

Insights

BE AWARE OF THE UK'S DIRECT MARKETING RULES WHEN COMMUNICATING WITH CUSTOMERS AND CLIENTS DURING THE COVID-19 PANDEMIC

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SUMMARY

This blog looks at the issues companies should consider when communicating with their customers and clients in relation to issues concerning COVID-19.

The current lockdown in the UK and the ongoing disruption to commerce as well as private life makes communication with customers and clients at distance crucial for companies. While there is widespread encouragement, including from the government, for people staying in touch, companies will not wish to find themselves inadvertently in breach of ePrivacy rules on direct marketing when doing so. Breach of these rules can lead to fines of up to £500,000 and the rules have been actively enforced in the UK. This blog identifies some key issues that companies in the UK should consider when looking to engage with their customer base.

1. What types of information can we send to our customers by email/SMS?

First, it is worth keeping in mind that different rules apply depending on whether the individual receiving the email or SMS is an “individual subscriber” (loosely equivalent to a consumer) or a “corporate subscriber” (broadly, this covers someone using a work email address or phone number). This note covers communications with the first type – “consumers”.

The Privacy and Electronic Communications Regulations 2003 (“PECR”) prohibit companies from sending “unsolicited communications for the purposes of direct marketing” to consumers unless they have consented (consent can be “implied” in narrow situations). This applies both to emails and SMS messages.

Companies that do business with consumers are required to maintain records of direct marketing consents they have collected on an individual by individual basis. Communicating with these “consented” individuals about the company’s COVID-19 arrangements is unlikely to be problematic, even if the update could be considered to include “direct marketing” content (see below).

However, as many businesses know well, not every consumer chooses to receive marketing. There will often be a residual “pool” of consumers for whom companies hold an email address, but who have not consented to direct marketing. To comply with PECR, any emails sent to this pool of individuals should be informational and/or operational only in nature in order to avoid being considered “direct marketing”. The UK regulator, the Information Commissioner’s Office, has stated in guidance that “all promotional material” falls within the definition, and that it will cover “any messages which include some marketing elements, even if that is not their main purpose.” Based on this, sending a service message to these “non-consented” consumers (for example, notifying customers of store closures) may be permissible; however, coupling this with details of online offers is likely to stray into the territory of direct marketing.

2. Can we contact our customers by phone?

Marketing by telephone is also regulated under PECR. Companies looking to engage with customers and clients by live telephone calls should be aware of the requirement to screen telephone numbers against the Telephone Preference Service and Corporate Telephone Preference Service, which record numbers that have opted out of receiving live telephone marketing calls. Companies should not market (including COVID-19 contact which includes a direct marketing element) to anyone who has previously expressed a preference not to be contacted in that way.

In all cases, companies looking to undertake marketing should make sure that doing so is not inconsistent with any privacy notice provided to individuals.

RELATED PRACTICE AREAS

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MEET THE TEAM



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