

Unsolicited marketing rules — how to comply

Davinia Brennan, Associate in the Litigation and Dispute Resolution department at A&L Goodbody, explains how not to fall short of compliance requirements for carrying out direct marketing

In December 2013, the Data Protection Commissioner (the 'DPC') prosecuted four telecoms companies in the District Court, for breaching data protection rules on unsolicited marketing calls and spam emails. All of the companies pleaded guilty to the charges. Meteor, Eircom and Vodafone were respectively fined €3,000, €9,000, and €21,000. O2 was spared a conviction, as the court heard it had no previous convictions. These prosecutions serve as a warning to organisations who engage in direct marketing to ensure that they comply with the applicable rules.

This article considers the rules on direct marketing, the penalties, and recent enforcement activities of the DPC.

The rules

Targeted direct marketing is lawful, so long as organisations comply with the applicable rules. The Data Protection Acts 1988 and 2003 ('the DPAs') and the e-Privacy Regulations 2011, S.I. 336 of 2011 ('the Regulations') contain rules restricting the processing of personal data for direct marketing purposes.

Whilst the DPAs apply to all forms of communication, the Regulations were introduced to offer additional safeguards in respect of electronic communications, including by email (i.e. text messages, MMS, and video messages), fax, automatic calling machine, and telephone. The Regulations apply to telecoms companies, ISPs, and to any entity using electronic communications to communicate with customers. The direct marketing rules are mostly contained in Regulation 13 of the Regulations. Different rules apply depending on the mode of communication used, and to whom it is addressed.

Guidance from the DPC highlights that 'the basic rule that applies to direct marketing is that you need the consent of the individual to use their personal data for direct marketing purposes.'

Consent

The most common method of obtaining consent for direct marketing purposes is the use of 'opt-in' and 'opt-out' clauses.

An 'opt-in' clause invites an individual to expressly indicate that they want to receive direct marketing material. For example, 'Please tick here if you would like 'X' to contact you by electronic means (email or SMS) with information about goods and services which we feel may be of interest to you.' If the individual does not tick the box, then he/she should not be sent any direct marketing material.

An 'opt-out' clause gives an individual the opportunity to object to receiving direct marketing material. For example: 'Please tick here if you do not want 'X' to use your personal data to contact you by electronic means (email or SMS) with information about goods and services similar to those which were the subject of a previous sale to you'. If the individual does not object, then it is permissible to send him/her direct marketing material.

What type of consent is required?

It is vital that organisations understand when they can use 'opt-in' or 'opt-out' clauses in order to obtain consent for direct marketing purposes. The existence of different rules depending on the mode of communication used tends to cause confusion. Below is a summary of the main types of direct marketing and how to comply with the rules.

(1) Postal marketing

Individuals must be provided with an opportunity to opt out of receiving direct marketing materials by post (section 2 (8) of the DPAs). This should be done at the time of collection of a customer or potential customer's data, for example, by providing a tick box giving an individual an opportunity to object in a service application form, such as: 'Please tick here if you do not want 'X' to contact you by post with information about goods and services which we feel may be of interest to you'. If an individual objects, then their personal data cannot be used for postal marketing purposes. An individual may withdraw their consent to postal marketing at any time.

The data protection legislation does not apply to unaddressed mail, or mail addressed to 'the resident or 'the

householder' as it does not involve the use of personal data. However, where the direct marketer can identify 'the resident' or 'the householder' from the address in conjunction with other data likely to come into his/her possession, then this may involve the processing of personal data, and the data protection legislation would apply.

There is no restriction on direct marketing by post to legal entities specified in the DPAs (for example, companies and agencies), including marketing of persons working within such entities, provided that the marketing is related to the organisation's business needs, and that the details of the named person in receipt of such marketing were obtained fairly.

(2) Text/email marketing

An unambiguous opt-in is required prior to sending direct marketing text messages or emails to individuals who are not customers.

Direct marketing text messages or emails may be sent to individuals, who are existing customers, on an opt-out basis, where the direct marketer has obtained the individual's electronic contact details (email address or mobile number) in the course of the sale of a product or service, and the following conditions are met:

- the product or service being marketed is the entity's own product or service;
- the marketing relates to a product or service of a similar kind to that which was sold to the individual at the time their contact details were obtained;
- the individual is clearly given an opportunity to opt-out of the

electronic marketing in an easy manner and free of charge, at the time the details are obtained, and each time he/she receives a marketing message; and

- the sale of the product or service occurred within the previous 12 months, or the contact details were

used for the sending of a text message or email for direct marketing purposes within that 12 month period.

Organisations will likely find it frustrating that they cannot send direct marketing text messages or emails concerning new (non-similar) services to existing customers without their prior consent, but the Regulations are designed to reduce unwanted spam emails and text messages.

An unsolicited electronic marketing communication may be sent to an individual's email address where the email address reasonably appears to be an email address used mainly by the individual in the context of their

business activities, and the unsolicited communication relates solely to those business activities.

Direct marketing text messages or emails may not be sent to business contacts (customers and non customers), if he/she/it has notified the direct marketer that they do not consent to the receipt of such communications (i.e. an opt out opportunity must have been provided).

It is essential that direct marketers provide a valid return address in all direct marketing text messages and emails, to which the recipient can

respond requesting the cessation of such marketing.

(3) Phone marketing

A marketing phone call may not be made to an individual or a business telephone line if he/she/it has notified the direct marketer that they do not consent to the receipt of such communications (i.e. an opt-out opportunity must have been provided), or if he/she/it has registered an objection to receiving such calls on the National Directory Database (the 'NDD'), by informing their telephone line provider of same.

However, guidance from the DPC indicates that telephone contact details obtained in the course of an ongoing commercial relationship can be used in the context of that relationship irrespective of any preference recorded in the NDD, unless the customer informs the direct marketer that he/she does not want to receive such calls.

Prior consent (i.e. an opt in) is required before contacting an individual or business contact, by mobile phone line for marketing purposes, unless that person has recorded his or her preference to receive such calls on the NDD.

(4) Fax and automated calling machine

Prior consent (i.e. an opt in) must be obtained before sending a marketing fax or making an automated call to an individual.

However a marketing fax or automated call may be sent or made to a legal entity, unless the legal entity has notified the direct marketer that they do not consent to the receipt of such communications, or the legal entity has registered an objection to receiving such communications on the NDD.

Penalties

Failure to comply with the DPAs and/

(Continued on page 6)

“Organisations will likely find it frustrating that they cannot send direct marketing text messages or emails concerning new (non-similar) services to existing customers without their prior consent, but the Regulations are undoubtedly effective in reducing unwanted spam emails and text messages.”

[\(Continued from page 5\)](#)

or the Regulations may result in civil and/or criminal sanctions. The DPC may investigate complaints made by individuals, or carry out investigations on his own initiative. Failing an amicable resolution of the matter, the DPC will issue a decision requiring the relevant entity to address any shortcomings identified. The decision may be used by a data subject to support a claim for damages as data subjects are owed a statutory duty of care under the DPAs.

The DPC may prosecute a business for offences under the DPAs. The maximum fine on summary conviction is set at €3,000. On conviction on indictment, the maximum penalty is a fine of €100,000.

Summary proceedings for an offence under the Regulations may also be brought and prosecuted by the DPC.

It is an offence to send an unsolicited marketing communication in breach of the Regulations. Each unsolicited direct marketing call or message can attract a fine of up to €5,000 on summary conviction. If convicted on indictment, the fines range from €50,000 for a natural person, to €250,000 if the offender is a corporate body.

Enforcement

In his last Annual Report for 2012, published in May 2013, the DPC noted that 606 of the 1,349 complaints (approximately 45%) received by his Office during 2012 concerned unsolicited direct marketing communications. The majority of the complaints received concerned unsolicited direct marketing text messages sent by businesses. The DPC noted that, in many instances, the offending businesses were unaware of the law which applies to unsolicited communications, with regard to customer consent and the requirement to provide an opt-out mechanism in each marketing message.

Whilst the vast majority of complaints were resolved amicably, the DPC took a number of prosecutions against companies for sending unsolicited direct marketing text

messages. In most instances, prosecutions were taken against companies who had already received a prior formal warning from the DPC.

The recent prosecutions taken by the DPC against four telecoms companies referred to earlier in this article demonstrate that the DPC will not hesitate to use his enforcement powers against those organisations who continue to infringe the law.

Conclusion

The DPAs and the Regulations impose a number of restrictions on the use of personal data for the purposes of direct marketing. The consequences of sending unsolicited direct marketing communications include prosecutions, fines, damage to reputation, and being sued by any data subject who has suffered loss or injury. Accordingly, organisations engaged in direct marketing would be well advised to take their data protection obligations seriously and ensure their practices do not fall foul of the applicable rules.

Davinia Brennan
A&L Goodbody
dbrennan@algoodbody.com
