the use of their contact details)

This is often referred to as '*soft opt-in*' and it can be used where legitimate interests is being relied on as the lawful ground for processing under the UK GDPR, meaning consent is not required under the UK GDPR or PECR 2003.

The soft opt-in can only be relied on if the data subject was given a simple means of refusing the direct marketing when their details were initially collected

Online marketing

Adverts shown to every person who views a website will generally not constitute direct marketing for the purpose of PECR 2003.

The UK GDPR must, however, be complied when targeting online adverts at individual users using their personal data. This might apply if, for example, personalised adverts are displayed based on browsing history, purchase history, or log-in information.

Viral marketing and refer a friend

Viral marketing through the use of emails, blogs, social media and other online and mobile channels has become a powerful tool for advertisers. For direct marketing, the most relevant forms of viral marketing are:

- viral email campaigns—emails or text messages containing a marketing communication is sent to a recipient who is encouraged to forward it on to others;
- refer-a-friend schemes—an individual is encouraged to provide the name and details of a friend, who is then contacted by the organisation with a marketing communication by electronic or postal means

These viral marketing methods can be difficult to undertake without some risk of falling foul of the UK GDPR and/or PECR 2003.

For viral email campaigns, organisations should ensure that they are permitted to send a marketing communication to the original recipient. Assuming that an organisation will not receive any personal data of individuals to whom the email is eventually forwarded, UK GDPR does not need to be considered further, provided it is complied with in relation to the processing of personal data involved in sending the original email.

Lead generation and marketing lists

A marketing list that is up-to-date, accurate, and reliably records specific consent for marketing used in compliance with the law should generate few complaints.

Using a marketing list that is out-of-date, inaccurate, and/or includes people who have not consented to their information being used or disclosed for marketing purposes is likely to result in a breach of the UK GDPR and PECR 2003.

Direct Marketing Checklist

The ICO publishes a [downloadable direct marketing checklist](#), which is a helpful method of verifying direct marketing compliance requirements.

The ICO also publishes a fuller [Direct Marketing Guidance booklet](#).

We highly recommend both these publications for additional and more detailed help and guidance on direct marketing.

The ICO's summary of Direct Marketing¹

- Direct marketing covers the promotion of aims and ideals as well as the sale of products and services. This means that the rules will cover not only commercial organisations but also not-for profit organisations (eg charities, political parties etc).
- In many cases organisations will need consent to send people marketing, or to pass their details on. Organisations will need to be able to demonstrate that consent was knowingly and freely given, clear and specific, and should keep clear records of consent. The ICO recommends that opt-in boxes are used.
- The rules on calls, texts and emails are stricter than those on mail marketing, and consent must be more specific.
- Organisations should not take a one-size-fits-all approach. Organisations can make live marketing calls to numbers not registered with the TPS, if it is fair to do so. But they must not call any number on the TPS list without specific prior consent.
- Organisations must not make any automated pre-recorded marketing calls without specific prior consent.
- Organisations making marketing calls must allow their number (or an alternative contact number) to be displayed to the person receiving the call.
- Organisations must not send marketing texts or emails to individuals without their specific prior consent. There is a limited exception for previous customers, known as the soft opt-in.

¹ Extracted from ICO's [Direct Marketing Version: 2.3-](#)

- Organisations must stop sending marketing messages to any person who objects or opts out of receiving them.
- Organisations must carry out rigorous checks before relying on indirect consent (ie consent originally given to a third party). Indirect consent is highly unlikely to be valid for calls, texts or emails.
- Neither the DPA nor PECR ban the use of marketing lists, but organisations must take steps to ensure a list was compiled fairly and accurately reflects peoples' wishes. Bought-in call lists should be screened against the TPS. It will be very difficult to use bought-in lists for text, email, or automated call campaigns as these require very specific consent (either where the specific organisation is named or it is within a precisely defined category of organisation).
- The ICO will consider using its enforcement powers, including the power to issue a fine of up to £500,000, where an organisation persistently ignores individuals' objections to marketing or otherwise fails to comply with the law.
- Our [direct marketing checklist](#) can help organisations to comply.

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Note: This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. The information contained in this document is intended to be for informational purposes and general interest only.

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