



INCLUSIVE SKATING

Advice note on Direct Marketing under the GDPR

The General Data Protection Regulation (GDPR) and the Privacy and Electronic Communications Regulations (PECR) both restrict the way organisations can carry out unsolicited direct marketing. The EU is in the process of replacing PECR with a new ePrivacy Regulation, which will not be agreed before the GDPR comes into effect on 25 May 2018. Until then, the existing rules under PECR will apply, but with some changes to account for GDPR, notably around the definition of consent.

PECR restricts unsolicited marketing by phone, fax, email, text, or other electronic message. There are different rules for different types of communication but the rules are generally stricter for marketing to individuals than for marketing to companies and you will often need specific consent to send unsolicited direct marketing. The best way to obtain valid consent is to ask customers to tick opt-in boxes confirming they are happy to receive marketing calls, texts or emails from you. For further guidance on PECR and the rules on unsolicited direct marketing please visit <https://ico.org.uk>.

The following guidance note only focuses on the main changes to the rules on direct marketing under the GDPR and is not intended to be an overview on the existing law under PECR. This note also does not consider the laws under the E-Commerce Regulations, the Consumer Protection from Unfair Trading Regulations, the Consumer ADR Regulations, the CAP Code and/or the DMA Code.

Please note that we have included some example consent wording at the footer of this guidance note.

What is direct marketing for the purposes of GDPR?

- If direct marketing involves the processing of personal data, it must comply with the principles set out in the GDPR.
- Whilst the GDPR doesn't define 'direct marketing', the Data Protection Bill which is currently being debated through parliament contains a definition of direct marketing which is very similar to the current Data Protection Act 1998 (**DPA**) definition.

Section 11(3) of the DPA defines "direct marketing" as:

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

- This definition covers **any** advertising or marketing material, not just commercial marketing. All promotional material falls within this definition, *including material promoting the aims of not-for-profit organisations such as any promotion for events, sports competitions or training workshops.*
- The definition also covers any means of communication. It is not limited to traditional forms of marketing such as telesales or mailshots, and can extend to online marketing, social networking or other emerging channels of communication.
- The key element of the definition is that the material must be directed to particular individuals. Indiscriminate blanket marketing e.g. leaflets delivered to every house in an area, magazine inserts, or adverts shown to every person who views a website or online social media account will not therefore fall within this definition of direct marketing.

Are there any exceptions for charities and other not-for-profit organisations?

- No. Direct marketing is not limited to advertising goods or services for sale. It also includes promoting an organisation's aims and ideals. This means that the direct marketing rules will apply to the promotional, campaigning and fundraising activities of not-for-profit organisations such as any not-for-profit sports organisations.
- Not-for-profit sports organisations therefore need to ensure that they clearly and prominently explain to their supporters/members what their details will be used for and obtain clear, specific consent for all electronic marketing.
- Not-for-profit sports organisations should take particular care when communicating by text or email. This is because the 'soft opt in' exception (*see below*) only applies to commercial marketing of products or services e.g. where an individual has purchased tickets to attend a race meeting or other sports event. Not-for-profit sports organisations might be able to use the soft opt-in for any commercial products or services they offer but they will not be able to send campaigning texts or emails without specific consent, even to existing supporters or members.

Do I need to obtain consent for direct marketing?

- Yes, in most cases organisations will need explicit 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.
- Any third-party controllers e.g. any commercial partners used by a sports organisation who will be marketing to members and who will rely on the consent must be named. Listing categories of those organisations will not give valid third-party consent. You must keep records to demonstrate what the individual has consented to, including what they were told and when and how they consented.

How do we obtain valid consent?

- Consent must be unambiguous and involve a clear affirmative action i.e. **an opt-in**.
- Pre-ticked opt-in boxes are not allowed under the GDPR. You also cannot rely on silence, inactivity, default settings, or your general terms and conditions, or seek to take advantage of inaction.
- Separate consents must also be obtained for each distinct processing operation.
- Consent should be separate from other terms and conditions and should not generally be a precondition of signing up to a service i.e. tied consents are not allowed.
- At the time of obtaining any necessary consents, you must provide individuals with information including: your purposes for processing their personal data, your retention periods for that personal data, and who it will be shared with. This information will be included within any privacy notices you send to individuals. ***(Please see template privacy notices for further information)***
- Currently, the DPA allows you to make transparency information 'readily available', but under the GDPR you must actively provide people with the information in a way that is easy for them to access. Putting a notice on your website without letting people know it's there will not be good enough. You must provide a privacy notice to individuals at the time you collect their personal data from them.
- If you obtain personal data from other sources, you must provide individuals with privacy information within a reasonable period of obtaining the data and no later than one month after obtaining the data.
- There are a few circumstances when you do not need to provide people with privacy information, such as if an individual already has the information or if it would involve a disproportionate effort to provide it to them.

What do we need to do where we have purchased a marketing list from a third party?

- If you have bought a 'consented' marketing list, the consent request must have identified you specifically. Even precisely defined categories will not be enough to give you valid informed consent under the GDPR. Where this has not been carried out, you must obtain explicit consent to send marketing to individuals on this marketing list.
- You must keep records to demonstrate what the individual has consented to, including what they were told, and when and how they consented.
- You must also provide people with your own privacy notice either at first point of contact or at the latest within month of data collection, detailing anything that they haven't already been told about how you intend to process the individual's personal data.

Are there any exceptions to obtaining explicit consent i.e. Soft Opt-In?

- Although organisations can generally only send marketing texts or emails with specific consent, there is an exception to this rule for existing customers, known as the 'soft opt-in'. This means organisations can send marketing texts or emails if:
 - they have obtained the contact details in the course of a sale (or negotiations for a sale) of a product or service to that person;

- they are only marketing their own similar products or services; and
- they gave the person a simple opportunity to refuse or opt out of the marketing, both when first collecting the details and in every message after that.
- The texts or emails must be marketing products or services, which means that the soft opt-in exception can only apply to commercial marketing. *Charities, or other not or- profit bodies will not be able to rely on the soft opt-in when sending campaigning texts or emails, even to existing supporters.*
- The soft opt-in can also only be relied upon by the organisation that collected the contact details directly. This means organisations *cannot* rely on a soft opt-in if they obtained a marketing list from a third party – they will need specific consent.

How long can we send direct marketing communications to an individual?

- The GDPR gives individuals a specific right to withdraw consent. You need to tell people about their right to withdraw their consent and offer them easy ways to withdraw consent at any time (***Please see template privacy notices for further information***).
- The GDPR also gives individuals the right to object at any time to processing of their personal data for the purposes of direct marketing. The right to object to marketing is absolute and you must stop processing for these purposes when someone objects.
- There is no fixed time limit after which consent automatically expires. However, consent will not remain valid forever. How long consent remains valid will depend on the context and whether it is still reasonable to treat consent as an ongoing indication of the person's current wishes i.e. if consent was originally given in the context of a particular promotional or fundraising campaign which was only anticipated to last a short period, this might not be enough to indicate ongoing consent for other unrelated marketing messages once that campaign is over.

What records do we need to hold?

- If you are relying on consent you must be able to demonstrate that the individual has consented to you processing their data for that particular purpose i.e. who, when, how and what you told people. This lends itself to the principal of accountability.

What do we do when someone invokes their right to 'opt out' to direct marketing communications?

- You must stop sending marketing texts or emails to an individual who has said they do not want to receive them promptly. Individuals have a right to opt out of receiving marketing at any time.
- The right to object to direct marketing does not prevent you as a data controller from holding a suppression list as the list supports the individual's right to object and is held for compliance rather than for direct marketing purposes. Organisations should maintain a 'suppression list' of people who have opted out or otherwise told that organisation directly that they do not want to receive marketing.

Do we need consent for business to business marketing?

- Not always. Consent is one lawful basis for processing, but there are alternatives. In particular, you may be able to rely on 'legitimate interests' to justify some of your business-to-business marketing. You can rely on legitimate interests for marketing activities if you can show the way you use people's data is '*proportionate, has a minimal privacy impact, and people would not be surprised or likely to object to what you are doing*' (**but only if you don't need consent under PECR or its replacement**).
- Note however that sole traders and some partnerships are treated as individuals so you can only email or text them if they have specifically consented, or if they bought a similar product/service from you in the past and they didn't opt out from marketing messages when you gave them that chance (*please see note above on 'soft opt-in'*).
- If you are processing an individual's personal data to send business to business texts and emails the right to object at any time to processing of their personal data for the purposes of direct marketing will still apply. The right to object to marketing is absolute and you must stop processing for these purposes when someone objects.

Example Consent wording for Direct Marketing

- The following example direct marketing consents are designed to be used on websites which collect personal information from visitors to the sites and in conjunction with the NGB/Regional Body /Club Privacy Notices. This is not intended to be a definitive list and separate consents should be obtained for each separate marketing activity.
- Best practice is to include a privacy notice in a prominent position so that it is easily accessible by an individual. A layered approach could be adopted to impart privacy information to the individuals when they input their personal data. Key information such as the name of the data controller, how their personal data will be used and who it will be shared with could be provided at the point where they submit their personal data with a pop up or if that is not possible a prominent link to the organisation's detailed privacy policy making it as easy as possible for individuals to view the terms of the policy before providing their personal information.
- Alternatively, you can achieve a similar result using the hover over feature when completing fields in an online form giving the individual the opportunity to click through the link if they wish to know more about how their personal data is being processed.
- Where personal information is collected and consents sought via a paper-based form, it is good practice to use the same medium you use to collect personal information to deliver the privacy notice. So, again it would be advisable to provide a copy of the privacy notice together with the form at the point of data collection. In some contexts, it can be very difficult or entirely impracticable to communicate a privacy notice. In cases like these, you should explain how you use the information at an appropriate point later on, or if you can't provide privacy information, it is particularly important to make sure you only use the information you collect in a way that members of the public are likely to anticipate and agree to.
- Adopting a layered approach again can be useful here as it allows you to include key information on the bottom of the form particularly where you are collecting special categories of information e.g. how their personal data will be used, the

individual's rights, how to make a complaint, details of the ICO, together with a prominent reference to the organisation's detailed privacy notice to ensure that it is as easy as possible for individuals to view the terms of the notice before providing their personal information if they wish.

Example 1

Your privacy is important to us. For more details about how we use your personal data, please read our Privacy Statement. This is available with our full data protection policies on our website through the following link: <http://www.inclusiveskating.org/legal-statements>

We would like to send you additional information that is relevant to you. By ticking the boxes you consent to receive our newsletter and other email communications from us about our services, promotional activities and events, by post , by email , by telephone , by text message , by recorded call

We will not pass your details to third parties. You may opt out of receiving these communications at any time by emailing inclusiveskating.event@gmail.com or using the opt-out facility on each email.

Please tick here if you are happy for us to disclose your personal data to our associated and affiliated organisations so that they can provide you with information about their goods or services. .]

Example 2

Your privacy is important to us. For more details about how we use your personal data, please read our Privacy Statement <http://www.inclusiveskating.org/legal-statements>

We would like to send you additional information that is relevant to you. By ticking the boxes you consent to receive information about our products, services and any special offers by post , by email , by telephone , by text message , by recorded call

We will not pass your details to third parties. You may opt out of receiving these communications at any time by emailing inclusiveskating.event@gmail.com or using the opt-out facility on each email.

[Please tick here if you are happy for us to disclose your personal data to **[NAME OF ORGANISATION OR PRECISELY DEFINED CATEGORIES OF ORGANISATION i.e. defined list of commercial partners]** so that they can provide you with information about their goods or services. .]

Example 3

Your privacy is important to us. For more details about how we use your personal data, please read our Privacy Statement [insert link to current statement].

We would like to send you additional information that is relevant to you. By ticking the boxes you consent to receive information about our upcoming events, offers and ways for you to get involved with the sport by post , by email , by telephone , by text message , by recorded call

[We will not pass your details to third parties.] You may opt out of receiving these communications at any time by emailing **[insert appropriate email address]** or using the opt-out facility on each email.

[Please tick here if you are happy for us to disclose your personal data to **[NAME OF ORGANISATION OR PRECISELY DEFINED CATEGORIES OF ORGANISATION i.e. defined list of commercial partners]** so that they can provide you with information about their goods or services. .]