



## What rules apply to electronic direct marketing?

The '[General Data Protection Regulation](#)' (GDPR) applies directly in Ireland to most kinds of data processing and is read in conjunction with the [Data Protection Act 2018](#); however, in addition to these general rules, there are **rules which specifically apply to electronic direct marketing** (marketing conducted by phone, fax, text message, and email), which are set out in the '[ePrivacy Regulations](#)' (SI 336 of 2011).<sup>1</sup>

The ePrivacy Regulations are an **extra set of rules** which are applicable to certain types of data processing, including electronic direct marketing, and are **read together** with the rules found in the Data Protection Act 2018 and the GDPR. Recital 173 and Article 95 of the GDPR clarify that the ePrivacy Directive continues to apply in tandem with the GDPR.

## How does the GDPR impact consent requirements for electronic direct marketing?

It is important for retailers to note that any '**consent**' required under the ePrivacy Regulations must be **consistent with the definition of consent found in the GDPR**,<sup>2</sup> namely;

any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

The concept of consent under ePrivacy is based on that found in the GDPR, and this position has been confirmed by the Article 29 Working Party (now replaced by the European Data Protection Board' or 'EDPB') in its '[Guidelines on Consent under Regulation 2016/679](#)' (at page 4).

In addition to the **characteristics of consent** under the GDPR, as set out above, further **conditions for valid consent are specified in Article 7 GDPR**, including the requirement that a request for consent must be **clearly distinguishable** from other

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<sup>1</sup> The ePrivacy Regulations transpose the EU Directive 2002/58/EC on Privacy and Electronic Communications, otherwise known as the 'ePrivacy Directive', into Irish law.

<sup>2</sup> See Article 4(11) GDPR

matters, and that a data subject is **entitled to withdraw** their consent at any time, and should be able to do so as easily as they gave it.

Recital 32 GDPR makes clear that **silence, pre-ticked boxes, or inactivity** on the part of a data subject **will not constitute consent** under the GDPR, and therefore will not be sufficient to demonstrate consent for the purposes of electronic direct marketing, where required under the ePrivacy Regulations.

## Is consent explicitly required for all cases of electronic direct marketing?

The **general rule** for electronic direct marketing is that it **requires the clear, affirmative consent** of the recipient (such as by specifically opting-in) under Regulation 13 of the ePrivacy Regulations.

Nevertheless, consent is **not specifically required** in respect of every instance of electronic direct marketing, and there is an **exception to the general requirement** for consent, but only in cases involving existing customers, where certain other conditions are also met.

Under Regulation 13(11) of the ePrivacy Regulations, where an organisation lawfully obtains electronic mail contact details '*from a customer ... in the context of the sale of a product or service*' (i.e. this only applies to **existing customers**), consent to electronic direct marketing is not required as long as the following **further conditions** are met in relation to the electronic direct marketing communication:

- a) the product or service being marketed is the organisation's **own product or service**,
- b) the product or service being marketed is of a kind **similar to that supplied** to the customer in the context of the original sale,
- c) the customer must be **clearly and distinctly given the opportunity to object** to the use of their details at the time those details are collected, as well as each time the organisation sends an electronic marketing message to the customer, and
- d) the **initial** direct marketing communication must be sent **within 12 months** of the date of the original sale to the customer.

This means that an organisation must not send direct electronic marketing to a *prospective customer* who does not complete a purchase, for example where they browse online for products but do not complete the checkout process.

Regulation 13(11) further requires that the customer's electronic mail contact details must have been **lawfully obtained** in accordance with the Data Protection Act 2018. This means the **initial reason** for obtaining the contact details must have been compliant with the [principles of data protection](#) and have had a **valid legal basis**, as appropriate for the context in which the electronic mail contact details were originally obtained.

## In what kinds of cases might consent not be specifically required for electronic direct marketing?

As mentioned above, in cases that fulfil the preconditions of Regulation 13(11) (i.e. cases of marketing to existing customers), retailers may be able to engage in direct marketing without the need for specific consent to such marketing. The **examples below** illustrate how this might work, and **what steps might be required** in practice:

### Case A

Customer X books and pays for a hotel room with Hotel Y. For the purpose of confirming the sale and issuing a receipt, Hotel Y requires Customer X's email contact details at the point of sale. Customer X is given an opportunity at the point of sale to object to the use of their details for electronic direct marketing, by ticking a box, but does not do so.

Within 12 months of that sale, Hotel Y wants to send an electronic direct marketing email to Customer X to advertise the fact that they are having a half-price deal on their rooms for a limited time. They plan to include a link at the bottom of the email allowing Customer X to opt-out of any further direct marketing emails.

Hotel Y may use the email contact details of Customer X in this case for electronic direct marketing, given that;

- the email contact details were initially obtained validly, with an valid legal basis, at the point of sale;
- the product or service being marketed is Hotel Y's own;
- the product or service being marketed is similar to that which the customer purchased in the original sale;
- the customer was given the opportunity to opt-out of electronic direct marketing at the point of sale;
- the customer was given the opportunity to opt-out of electronic direct marketing in each subsequent message; and
- the sending of the first direct marketing email occurred within 12 months of the original sale.

The further examples below illustrate how the exception in Regulation 13(11) **cannot be relied on** by retailers, or those engaging in electronic direct marketing, **where just one of the conditions** of Regulation 13(11) is **not met**:

#### Case B

In a case with similar details as in Case A, this time regarding the sale of a room to Customer Z, where there was no option on the booking form at the point of sale for Customer Z to opt-out of electronic direct marketing, or any indication that their email contact details might be used for direct marketing.

Hotel Y may **not** use the email contact details of Customer Z in this case for electronic direct marketing, given that;

- the customer was **not** given the opportunity to opt-out of electronic direct marketing at the point of sale.

#### Case C

The same details as in Case A, but this time Hotel Y wants to send Customer X a direct marketing email regarding a deal which another hotel chain (which is not connected or affiliated with Hotel Y; they just want to do this as a favour) is having.

Hotel Y may **not** use the email contact details of Customer X in this case for electronic direct marketing, given that;

- the product or service being marketed is **not** Hotel Y's own

In practice, the rule in the case of electronic direct marketing, is that an **opt-out or pre-ticked box** for the gathering of permission for direct marketing is **unlikely to be sufficient** to meet the requirements where consent is required, because in general **opt-outs, silence, pre-ticked boxes, etc., won't satisfy the requirements for consent** as defined under the GDPR.

However, consent is not specifically required in cases of electronic direct marketing to existing customers who are given an opportunity to object, where the marketing relates to the organisation's own similar products or services and where the first marketing communication is sent within 12 months of the original sale.

## Can customers object to electronic direct marketing?

The ePrivacy Regulations provide that individuals have the right to object to receiving electronic direct marketing and that a facility to opt-out must be included with each marketing communication.

Where a person is purchasing a product or service, they must be given the right to object to the use of their details for direct marketing at the time those details are collected. A valid means of opting out must be included in every message subsequently sent to them. In practice, many organisations implement this by means of an unsubscribe link in an email, or a text short code which will automatically opt the person out of direct marketing when they send a stop request to a dedicated number.

It is a criminal offence to send direct electronic marketing to a person who objects to receiving such communications.

Separately, Article 21 of the GDPR gives individuals **the right to object at any time** to processing of their personal data for the purposes of **direct marketing**, which includes profiling to the extent that it is related to direct marketing. Where an individual objects to processing for direct marketing purposes, their personal data **must no longer be processed** for those purposes.

Additionally, as noted above, if consent is relied on to send the marketing texts or emails then the individual has the right to **withdraw their consent** at any time, and it must be as **easy to withdraw consent** as it was to give it.

## Where can I find further information on electronic direct marketing?

Further information on the [rules for electronic direct marketing](#) can be found on the DPC website, including the [DPC's guidance on the issuing of e-receipts](#).