Introduction to data protection and direct marketing: the rules of the game

Rob Sumroy, Partner

Direct marketers are data controllers who use personal information to conduct marketing activities directed at specific customers/potential customers. They face a plethora of legislation, regulations and voluntary codes in carrying out those activities.

The focus of this article is broadly to set out the legislative and regulatory framework in this area. Further articles in this series will consider particular concerns, such as marketing to children and sale of customer lists. Clearly, direct marketing involves the targeting of specific individuals, and hence data protection and privacy concerns are of particular relevance to entities carrying on direct marketing activities. A Glossary of key terms follows at the end of this article.

Which Rules Apply?
The most important UK legislation for present purposes is clearly the Data Protection Act 1998 (the "DPA") implementing the Data Protection Directive (95/46/EC), and the various subordinate statutory instruments relating to the DPA. Of particular relevance in the UK are also:

> the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2003/2426) (the "Privacy Regulations") which implement the Privacy and Electronic Communications Directive (2002/58/EC);
> voluntary codes of the Advertising Standards Authority and the Direct Marketing Association;
> the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) (the "E-Commerce Regulations") which implement the Electronic Commerce Directive (2000/31/EC); and
> the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) (the "Distance Selling Regulations") which implement the Distance Selling Directive (97/7/EC).

1. Data Protection Act 1998

As readers of this journal will be aware, the most important legislation in the UK for direct marketers is the DPA, with which all direct marketers established in the UK (or established outside the EEA who use equipment in the UK for processing the data) must comply. The DPA includes the requirement on data controllers to comply with the eight principles set out in Schedule 1 of the DPA in relation to the personal data they process (see box: "Recap on the Eight Principles"). While breach of the principles is not itself a criminal offence, a breach may lead the Information Commissioner to issue an enforcement notice (and breach of an enforcement notice is a criminal offence).

The first, and probably the most important, of the eight data protection principles requires data controllers to process personal data fairly and lawfully. There are two elements to this principle:

(i) fair processing information; and

(ii) conditions for processing (that is, data controllers must not process such data unless at least one of the conditions set out in Schedule 2 of the DPA are met, and in the case of sensitive personal data, at least one of the conditions set out in Schedule 3 of the DPA is also met).
The essence of the principle is that personal data should be fairly and lawfully processed. Meeting a Schedule 2 and (where applicable) Schedule 3 condition may not in itself be sufficient to comply with the principle – the principle itself is wider-reaching. The onus to ensure that information is fairly processed falls on the data controller, here the direct marketer. Whether information has been fairly processed is judged by looking at all the circumstances.

On its face, this appears an overly broad requirement on data controllers. In practice, compliance with industry codes (notably, in the UK, those administered by the Advertising Standards Authority and the Direct Marketing Association) will be relevant to evidencing compliance with the fair processing requirement.

(i) Fair processing information

Under the DPA, personal information about customers/potential customers is not to be regarded as fairly processed unless the direct marketer ensures (so far as practicable) that the individual has, is provided with, or has made readily available to him the following information:

- the identity of the direct marketer;
- if the direct marketer has a nominated representative, the identity of that representative. A data controller who is not established in the EEA but who uses equipment in the UK for processing personal data (other than merely for the transit of data through the UK), must appoint a representative;
- the purpose(s) for which the data will be processed; and
- any other information necessary in the circumstances to render the processing fair.

“Other information necessary” may include, for example, the identity of a data processor. The Information Commissioner’s Legal Guidance on the DPA advises data controllers to consider what processing of data they will be carrying out and whether data subjects are likely to understand the purposes for which their data are going to be processed, the likely consequences of the processing and whether particular disclosures can reasonably be envisaged.

From a practical point of view, it is worth thinking through at an early stage the likely processing activities that may be conducted in relation to the individual’s data. For example:

- use of the data by other members of the data collector’s group and/or third parties;
- transfer of the information out of the EEA (for example, to other members of the group or to an outsourced function);
- the media through which customers/potential customers may be marketed (i.e. fax, email, post etc).

It must be clear that direct marketing is one of the intended uses of the information. Much of this information is provided at the point of data capture, for example from a written or online application form. Data capture will be explored further in the next article in this series.

There is no requirement to provide all of this information in a single document or in a formal notice, or even for the information to be provided in writing. It is also sufficient if the data subject already has the information, or the information is made readily available to him (for example, where data is collected on the internet, on a separate “Privacy” webpage where a link to that page is flagged).

In the context of the Data Protection Act 1984 (now repealed and replaced by the DPA, though relevant for present purposes), the Data Protection Tribunal supported the Commissioner’s view that personal information will not be fairly obtained unless the individual has been informed of the non-obvious purposes for which it is required, before the information is obtained (Innovations (Mail Order) Ltd v The Data Protection Registrar, September 1993). There is no objective test of what is “obvious” and this will vary from one data subject to another depending on the individual’s
knowledge. Transfer of such data to third parties is very likely to be non-obvious, as would export of the data to an outsourced function such as a call centre in India.

The direct marketer may face circumstances in which fair processing information was not provided to the data subject at the point of data capture, or where the information that was provided is insufficient for new proposed purposes. For example, where customer/potential customer information is:

> obtained for one purpose and subsequently used for another (for example, obtained in the course of concluding a contract of sale with the data subject and subsequently used in marketing a new initiative to that data subject);

> disclosed to a person not originally envisaged (for example, on the sale of a customer list); or

> obtained from a third party (for example, through a "recommend a friend" scheme).

In such circumstances, the fair processing information (or additional information, where certain fair processing information has already been provided) must be given to the data subject in a timely manner. The exercise of providing such information to a large number of customers/potential customers who have already been provided with certain fair processing information is generally impracticable and expensive. This reiterates the point that it is crucially important to anticipate at the time collected the uses to which data may be put and the categories of person to whom they may be disclosed.

(ii) Conditions for Processing

Schedule 2 to the DPA sets out six conditions for processing of personal data. At least one of these needs to apply for the processing to be fair and lawful. Only two of the conditions are, in practice, relevant to direct marketing activities: consent of the data subject and what is commonly referred to as the "legitimate interests" condition (explained below).

Consent

The DPA does not define consent, although Article 2 of the Data Protection Directive 95/46/EC defines the data subject’s consent as "any freely given, specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed". This consent should be given unambiguously. Therefore, the consent must be:

> Informed: that the customer/potential customer is provided with sufficient information for him/her to consider whether he/she wishes the processing to go ahead;

> Specific: in respect of specific data processing activities;

> Signified by the data subject unambiguously: this is generally taken to mean that the data subject must take positive action to show his consent and silence will not generally suffice;

> Given freely: effective consent cannot be obtained by virtue of duress or where the individual is given no real opportunity to say no.

Legitimate interests condition

The other condition relevant to direct marketing activities in paragraph 6 of Schedule 2 is often referred to as the "legitimate interests" condition. This permits processing where it is necessary for the legitimate interests of the data controller or by the third party to whom the data is disclosed, except where that processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the customer/potential customer.
The DPA itself seems to acknowledge the ambiguity of this provision, providing that the Secretary of State may by order specify when it will apply (although no such order has yet been made). The Information Commissioner states in the Legal Guidance to the DPA that a wide view of the condition is taken, and notes that:

"Where a data subject does not signify his agreement to personal data relating to him being processed, but is given an opportunity to object to such processing, although this does not amount to consent for the purposes of the Act, it may provide the data controller with the basis to rely upon another Schedule 2 condition, for example, the legitimate interests condition, provided that the data subject is given the right to object before the data are obtained."

A disadvantage of relying on the legitimate interests condition is that it is open for the customer/potential customer to demonstrate that his/her rights/freedoms/legitimate interests have nonetheless been prejudiced by virtue of the processing. In Douglas v Hello! ([2003] EWHC 786 (Ch)), Lindsay J indicated that the condition "does not provide, as it so easily could have done, how serious has to be the prejudice before the processing becomes unwarranted and in point of language any prejudice beyond the trivial would seem to suffice". The data subject's interests will therefore be paramount.

Sensitive personal data

As readers of this journal will be aware, special rules apply in respect of the processing of sensitive personal data. Though less likely, it is conceivable that there may be processing of sensitive personal data in connection with direct marketing activities; for example, by health insurance companies. In the UK, sensitive personal data cannot be processed for direct marketing purposes unless the data subject has given his "explicit consent" to the processing (Schedule 3 of the DPA). "Explicit consent" is not defined in the DPA.

The Information Commissioner, in the Legal Guidance on the DPA, states that "the use of the word "explicit" suggests that the consent of the data subject should be absolutely clear. In appropriate cases it should cover the specific detail of the processing, the particular type of data to be processed (or even the specific information), the purposes of the processing and any special aspects of the processing which may affect the individual, for example disclosures which may be made of the data."

Compliance with the fair processing conditions

Generally, it is advisable for direct marketers to obtain consent of data subjects to whom they market, rather than rely on the legitimate interests condition. However, it seems likely that in many cases it will be possible for direct marketers to rely on the legitimate interests condition to use personal data to inform customers/potential customers of the acquisition of such information from a third party or other proposed new use of their data, and to ask them for consent for further processing (including for direct marketing purposes) of that data.

Moreover (aside from marketing by post), direct marketing to data subjects through various media is prohibited under the Privacy Regulations (discussed in section 2 of this article) unless consent is obtained, typically from the individual ticking or checking an "opt-in" box.

(iii) Lawful processing

In addition to being fair, the processing of personal data must be lawful under both the criminal and civil law. Therefore, a stolen customer list is unlawfully obtained, as is one obtained through a breach of a confidentiality undertaking by the party obtaining it. It will similarly be unlawfully obtained where in obtaining it a company acts ultra vires or a director exceeds the authority delegated to him by the board.

The requirement to process lawfully can be usefully seen as a requirement to:

> meet one of the Schedule 2 conditions (and Schedule 3 conditions in the case of sensitive personal data); and

> observe any statutory or common law obligations relating to the processing of personal information, including privacy, confidentiality and discrimination laws.
(iv) Right to prevent processing for direct marketing purposes

An individual has rights to prevent processing of his data for the purposes of direct marketing. In the Legal Guidance on the DPA, the Information Commissioner states that this will apply not merely to the offer for sale of goods and services, but also the promotion of an organisation’s aims and ideals. This would include a charity or a political party making an appeal for funds or support, and an organisation whose campaign is designed to encourage individuals to write to their MP or attend a public meeting.

This provision was the subject of discussion in Brian Robertson v City of Wakefield Metropolitan Council (16 November 2001). In this case Mr Robertson objected to the fact that Electoral Registration Officers sell copies of the Electoral Register to commercial interests who would then use them for the purposes of direct marketing. The court found that this was a breach of the DPA by the Electoral Registration Officers, notwithstanding that they themselves did not engage in direct marketing. The decision is of interest to all data controllers who pass information on to third parties, particularly where mailing lists are sold. The disclosure of data to a third party, knowing that the third party proposes to use the information for direct marketing, is itself processing of the information for direct marketing purposes. The data subject therefore has the right to prevent such disclosure.

The practical effect of the provision is that marketers must honour opt-out requests. Careful management of the database containing the data will therefore be required, and databases should be structured in such a way as to enable systems to distinguish between data that can be used for direct marketing purposes. Opt-in and opt-out requests will be explored in further articles in this series.

2. The Privacy and Electronic Communications (EC Directive) Regulations 2003

In general terms the Privacy Regulations place the following restrictions on direct marketing:

- the use of automated calling systems is prohibited unless the subscriber has previously indicated to the caller that he consents to receiving such calls;
- the sending of faxes to individual subscribers is prohibited unless the subscriber has previously indicated to the caller that he consents to receiving such faxes;
- the sending of faxes to corporate subscribers is prohibited where the subscriber has previously indicated to the caller that calls should not be made on that line. In this case a subscriber can notify his objection to receiving such faxes either by contacting the relevant company directly or by registering with the Fax Preference Service (see box: "Opting Out: Preference Services"). Companies wishing to send out direct marketing materials by fax are obliged to check this register before doing so;
- cold calling is prohibited where the subscriber has previously indicated to the caller that communications should not be sent on that line. As with faxes to corporate subscribers, persons not wishing to receive cold calls can either notify the company concerned or register with the Telephone Preference Service (see box: "Opting Out: Preference Services"). Companies wishing to cold call subscribers are obliged to check this register before doing so;
- sending of unsolicited email to individual subscribers unless the subscriber has previously indicated that he consent to receiving such emails.

The Soft Opt-in

In respect to email, prior consent is not required where the email address was collected during the course of a sale or negotiations for a sale of a product or service to the subscriber (Regulation 22(3), widely referred to as the “soft opt-in”) providing that:
the direct marketing material is in respect of “similar products and services only”; and

the recipient has been given a simple means of refusing (free of charge except for the cost of the transmission) the use of his or her contact details for marketing purposes at the time those details were initially collected and, where he did not refuse the use of those details, at the time of each subsequent communication.

There may be significant practical difficulties in assessing whether two products/services are “similar”. The Information Commissioner has indicated that the crucial question is taken from the recipient’s point of view; that is, what products and services would that recipient reasonably expect to hear about from the marketing organisation. To cite an example, a supermarket may sell a diverse range of products and services but a florist may only sell a limited range of products and services. If the customer orders flowers from an on-line florist and did not opt-out of receiving further email marketing when the on-line florist collected the data, the customer would only expect to receive emails about the limited range of products and services that the florist offers.

It would therefore be prudent for commercial entities with a diverse range of products and/or services to flag the full range of available products to the customer when data is collected from the customer. Similarly, adopting a consistent house brand may enable marketers to rely on this opt-out exception in respect of new initiatives, where the recipient may have a reasonable expectation of that entity going into the new field. The disadvantage for the direct marketer is the lack of clear guidance in this area, and each scenario would therefore need to be assessed in the circumstances.

For example, it is arguable that a customer of VIRGIN megastore may have a reasonable expectation of receiving an email relating to a new VIRGIN radio service; however, it is less obvious that he/she would reasonably expect to receive an email relating to VIRGIN wines.

Note that a contract need not actually have been concluded with the data subject concerned. For example, a data subject may input data online in the course of requesting a quote for insurance, and then choose not to take up the offer. If the potential customer does not opt-out when his/her details are collected, they must be given a chance to opt-out with every subsequent marketing message they are sent by the direct marketer.

3. Advertising Code

The British Code of Advertising, Sales Promotion and Direct Marketing (created by the Committee of Advertising Practice and administered by the Advertising Standards Authority, the “ASA”), sets out rules which apply to non-broadcast marketing (the “CAP Code”).

In practice, compliance with the Code will generally entail compliance with the DPA and Privacy Regulations. For example, Rule 43.3, includes the soft opt-in: explicit consent of consumers is required before send marketing communications by email or to mobile devices, except that marketers may send unsolicited marketing about their similar products to those whose details they have obtained in the course of, or in negotiations for, a sale.

The ASA is the independent body responsible for ensuring that advertisers follow the CAP Code. The ASA cannot impose fines on its members, however its adjudications are a matter of public record, and there is therefore a reputational risk inherent in failing to comply with the CAP Code. The ASA can also request the Committee of Advertising Practice to inform its members of a breach. Under the rules of membership, members can then refuse that marketer advertising space, commission and/or membership of a trade association.

All UK organisations carrying out direct marketing activities must comply with the self-regulating regime. Note that the CAP Code does not apply to direct marketing that originates outside the UK. Direct marketing that originates outside the UK but is targeted at UK consumers will be subject to the jurisdiction of the relevant authority in the country where it originates so long as that authority operates a suitable cross-border complaint system. If it does not, the ASA has indicated that it will take what action it can. Members of the European Union (and a number of non-European Union countries), have self-regulatory organisations that are members of the European Advertising Standards Alliance which co-ordinates the cross-border complaints system for its members (which include the ASA).
4. Direct Marketing Code

The Direct Marketing Authority ("DMA") Code of Practice sets standards of ethical conduct and best practice for direct marketers, and is administered and monitored by the independent DMA. All the new marketing and media channels, such as email and SMS marketing, together with field marketing and door-to-door, are now included within the DMA Code of Practice, as well as the traditional media like direct mail, press and telemarketing.

The Direct Marketing Authority is an independent body which, amongst other things, investigates complaints made by consumers and other businesses against DMA member companies to decide if there has been any breach of the DMA’s Code of Practice, and makes adjudication as appropriate. Complaints against non-member companies who have applied for membership of the DMA may also be assessed.

The DMA Code of Practice requires members to check the Email Preference Service (see above) when undertaking any cross-border marketing to countries outside the European Union. Note that although there are no legal sanctions in the UK when a company does not comply with this requirement, the DMA may terminate that entity’s membership for sending spam to persons who have registered with the Email Preference Service.

The DMA Code of Practice further requires members to:

> avoid sending unsolicited commercial communications to individuals who have registered an objection to receiving such communications;

> ensure all commercial communications by email are clearly identifiable as such on receipt; and

> operate and maintain a suppression file listing recipients who have opted-out.

5. The E-Commerce Regulations and Distance Selling Regulations

The E-Commerce Regulations provide that direct marketers communicating via email or SMS must indicate that unsolicited commercial messages are indicated as such “clearly and unambiguously” (Regulation 8) as soon as the message is received. The manner of this identification is not itself prescribed, although the intention of the underlying Directive would appear that the message is identifiable as a commercial communication from the header (i.e. without requiring the recipient to open the message). Certain information must also be provided to the recipient, such as the name and address of the sender, VAT number (if relevant) and an email address (Regulation 6).

In relation to the Distance Selling Regulations, a “distance contract” means any contract concerning goods or services concluded between a supplier and a consumer run by the supplier who (for the purpose of the contract) makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded. The Distance Selling Regulations state that a certain amount of information must be provided prior to the conclusion of a contract at a distance relating to the identity of the supplier, the description of the goods and services, the price and delivery costs, and arrangements for payment and delivery.
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Glossary

**Data controller** is a person (which may be a company) who (alone or jointly with other persons) determines the purposes for which, and the manner in which, any personal data are (or will be) processed.

**Data processor** is in person (which may be a company) who processes personal data on behalf of the data controller.

**Direct marketing** is the communication of advertising or marketing material (in whatever form) which is directed to particular individuals.

**Personal data** are data which relate to living individuals who can be identified from those data (or from other information in the control of, or likely to come into the control of, the data controller). It includes virtually any information about a living individual, there being no need for the data to be confidential.

**Sensitive personal data** means personal data consisting of information as to (a) the racial or ethnic origin of the individual; (b) his political opinions; (c) his religious beliefs or other beliefs of a similar nature; (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992); (e) his physical or mental health or condition; (f) his sexual life; (g) the commission or alleged commission by him of any offence; or (h) any proceedings for any offence committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

**Recap on the Eight Principles**

Data controllers must comply with the eight data protection principles:

> processing must be fair and lawful;
> processing must be for specified purpose(s);
> data held must not be excessive;
> data held must be accurate;
> data must not be held for longer than necessary;
> the rights of data subjects must be observed;
> appropriate security measures must be taken; and
> data cannot be transferred outside the EEA unless adequate data protection is ensured.

**Opting Out: Preference Services**

In the UK, a number of different opt-out (preference) schemes have been established for direct marketing activities through different media:

> The **Telephone Preference Service** is a mandatory service, meaning that direct marketers must check the register against their mailing lists. Further, criminal sanctions by way of fines apply is someone is marketed to by telephone and the individual has asked for their name to go on the list (unless it is a recent request).

> The **Fax Preference Service** is also a mandatory service and criminal sanctions by way of fines similarly apply for direct fax marketing to an individual who has registered with the preference service.
> The **Email Preference Service** is a voluntary scheme administered in the US by the DMA. Whilst the service is not mandatory (i.e. not obligatory for direct marketers to search it), DMA members are required to observe it.

> The **Mailing Preference Service** is again a voluntary scheme. Use of the Consumer File by list owners and users is a requirement of the British Code of Advertising, Sale Promotion and Direct Marketing (and administered by the ASA), as well as a condition of the DMA’s code of conduct. Note that there is also a **Baby Mailing Preference Service**. This is similarly a voluntary service aimed at helping to reduce the number of baby-related mailings received by those who sign up to it.

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