In the first article in this series “Introduction to data protection and direct marketing: the rules of the game” we introduced the data protection framework in the context of marketing activities, setting out the legislative and regulatory provisions relevant to direct marketers. This article follows on from that and examines in more detail the requirement to obtain consent prior to carrying out marketing activities, also looking at the correct form of consent and possible means for procuring consent.

**Point of data capture**

It is important, at the time of data capture, to consider the type of consent that is required for the particular use of data envisaged. Obtaining the express consent of a large number of data subjects subsequently to the data capture is generally impracticable and expensive. It is therefore crucial to anticipate at the time data are collected the uses to which they may be put and the categories of person to whom they may be disclosed. Data is usually collected using a written or online application form and inclusion of appropriate wording on the form will often be the most convenient and efficient way of obtaining consent. It is also now common for data to be captured through call centre services. In each of those circumstances of data capture, the key to obtaining necessary permissions to direct market is careful consideration of what marketing activities are intended to be carried out with the captured data, and inclusion of appropriate, informative wording and consent options. These issues will be explored further in this article.

**Data Protection Act 1998**

The Data Protection Act 1998 (the “DPA”) sets out eight principles that a data controller must comply with when processing personal data. The first data protection principle requires data controllers to process data fairly and lawfully. This consists of an obligation to provide fair processing information to the data subject and also provides additional conditions which must be met for the processing of data to be fair under the DPA. In the previous article in this series, we considered that obtaining the consent of the data subject to the marketing is a key element in complying with this fair processing principle.

**Consent for the purposes of the DPA**

Although consent is not defined in the DPA, 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”. The Information Commissioner takes this to mean that there must be some active communication between the parties and that data controllers cannot infer consent from non-response to a communication. 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/her 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.
Particular care must be taken in respect of children and young persons under the age of 16. It is a question of fact whether a child has sufficient understanding and intelligence to be capable of giving valid consent. The standard adopted by Trust UK in its accreditation criteria is considered by the Information Commissioner to be a reasonable one. This is that “Personal data must only be collected from children with the explicit and verifiable consent of the child’s parent/guardian unless that child is aged 12 years or over, the information collected is restricted to that necessary to enable the child to be sent further but limited on-line communications and it is clear that the child understands what is involved.”

The Privacy and Electronic (EC Directive) Regulations 2003

In the context of direct marketing, it is likely that consent will be required in any event by virtue of the Privacy and Electronic (EC Directive) Regulations 2003 (the “Privacy Regulations”). Therefore it is advisable to ensure that the wording used to procure consent satisfies the requirements of both the DPA and the Privacy Regulations.

Following the introduction of the Privacy Regulations, consent is required where personal details are used for the purposes of sending direct marketing materials to individuals by fax, email or by means of an automated calling system. Such consent is not required where direct marketing communications are sent by post (although note that consent must nonetheless be obtained in respect of communications sent by post for the purposes of complying with the DPA). The precise mechanisms by which consent is obtained may vary according to the precise nature of the marketing activity envisaged.

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/she 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/she 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/her objection to receiving such faxes either by contacting the relevant company directly or by registering with the Fax Preference Service. 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. 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/she consents to receiving such emails.

“Opt-in” and “Opt-out” Consent

Consent to direct marketing for the purposes of the Privacy Regulations may be required to be in the form of “opt-in” or “opt-out” depending on the method of communication involved. “Opt-in” requires the individual to actively consent to receiving direct marketing materials from the data controller. The term “opt-in” tends to refer to a box that the individual ticks to indicate agreement to receipt of marketing communications. “Opt-out” consent is obtained where the individual is given the opportunity to object and does not take it up. Generally, an unticked box is presented and the individual ticks to indicate objection (see example wording below).

In terms of the type of consent required under the Privacy Regulations, the various types of communication will be considered in turn:
(i) Marketing by telephone and fax

In respect of marketing by telephone, an important distinction must be made between marketing by means of an automated calling system (i.e. a marketing call which is a recorded message) and marketing by “live” telephone calls, for example, a marketing call made “live” by a call centre employee. The Privacy Regulations define an automated calling system as a system which is “capable of automatically initiating a sequence of calls to more than one destination in accordance with instructions stored in that system” and which transmits “sounds which are not live speech for reception by persons at some or all of the destinations so called”. Guidance on the Privacy Regulations provided by the Information Commissioner (dated November 2003) states that automated calls are those which are pre-recorded and offer no opportunity to a recipient to speak to a “live” person. The guidance provides that, in the Information Commissioner’s view, even if an opportunity is provided at some point in the message, for example, “to speak to a live operator, press 1”, such a call would be deemed to be automated because not all telephones are “touch-tone” phones. Accordingly, if a company carries out its marketing by means of an automated calling system and recorded messages or by the sending of faxes to individuals, the Privacy Regulations require it to obtain prior consent from its customers, i.e. an “opt-in” provision.

The position is complicated by the fact that stricter obligations are placed on companies that market by means of “live” calls and, in the event that the person they are calling “live” does not answer their telephone at the time, leave messages on that person’s voicemail or answerphone. The Information Commissioner’s guidance states that voicemail and answerphone messages left by persons making marketing calls that would otherwise be “live” calls, fall within the category of “electronic mail”, and therefore will be subject to the prior consent provisions of the Privacy Regulations. Accordingly, a customer’s prior consent (by means of an opt-in provision) will be required in order for a “live” marketing caller to leave a voicemail or answerphone message. This is something that a company should bear in mind when structuring its marketing campaigns.

(ii) Email and SMS

A sender of electronic mail (deemed to include email and text, video or picture marketing messages) cannot transmit, nor instigate the transmission of, unsolicited marketing material by electronic mail to an individual unless the recipient of the electronic mail has previously notified the sender that he or she consents, for the time being, to receiving such communications. In other words, opt-in consent is required (except in certain prescribed circumstances, see below: “the soft opt-in”). An “unsolicited marketing material that an individual has opted into receiving” is one that the individual has not invited but which he has indicated that he does not, for the time being, object to receiving. If challenged, marketers would need to demonstrate that the individual positively opted into receiving further information from them.

In addition, a sender must not conceal his/her/its identity when sending an electronic mail and must provide a valid address to which a recipient (whether individual or corporate) may send an opt-out request (e.g. that such communications cease). The Information Commissioner’s guidance suggests that, for these purposes, a valid email address would suffice as a “valid address” in an online environment.

(iii) Post and “live” telesales calls

For direct marketing by post or by means of “live” call centre operators calling customers, neither an opt-out nor opt-in provision is specifically required by the Privacy Regulations. Nonetheless, the inclusion of any such provision is one of the ways in which a company may demonstrate that it acts in compliance with the DPA when processing personal data. Since the DPA does not specify how consent should be obtained, either an opt-out or opt-in provision may currently be used in respect of “live” telesales calls and postal marketing.

Whilst the Privacy Regulations do not specify that prior consent is required in order for a company to make “live” unsolicited marketing telephone calls, certain provisions of the Privacy Regulations do apply to such telesales calls. A firm must identify itself when making a telesales call, and, if asked, must provide a valid business address or freephone telephone number at which the firm can be contacted. When using a subcontractor, the subcontractor’s call centre staff must identify the organisation on whose behalf they are making the call. In addition, as mentioned above, if a customer has previously told a firm that he/she does not wish to receive telesales calls for the time being, the firm must comply with that request.
Telephone and Fax Preference Services

Caution must also be taken to avoid making “live” marketing calls to individuals or sending faxes to corporations who have subscribed to the Telephone Preference Service (“TPS”) or Fax Preference Service (“FPS”) respectively. The TPS and FPS are statutory lists of telephone numbers and fax numbers respectively where the subscriber to a listed number has registered a general objection to receiving unsolicited marketing calls/faxes on that number. Any landline or mobile number can be registered on TPS to block unwanted “live” calls and any fax number can be registered by a corporation on FPS to block unwanted faxes. Under the Privacy Regulations, a company wishing to market to a customer cannot make or instigate the making of unsolicited telesales calls or faxes to any number listed on the TPS or FPS registers. The only circumstances in which a company can make or instigate the making of unsolicited telesales calls or faxes is where that subscriber has notified the company that, for the time being, they do not object to receiving such calls or faxes on that TPS/FPS registered number. A subscriber can withdraw such overriding consent at any time, in which case, further telesales calls or faxes must not be made or sent to that number. For more information on this service, go to www.tpsonline.org.uk.

The wording of the Privacy Regulations does not make clear how a TPS/FPS subscriber should notify a firm that he or she does not object for the time being to receiving marketing calls or faxes on a TPS/FPS registered number. Such overriding consent may therefore equate to specific opt-in consent, meaning that simply not opting-out in a particular circumstance will not be sufficient for these purposes. In other words, it seems that a TPS/FPS registered customer may have to give specific opt-in consent to a company in order for the company to be permitted to market to that customer.

The “soft opt-in”

In respect of marketing communications sent by electronic mail (including email, text, video and picture marketing services), there is a limited exception to the usual requirement for opt-in consent. This limited exception applies 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;

> 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/her contact details for marketing purposes at the time those details were initially collected and, where he/she did not refuse the use of those details, at the time of each subsequent communication.

A sale does not have to be completed to satisfy the criterion that the email address was collected during the course of a sale or negotiations for a sale. For example, an individual may have asked for a quote for insurance on-line but chose not to take up the offer. Where the company offering insurance wants to collect the individual’s email address to market to him in the future, they should give him a chance to opt-out when they collect that address. In other words, the prior consent rule is relaxed because the individual’s details are being collected in the course of a sale or negotiations for a sale of products or services similar to those that will be marketed in the future. If the individual does not opt-out of the future marketing when his details are collected, the data can be used for future marketing of similar products and services. However, the company must give him a chance to opt-out with every subsequent marketing message they send.

With regard to the difficulty involved in assessing whether two products/services are similar, the Information Commissioner has stated that “similar products and services” means the products and services the individual would reasonably expect to hear about from the organisation in question.

Marketing by group companies and third parties

Where the company carrying out marketing activities passes on contact details for the purposes of marketing, the provisions of the DPA apply and the company must always bear in mind its obligation to process data in a fair and lawful way. It must inform the customers of the potential disclosure and provide customers with sufficient information,
either on its website, on the application form through which the customers’ details are collected or in the relevant call centre script for telephone data capture, in respect of the services and products of any third parties and group companies to which the details may be passed. Otherwise, the risk arises that a customer will claim he was not afforded the opportunity to give appropriate, informed consent.

Where the contact details being passed on consist of electronic contact details, i.e. email addresses, the Privacy Regulations are also of relevance:

(i) Disclosure to third parties
The Information Commissioner’s guidance on the Privacy Regulations provides that the decision about what happens to an individual’s electronic contact details must rest with the individual. No disclosure can be made to third parties for their marketing purposes unless that individual actively consents to such a disclosure taking place. Therefore, if a company wishes to pass on a list of email addresses for individuals, it must make clear at the time it seeks consent from a customer to which third parties it is proposing to pass these details on to and what sort of products and services they will be offering. An opt-out provision will not be sufficient for marketing by electronic means, fax or automated calling system by third parties.

(ii) Group companies
The Information Commissioner’s guidance provides that, as a minimum, a company must ask individuals whether they consent to receiving unsolicited marketing by electronic mail from other group companies when it collects their contact details. In an online environment, the guidance suggests providing a link listing the group companies and suggests that a company may even wish to consider providing separate opt-in opportunities for each company on that list in order to give the individual greater choice and to target the group’s marketing more efficiently. Another option that the Information Commissioner proposes is for a company to provide an opportunity for the individual to invite (i.e. solicit) contact from other companies within the group.

(iii) Different trading names
Where a company trades under several different names, the Information Commissioner has stated that it cannot assume that a customer who agrees to receive mailing from one trading entity has agreed to receive marketing from other trading entities since customers may not even be aware of any connection between different trading names. A company must therefore ensure that an individual is made aware that they will receive unsolicited marketing from all of its trading names when they opt-in to receiving marketing from that company. Similarly, when an individual opts-out of receiving unsolicited marketing from one of a firm’s trading names, this opt-out applies to all that firm’s trading names, unless the individual makes clear otherwise. The Information Commissioner’s guidance suggests companies can get around this by providing an opportunity for the individual to invite contact from the wide range of trading names within the company.

Practical approach to procurement of consent
Where a company envisages that it may carry out various types of data processing or send various types of marketing communications, it may be appropriate to offer more than one tick box, each relating to a different set of purposes or type of marketing activity. For example, a company may want to market by way of electronic communications as well as by post. In this situation, the company could have an opt-in provision for the electronic marketing and an opt-out provision for the postal marketing. The technology underpinning the data capture activities must, however, be capable of distinguishing the data subjects by category of consent given, so that the data controller can process their data only within those consents. As many companies do not have a sufficiently sophisticated systems to differentiate between databases for online communications and databases for postal communications, it may be easier to simply use opt-in consent in respect of all types of processing.

It is important for a company to maintain a record of the relevant versions of the fair processing information and opt-outs offered on each data capture form, from time to time, so that the extent of the consent given by each individual at any particular time can be determined at a later date.
Practical approach to opt-out

As this article has shown, there is a prevalence of “opt-out” mechanisms for obtaining consents – albeit now only for postal and “live” telephone call marketing. Here the consent is presumed unless the data subject indicates otherwise (by ticking a box or notifying the marketer at a supplied postal or e-mail address). Care must be taken with this approach to ensure that the data subject can be said to have “unambiguously” signified his/her consent. We would suggest that the intended marketing use must be clear (language used, size of typeface, position of “opt-out” wording) and the means for opting out sufficiently simple. Whilst an opt-out on a returned application form requires little effort on the part of the data subject, an invitation to indicate an opt-out by writing to a postal address where no stamped address envelope is provided requires significantly more effort from the data subject. This author considers that a well known high street bank’s recent practice of inviting customers to opt-out by “contacting [their] local branch” would not amount to unambiguous consent. These days it is notoriously difficult, if not impossible, to contact a local bank branch by telephone.

Examples of wording for obtaining opt-in and opt-out consent in respect of direct marketing

Suggested rubric for opt-out consent where direct marketing is to be carried out by post or live telesales calls, and where the data controller may pass personal data to other companies in the group:

> [Data controller] may share information about you with other [members of the same group of companies] [and] [state persons to whom data may be transferred] who may send you information about their other goods or services which they believe may be of interest to you. If you do not want to receive this information, please tick this box.

Suggested rubric for opt-out consent where direct marketing is to be carried out by post or live telesales calls, and where the data controller may pass personal data to other third parties:

> [Data controller] may also pass details about you and your account(s) to other [carefully selected] [reputable] companies who may wish to offer you other goods or services [which [data controller] believes may be of interest to you]. If you do not want to receive this information, please tick this box.

N.B. where direct marketing is to be sent by email as well as by post, you will need opt-in consent.

Suggested rubric for opt-in consent where direct marketing is to be carried out by email, fax or automated calling systems:

> From time to time we would like to send you information about our other goods or services which we believe may be of interest to you. If you would like to receive this information tick the relevant box below.

Please send me information about your other goods or services:

by fax  ☐  by email  ☐  by telephone  ☐

N.B. in these cases data may not be passed onto third parties.

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