



**Sytorus Guidance Document:
Preparing your Direct Marketing Campaigns
For The
General Data Protection Regulation (GDPR)**

Introduction

The following is a proposed outline of the steps we recommend in order to address the issues raised with regard to data quality in general, and the quality of consent for direct marketing purposes in particular.

One of the primary causes for complaint with the Office of the Irish Data Protection Commissioner is the lack of clear consent for electronic direct marketing, i.e. the recipient of a promotional message disputes the fact that they ever gave consent, or had declined to give consent and were nonetheless contacted.

We propose a review of the quality of customer data being held by organisations, with particular reference to contact details relating to individuals for the purpose of direct marketing.

The current DP legislation, combined with the EC Electronic Communications Regulations, requires the following levels of consent for direct marketing purposes (very simplified):

For new customers or donors:

Postal: No prior consent required, but all promotional messages must offer the recipient a free and easy-to-use option to opt out from receiving further messages.

SMS messages and e-mail: The organisation must seek prior, explicit consent to use personal contact details for marketing purposes; where consent is received, use the data for that purpose at least once in each 12-month period; and each message must contain a free and easy-to-use option to opt out from receiving further messages.

Calls to land-line and mobile phones: Check whether the number is listed in the National Directory Database (NDD). If it is, seek prior, explicit consent to use phone details for marketing purposes. Where the number is not on the NDD, marketing messages can be sent without prior consent.

Once this is established, the organisation must use the contact data for that purpose at least once in each 12-month period; and each message must contain a free and easy-to-use option to opt out from receiving further messages.

For charities and not-for-profit organisations, the 'double opt-in' principle applies – it is not sufficient that an individual donates to a particular charity or campaign in order for their details to be added to your direct marketing list – separate, clear consent must be acquired for this purpose.

For existing customers or donors:

Postal: As long as the individual was given the option to opt out at the time their data was acquired, no further consent is required. All promotional messages must offer the recipient a free and easy-to-use option to opt out from receiving further messages.

Calls to land-line and mobile phones, SMS messages and e-mail: as long as the organisation offered the recipient the option to opt out at the time their data was acquired and in subsequent marketing messages, the personal data can continue to be used for direct marketing purposes;

The same conditions continue to apply:

- the data must be used for that purpose at least once in each 12-month period;
- each message must contain a free and easy-to-use option to opt out from receiving further messages.

The General Data Protection Regulation (GDPR)

The GDPR, due to come into force in May, 2018, will introduce a new set of criteria for consent.

As defined in the GDPR: “‘consent’ of the data subject means 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.”

In order to comply with this standard, organisations will need to:

- Be able to explain when and how they acquired the personal data of the Data Subject
- Be able to explain the purpose or purposes for which the data was acquired
- Be able to demonstrate the quality of the consent they have received

These more stringent criteria are likely to raise some challenges for organisations with regard to the consent they have for marketing purposes. There is a natural concern that the data they currently hold will not meet these more stringent criteria.

The guidance from the Office of the Irish Data Protection Commissioner is that data can only continue to be used for marketing purposes where the quality of consent can be shown to meet this standard.

In their view, “it will be necessary for Data Controllers to ensure that consent is valid in line with the provisions of the Regulation.”

They also refer to Recital 171, which accompanies the text of the new Regulation, and which states:

“Processing already under way on the date of application of this Regulation should be brought into conformity with this Regulation. Where processing is based on consent..., it is not necessary for the Data Subject to give his or her consent again if the manner in which the consent has been given is in line with the conditions of this Regulation, so as to allow the Controller to continue such processing after the date of application of this Regulation.”

Preparing your data assets ahead of the GDPR

In preparation for the GDPR, therefore, we recommend that organisations take the following steps:

1. Review the organisation's current list of personal data intended for use in direct marketing campaigns
2. Assess the quality of the consent acquired from these individuals against the criteria provided above

In particular, the organisation should assess:

- a. for postal marketing purposes, whether the individual was offered the option to opt out from being contacted for marketing purposes at the time their contact details were acquired;
- b. for electronic marketing purposes, whether the individual was offered the option to provide explicit 'opt in' for marketing at the time their contact details were acquired; and

- c. against these two criteria, whether the individual has been contacted for marketing purposes in each 12-month period since their details and consent were acquired.
3. For those customer and donor records which meet these acceptable criteria of the DP legislation, this cohort of data (the 'Gold Standard') will immediately form the core distribution list for future direct marketing campaigns;
4. Where the data does not meet the stringent GDPR criteria, e.g. where there is little confidence in the quality of the individual consent, no record of how and when their data was acquired, where individuals were not offered an option to opt in, or where their data has not subsequently been used for marketing campaigns, further work is required in order to bring this data up to the standard required (the 'Silver Standard');
5. Where there is no confidence regarding the manner in which the data was acquired, and no evidence that there has been any interaction or response from the individuals during previous campaigns, we recommend that the organisation considers removing this data altogether, on the basis that it represents substantial risks to the organisation if used (the 'Bronze Standard').
6. We recommend that this data is immediately removed from the organisation's database, as it fails to meet the criteria set by the GDPR, and poses a substantial risk of giving rise to future complaints and investigations by the ODPC if it continues to be used.
7. For the 'Silver Standard' data identified above, we recommend a quality review under Rule 5 of the DP legislation to establish:
 - a. That the contact details for that person remain accurate and up-to-date
 - b. That the individual's status and preference with regard to the organisation's products and services are verified, and
 - c. That the individual's preferences with regard to electronic or postal direct marketing are fully understood.
8. Most importantly, this Rule 5 campaign must be conducted as a data quality exercise – it would be a direct breach of the Legislation to include ANY marketing aspect or content in this dialogue with the client. It must be the clients perception, as well as the organisation's intention, to use the campaign solely to enhance the data already held, and to gain confidence regarding the quality and accuracy of that data.
9. Once complete, we propose to introduce clean data management procedures so that those who indicate their consent to be contacted for marketing purposes can be added to the 'Gold Standard' listing.
10. Likewise, those who exercise their right to 'opt out' and indicate they no longer wish to be contacted are marked as "Do Not Contact" (DNC) for marketing purposes, and are only retained further by the organisation if there is an appropriate operational or contractual reason to do so.
11. We strongly recommend that, once this exercise is completed, the organisation maintains a single, consistent list of its clients/donors which is updated regularly and provides an accurate view of customer preferences.
12. Finally, the organisation must review its registration and client/donor interaction forms (competitions, registration forms, web-site query facility, etc.) to ensure that, from this point forward, any data acquired from Data Subjects offers the appropriate options to opt in, or to opt out and decline future marketing contact.

NOTE:

There are several implications and challenges for the Data Controller and the Data Processor in light of the GDPR, including process logging, breach notifications and revision of third party contracts. Sytorus will be providing more comprehensive guidance on these changes in the coming weeks. This document will focus on the challenges of preparing for, and conducting a Direct Marketing campaign in compliance with the GDPR.

Conducting a Direct Marketing Campaign – Best Practice

Direct Marketing is a legitimate activity provided it respects the individual's right to privacy.

Remember that any correspondence promoting an event, product, service or ideology which is sent to a named individual is considered Direct Marketing. The message does not need to include a 'call to action' or a request for donation. Simply promoting a message or raising awareness about a campaign qualifies.

Once an organisation has taken the steps outlined above, and has gained a degree of confidence regarding the quality and reliability of the consent for direct marketing, campaigns can proceed without delay!

Organisations should always be mindful of the triple constraint when planning a marketing campaign:

- **Cost** – the available budget will determine the media used, the range and volume of recipients contacted, the size of the campaign, etc.
- **Compliance** – in addition to the quality of consent, the organisation should consider the intended audience, such as the age of recipients, the medium through which the message is being sent, the timing of the campaign, and any obligations to provide formal notices, wording or information.
- **Content** - Ultimately, this will vary from organisation to organisation, product to product and campaign to campaign. This will depend almost entirely on the experience and expertise of the marketing and creative teams at the disposal of the organisation.

The GDPR will place new challenges on organisations who conduct direct marketing. This document provides a high level road map, highlighting key areas that organisations need to consider.

Campaign Planning

- Involves developing a mailing or distribution list and establishing the format of the campaign. Formats include postal, text/email, phoning landlines, phoning mobile phones and faxes;
- Consideration to be given to Principle 1 and 2 of the GDPR regarding consent and lawful processing;
- The rules on calls to mobile phones, SMS texts and emails are stricter than those on mail (postal) marketing, and such consent must be more specific;
- Neither the DP legislation nor the e-Privacy Regulations ban the purchasing of marketing lists, but organisations who acquire these lists from third party providers must seek assurances to ensure that such a list was compiled fairly and that it accurately reflects peoples' preferences with regard to direct marketing;

- It will be very difficult to use purchased lists for SMS, email, or phone-based campaigns as these require very specific, prior consent;
- Consider the 3rd parties involved; As data processors, the organisation commissioning the campaign must ensure that the appropriate Data Processor Agreement is in place prior to commencing the campaign?

Data Preparation

- Consider database cleaning and preparation;
- Consider Principle 4, *Data Accuracy and Quality*: such as checking and removing duplicates, validating and updating addresses before the campaign begins;
- Verify that the available consent is appropriate for the campaign and for the medium being used: freely given, specific; informed, 'opt-in' means you can only market to an individual where you have their explicit consent to do so;

Guidance of the Irish DP Commissioner with regard to consent for Direct Marketing

	Postal Marketing	Text/Email Marketing	Phone Marketing to Landlines	Fax Marketing	Phone Marketing to Mobile Phones
Individual Customer	Opt-Out	Opt-Out (provided similar product or service)	Opt-Out	Opt-Out	Opt-Out
Individual Non-Customer	Opt-Out	Opt-In	Opt-In <i>if on NDD</i> , Opt-Out <i>otherwise</i>	Opt-In	Opt-In
Business Contacts (Customer & Non-Customer)	Opt-Out	Opt-Out	Opt-In <i>if on NDD</i> , Opt-Out <i>otherwise</i>	Opt-In <i>if on NDD</i> , Opt-Out <i>otherwise</i>	Opt-In

*Opt-in means you can only market an individual where you have their explicit consent to do so. Similarly, selected third parties with whom you share your marketing lists may only market an individual where you have obtained the explicit consent by the individual for marketing by each specific third party.

**Opt-out means that you can market an individual provided you have previously given them the option not to receive such marketing and they have not availed of this option.

Quick Reference Guide for Campaign Planning

Method of communication	Individual consumers (plus sole traders and partnerships)	Business-to-business (companies and corporate bodies)
Live calls	Screen against the National Directory Database Opt-Out Register (NDD) Can opt out	Screen against the National Directory Database Opt-Out Register (NDD); Can opt out

Recorded calls	Consumer must have given caller-specific consent to make recorded marketing calls	Consumer must have given caller-specific consent to make recorded marketing calls
Emails or texts	Consumer must have given consent to send marketing emails/texts,	Can email or text corporate bodies; Good practice to offer opt out; Individual Employees can opt out
Mail	Ensure name and address obtained fairly Can opt out	Can mail corporate bodies Individual employees can opt out

Analysis of audience

- Profiling will be the key consideration for this stage. The GDPR severely curtails automated profiling, giving data subjects significant rights to avoid being included in decisions;
- Controllers must honour data subjects' rights regarding profiling;
- Soft opt-in will not apply to charities, political parties or not-for-profit; can only be sent with prior specific consent.

Execution of the campaign

- Consider Principle 1 (*Lawful, fair and transparent processing*) especially the inclusion of a Fair Processing Notice, as outlined above;
- Crucial that an opt-out message is included in any campaign literature; consider an appropriate method or script for inclusion of this element in phone-based campaigns;
- Policy in place for Suppression (suppressing data which is not for operational use, data which is retained solely as a reference database for a 'do not contact' list, etc.);
- Suppress rather than delete, retaining just enough information to ensure that their preferences are respected in the future;
- Organisations can also remind individuals that they can opt back in to marketing as long as the reminder forms a minor and incidental addition to a message being sent anyway for another purpose;
- Indirect consent will not be enough for texts, emails or calls to land-line or mobile.

Complaints management

- Must have policy and resources in place to manage complaints;
- Must be free and easy for data subject to make a complaint;
- Consider that the campaign may trigger Subject Access Requests;
- Have a nominated individual who will respond if complaint comes via ODPC.

Updating your Database

- Ensure that any updates arising from the campaign are reflected on the database in a timely and accurate manner – this includes:
 - removal of addresses which are returned undelivered or 'not known at this address'
 - update data records where the recipient indicates a change of address, etc.
 - 'blocking' records where the recipient opts out from receiving future messages

Managing Third Party Service Providers

The Data Controller remains primarily responsible and liable for the activities of the third-party service providers processing the data, or managing a campaign, on the Controller's behalf.

- Review standard operating procedures to ensure that the third party activities are in line with the Controller's objectives
- Review the clauses of Data Processor Agreements to ensure that they meet the requirements of the GDPR, with clear reference to the clauses required by the new Regulation
- Introduce quality checks and audits from time to time, to ensure that personal data continues to be used and processed in a compliant manner
- Ensure that any data shared or disclosed during the contract term is either returned or destroyed at the end of the contract.

B2B Marketing Activity

While the DP Legislation focuses on 'Business to Consumer' or B2C marketing, it is important to consider B2B campaigns as well, since the corporate clients also have certain rights under the legislation (see the 'Business Contacts' row in the ODPC matrix above).

Most importantly, it should be remembered that Corporate clients can opt out from receiving further marketing messages.

Social Media Marketing

Where promotional messages are sent to the social media accounts of known individuals, rather than simply appearing as 'pop-up' advertisements, such activity is equally to be considered direct marketing, and must be conducted in a compliant manner as outlined above.

Where the organisation intends to conduct direct marketing using social media campaigns, the recipients of the marketing messages need to be made aware of this, and to be given the same options to indicate their consent or to 'opt out'.