

Direct marketing Q&A: Ireland

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Country Q&A | Law stated as at 31-Dec-2019 | Ireland

Ireland-specific information concerning direct marketing laws. This Q&A provides country-specific commentary on *Practice note, Direct marketing: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

The regulation of unsolicited commercial communications

1. How does national law regulate the making of unsolicited telephone calls for marketing purposes?

Direct marketing generally

The use of personal data for direct marketing purposes is governed by the EU General Data Protection Regulation (2016/679) (GDPR) and the Irish Data Protection Act 2018.

Where the direct marketing takes the form of an electronic communication to an individual (for example, by phone or e-mail), ePrivacy law also applies, in the form of the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (ePrivacy Regulations), which transpose the ePrivacy Directive (2002/58/EC) in Ireland.

The Irish Data Protection Commission (DPC) is the regulator and enforcement body for both the GDPR and the ePrivacy Regulations.

The current ePrivacy law framework is due to be superseded soon (at a date that has yet to be confirmed), by a new EU ePrivacy Regulation which is currently in draft form.

In Ireland, the ePrivacy Regulations set out rules regarding the circumstances in which electronic communication services may be used to send unsolicited direct marketing communications. These rules vary according to the communication method used and the intended recipient. However, the general rule is that such unsolicited direct marketing communications cannot be sent unless the recipient consents.

Direct marketing by telephone

Importantly in relation to telephone calls, the ePrivacy Regulations do not distinguish between unsolicited telephone communications to individuals and those to companies (and all other persons other than natural persons). How they are regulated depends on whether they are calls to landlines, or to mobile phones.

Unsolicited marketing calls to landline phones are permitted unless and until the intended recipient notifies the marketer that they do not consent to the calling (that is, on an opt-out basis) (*regulation 13(5), ePrivacy Regulations*). However, the direct marketer must also screen phone numbers against the Irish National Directory Database to ensure that the intended recipient's number is not recorded on its opt-out list (see [Question 13](#)).

Unsolicited marketing calls to mobile phones are prohibited unless the person undertaking the marketing has been notified by that individual that they consent to the receipt of those calls on the mobile phone (that is, an express opt-in is required) (*regulation 13(6), ePrivacy Regulations*). (An exception exists where the person has recorded their consent to direct marketing calls on the National Directory Database.)

Under the GDPR, it is likely that this would be construed to require consent which satisfies the GDPR standard; there is some uncertainty as to how references to "consent" in the ePrivacy Regulations should be construed since the coming into force of the GDPR, due to ambiguous wording in the GDPR. It is possible that the references will be construed to mean "consent" as that term was understood under the "old" data protection regime in Ireland.

However, it seems more likely that the references will be deemed to mean consent as envisaged by the GDPR, and this is the view that the DPC seems to take. The European Data Protection Board (EDPB) has also issued an opinion on the interplay between the ePrivacy Directive and the GDPR, to the effect that consent for the purposes of the ePrivacy Directive (and consequently the ePrivacy Regulations) should be construed as GDPR-standard consent (see further discussion in [Question 6](#)).

As such, where a direct marketer is undertaking unsolicited marketing to mobile phones, it must have consent and such consent must be:

- Given in advance.
- Freely given.
- Specific.
- Informed.
- An unambiguous indication of the individual's wishes either by a statement or by a clear affirmative action that signifies agreement to the direct marketing by that means.

In all cases, whether solicited or not, and whether on mobile phone or landline, a person making any phone call for the purposes of direct marketing must provide the name of the person making the call (or, if applicable, the name of the person on whose behalf the call is made) (*regulation 13(10)(a), ePrivacy Regulations*).

Where the call is made by an automated calling machine, the communication must include the name, address and telephone number of the person making that communication (*regulation 13(10)(b), ePrivacy Regulations*).

Finally, all direct marketing by phone must also comply with the GDPR and the Data Protection Act 2018 (see [Question 6](#)).



2. How does national law regulate direct marketing by fax?

In respect of individuals, it is prohibited to send an unsolicited direct marketing communication to an individual by fax unless the individual has consented to the communication (*regulation 13(1), ePrivacy Regulations*). Consent ought to be GDPR-standard consent (see [Question 1](#)).

In respect of companies (and all persons other than natural persons), an unsolicited direct marketing communication by fax (or a call by automated calling machine) is permitted unless and until the intended recipient company notifies the caller that it does not consent to it (that is, on an opt-out basis) (*regulation 13(3), ePrivacy Regulations*).

In all cases, a person making a fax communication for the purposes of direct marketing must include the name, address and telephone number of the person making that communication (*regulation 13(10)(b), ePrivacy Regulations*).

All direct marketing by fax (or a call by automated calling machine) must also comply with the GDPR and the Data Protection Act 2018 (see [Question 6](#)).

3. How does national law regulate direct mail advertising?

The ePrivacy Regulations do not apply to direct marketing to postal addresses, as this form of marketing does not fall within the definition of "electronic mail" in those regulations.

However, the requirements of the applicable data protection law still apply, and, in particular, must be met where the marketing is addressed to a particular individual (as opposed to the "owner/occupier"). If an organisation knows the name of the person it is mailing, it cannot avoid data protection obligations by simply addressing the mail to "the owner/occupier", as it is still processing that individual's personal data.

The requirements are that:

- An individual must be made aware that an organisation has their contact details, and intends to use them for marketing purposes.
- The organisation must have obtained the address fairly and lawfully.
- The organisation cannot send unsolicited marketing mail if the address was originally collected for an entirely different purpose.
- Organisations must not send marketing mail to anyone who objects or opts out from such marketing.
- The organisation must comply with any objections or opt-outs promptly.

4. How does national law regulate direct marketing by email?

The ePrivacy Regulations define "electronic mail" broadly, as:

"... any text, voice, sound or image message including an SMS message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient".

Individuals

When sending direct marketing messages by electronic mail to an individual, the general rule is that consent must be obtained from the person to whom the marketing communication is to be addressed. (The consent should satisfy the GDPR standard; see [Question 1.](#))

However, there is an exception to this general rule known as the "soft opt-in", which applies when sending direct marketing messages by electronic mail to existing customers of the company or person sending the unsolicited marketing communications in certain limited circumstances, but only where all of the following criteria are met:

- The contact details were collected in accordance with data protection law in the context of the sale of a product or a service to that customer.
- The product or service being marketed is the relevant company/person's own product or service.
- The product or service being marketed is of a kind similar to that supplied to the customer in the context of the initial sale.
- The customer is clearly and distinctly given the opportunity to object, in an easy manner and without charge, to the use of their contact details for direct marketing, both at the time the details are collected and also each time a direct marketing message is sent to that individual.
- The initial sale occurred within the previous 12 months, or that customer has been sent a compliant direct marketing message offering them the chance to opt out, which they did not take, within the previous 12 months.

(Regulation 13(11), ePrivacy Regulations.)

At the time of writing, the latest draft of the new EU ePrivacy Regulation envisages that a soft opt-in will continue to be available (although the applicable conditions will not be identical to the current soft opt-in provided for under the ePrivacy Regulations).

Companies

Electronic mail communications to companies (and all persons other than natural persons) for the purpose of direct marketing are permitted unless and until the intended recipient notifies the person undertaking the marketing that they do not consent to receiving such communications (that is, the marketing can take place on an opt-out basis) (*regulation 13(4), ePrivacy Regulations*).

In addition, in the business to business context, an unsolicited direct marketing communication to a natural person via electronic mail will **not** fall within the regulation of direct marketing to individuals if it:

- Is to an e-mail address that reasonably appears to the sender to be an e-mail address used mainly by the subscriber or user in the context of their commercial or official activity.
- Relates solely to that commercial or official activity.

(*Regulation 13(2), ePrivacy Regulations*.)

General requirements

In all cases, a person sending an electronic mail for the purposes of direct marketing must include a valid address at which the sender may be contacted (*regulation 13(10)(c), ePrivacy Regulations*).

All direct marketing by electronic mail must also comply with the GDPR and the Data Protection Act 2018 (see [Question 6](#)).

5. How does national law regulate direct marketing by text messaging (SMS)?

Direct marketing by SMS is regulated in almost entirely the same way as email communications, since SMS communication is regarded as a form of "electronic mail" under the ePrivacy Regulations (see [Question 4](#)).

However, there is one distinction: a direct marketer may not use a publicly available electronic communications service to send a subscriber or user an SMS message for a **non-marketing purpose** which includes information intended for the purpose of direct marketing, unless the marketer has been notified by that subscriber or user that they consent to the receipt of such a communication (*regulation 13(7), ePrivacy Regulations*).

6. How do your national data protection regulations impact on direct marketing campaigns?

The GDPR and the Data Protection Act 2018 apply to direct marketing campaigns in Ireland.

As a form of processing of personal data, any direct marketing activities must comply with the GDPR generally. This includes compliance with the key principles set out in Article 5, including:

- Fair and lawful processing.
- Data minimisation.
- Accuracy of all data processed for direct marketing purposes.

Among other generally applicable obligations, the GDPR also requires a controller of personal data for direct marketing purposes to provide certain information about its processing activities (that is, by way of data protection notice), including the intended purposes for the processing of the personal data (here, direct marketing).

Legal basis

Any and all forms of processing of personal data for the purposes of direct marketing must have a legal basis under the GDPR (such as consent or legitimate interests) (*Article 6, GDPR*). Recital 47 to the GDPR provides that the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest. Any such legal basis must also be notified to individuals (for example, in the data protection notice).

In March 2019, the EDPB issued Opinion 5/2019 on "the interplay between the ePrivacy Directive and the GDPR, in particular regarding the competence, tasks and powers of data protection authorities" (https://edpb.europa.eu/our-work-tools/our-documents/stanovisko-vyboru-cl-64/opinion-52019-interplay-between-eprivacy_en).

This opinion takes the view that where the ePrivacy Directive (and, by extension, the ePrivacy Regulations) requires "consent" to be obtained, the controller cannot rely on the full range of possible lawful grounds provided by Article 6 of the GDPR. According to the EDPB only consent may be relied on as the legal basis for processing under Article 6 of the GDPR, and it is not possible to rely on legitimate interests or any other legal basis for processing.

While the opinion of the EDPB is not legally binding, it does reflect suggested best practice, as agreed by representatives from each of the EU data protection authorities. As such, where consent is required under the ePrivacy Regulations (for example, to send direct marketing messages by e-mail or SMS), the EDPB's view is that a direct marketer under data protection law must also rely on consent for the purpose of the GDPR (as opposed to legitimate interests), in line with the approach advocated by the EDPB. In practice, where a soft opt-in could not be relied on (see *Question 4*), this would necessitate a direct marketer in Ireland obtaining updated GDPR-compliant consents from its existing marketing database contacts. Continued reliance on the option of a soft opt-in will still be available and is unaffected by the EDPB opinion.

Right to object

Where personal data is processed for direct marketing purposes, the data subject has the right to object at any time to the processing of personal data concerning them for such marketing, including profiling (*Article 21, GDPR*). Where the data subject objects to processing for direct marketing purposes, the personal data must no longer be processed for these purposes. This right to object must be communicated to the data subject in a clear manner.

The Data Protection Act 2018 provides that for the purposes applying of Article 21 of the GDPR in Ireland, "direct marketing" means direct mailing other than that carried out:

- In the course of electoral activities in the state by a political party or its members, or a candidate for election.
- By the Referendum Commission.

7. What sanctions exist for breach of unsolicited marketing communications legislation?

A breach of any of the relevant requirements of the ePrivacy Regulations constitutes a criminal offence. Each marketing communication sent in contravention of the ePrivacy Regulations constitutes a separate offence (if, for example, a direct marketing e-mail is sent to 1,000 individuals in breach of the ePrivacy Regulations, this could be construed to be 1,000 separate offences).

If found guilty of an offence under the ePrivacy Regulations, the marketer would be liable:

- On summary conviction to a fine not exceeding EUR5,000 per offence.
- On conviction on indictment, to a fine not exceeding EUR250,000 per offence.

The DPC regularly brings criminal enforcement actions under the ePrivacy Regulations and also "names and shames" those found in breach.

It should be noted that, in proceedings for an offence under the ePrivacy Regulations, the onus of establishing that the individual who received the unsolicited marketing communication consented to its receipt lies on the defendant (that is, the direct marketer) (*regulation 14, ePrivacy Regulations*).

Any associated breach of the GDPR could give rise to:

- An administrative fine of up to the greater of:
 - 4% of worldwide turnover; or
 - EUR20 million.
- An enforcement order by the DPC (for example, an order to delete any contact details kept for direct marketing purposes in breach of the GDPR).
- Other regulatory enforcement action by the DPC, including:
 - investigations and audits;
 - warnings and reprimands; and
 - orders compelling that processing operations be brought in line with the GDPR's requirements, temporarily suspended or indefinitely banned.

If there has been a breach of applicable data protection law arising out of the unsolicited direct marketing, an individual data subject could also choose to bring a claim for compensation under Article 82 of the GDPR.

8. Are there any additional national rules that apply to direct marketing campaigns?

Direct marketing activities (depending on their nature and context) may also be affected by other generally applicable or sector-specific law and regulation. The following are examples:

- In the business to consumer context, applicable consumer protection law, including the Consumer Protection Acts 2007 and 2014, must also be considered (for example, a direct marketer must not engage in unfair commercial practices and must also ensure that its unsolicited communications to consumers are not misleading or deceptive).
- In the business to business context, the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 also apply, which:
 - provide, for example, that a trader should not send misleading marketing communications to another trader; and
 - regulate comparative advertising.
- The Advertising Standards Authority for Ireland's code on advertising (see [Question 11](#)), contains further rules on advertising, including specifically in relation to (among other areas):
 - food;
 - alcoholic beverages;
 - gambling;
 - health and beauty; and
 - tobacco products.
- For direct marketing campaigns concerning medicinal products:
 - the Medicinal Products (Control of Advertising) Regulations 2007 include a prohibition on the advertising or marketing of prescription medicinal products to the general public, as well as restrictions on marketing to healthcare professionals; and
 - for pharmaceutical companies subject to its terms, the Code of Practice for the Pharmaceutical Industry published and regulated by the Irish Pharmaceutical Healthcare Association (IPHA Code) also contains further restrictions on direct marketing to healthcare professionals.

- For direct marketing concerning financial products and services, the Consumer Protection Code issued by the Central Bank of Ireland also regulates the marketing of such products and services to individual consumers. For consumer credit products, the European Communities (Consumer Credit Agreements) Regulations 2010 (as amended) likewise contain relevant restrictions on advertising to consumers.

Cross-border communications

9. Under the laws of your country, is a direct marketer bound by the laws of the country of the recipient of unsolicited commercial communication (EU principle of the country of destination)?

The extent to which direct marketing laws in other jurisdictions will apply to a direct marketer based in Ireland who sends unsolicited direct marketing communications to recipients in other jurisdictions will depend on the laws of those other jurisdictions. As a matter of Irish law, it is clear that the Irish ePrivacy Regulations apply to a direct marketer based in Ireland who sends unsolicited direct marketing communications to recipients in Ireland. It is ambiguous whether they apply to a direct marketer based outside Ireland who sends unsolicited direct marketing communications to recipients in Ireland but prudent for a direct marketer based outside Ireland to assume that they do.

The GDPR has significant extra-territorial scope, explicitly providing that it applies to the processing of personal data of EU data subjects by a controller or processor not in the EU, where the processing activities relate to:

- The offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the EU.
- The monitoring of their behavior (as far as it takes place within the EU).

(Article 3(2), GDPR.)

10. Under the laws of your country, can an individual seek redress in their own courts against a foreign company who targeted them in breach of that individual's laws against unsolicited communications?

An individual does not have a right to compensation under the ePrivacy Regulations. The DPC enforces breaches of the ePrivacy Regulations in Ireland. Individuals may, however, bring a data protection action if an unsolicited direct marketing communication also involves a breach of the GDPR (for more detail on DPC enforcement, see [Question 14](#)).

While an individual cannot bring a claim for breach of the ePrivacy Regulations, they could make a complaint to the DPC in the hope that the DPC will enforce the ePrivacy Regulations against the relevant marketer.

Where the issue arising out of the direct marketing activity is an actual or potential breach of the GDPR, the GDPR provides for the following rights:

- A right to compensation for material or non-material damage suffered as a result of infringement of the GDPR (*Article 82, GDPR*).
- A right to bring proceedings against a controller or a processor before the courts of the member state where the data subject is habitually resident, unless the controller or processor is a public authority of a member state acting in the exercise of its public powers (*Article 79(2), GDPR*).

The Recast Brussels Regulation (*1215/2012*) applies in Ireland. It provides that a person domiciled in an EU member state may be sued in another member state in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur (*Article 7(2)*). Therefore, where an individual suffers harm in another member state as a result of direct marketing activity from an Irish company, that Irish company could be sued in the courts of the member state of that individual.

The Lugano Convention has a similar effect to the Recast Brussels Regulation in respect of companies domiciled in Iceland, Norway and Switzerland.

Elsewhere, the applicable national rules on jurisdiction/service of proceedings will apply.

Self-regulation

11. Through which organisations is direct marketing self-regulated in your country?

The Advertising Standards Authority for Ireland (ASAI) is an independent self-regulatory body set up and financed by the advertising industry with the aim of promoting the highest standards of marketing communication.

The ASAI issues a Code of Standards for Advertising and Marketing Communications in Ireland (ASAI Code). Members of ASAI must abide by the ASAI Code and refrain from publishing an advertisement or conduct a promotion which contravenes it. The ASAI Code applies to marketing communications, defined in section 1.1(a) of the Code as including direct marketing.

In addition, direct marketing to healthcare professionals in the pharmaceutical industry context is also regulated by the Irish Pharmaceutical Healthcare Association and its Code Council for breaches of the relevant marketing obligations contained in the IPHA Code (see [Question 8](#)).

12. What obligations or standards do codes of practice for direct marketing impose upon marketers?

The ASAI Code provides that all marketing communications (including direct marketing) should:

- Be legal, decent, honest and truthful.
- Not mislead the consumer.
- Be prepared with a sense of responsibility, both to the consumer and to society.
- Conform to the principles of fair competition as generally accepted in business.

The ASAI Code also provides that direct marketing communications that originate outside Ireland, and sales promotions and marketing communications on non-Irish websites, if targeted at Irish consumers, are subject to the jurisdiction of the relevant authority in the country from which they originate (if that authority operates a cross border complaint system). If it does not, the ASAI will take "what action it can".

Most EU member states, and many non-EU countries, have a self-regulatory organisation that is a member of the European Advertising Standards Alliance (EASA). The ASAI is a member of the EASA. The EASA coordinates the cross-border complaints system for its members.

13. Are there any opt-out lists in your country? If so, how does one register on each list? Which organisation manages each list? What rules apply to each list?

The National Directory Database (NDD) contains subscribers' details of which can be published in a directory and/or made available through directory enquiries. The NDD Opt-Out Register records subscribers who have expressed a preference not to receive marketing calls.

The NDD is managed by Eir (an Irish telecommunications company) on behalf of the Commission for Communications Regulation, as part of its universal service obligation. As part of this obligation, Eir manages the collection of customer listings, including telemarketing preferences, from all authorised operators assigning telephone numbers to subscribers.

An individual cannot contact the NDD, as it is only capable of taking instructions from telephone line providers. A subscriber will be asked for their marketing preference by their telephone line provider at the time of subscription and can also contact the provider subsequently to express or change their preference. The line provider will then record this with the NDD. Both residential and business numbers are listed in the NDD and both types of numbers can have a marketing preference recorded.

Registering a preference with the NDD only applies to unsolicited marketing calls made from within Ireland. Non-marketing calls (including certain types of market research) will not be subject to this regulation.

Direct marketing companies must purchase a copy of the NDD to see which phone numbers do not want to receive "cold calls" and make sure that they do not call them.

If a person receives a direct marketing call more than 28 days after their details have been recorded in the opt-out register of the NDD, or after the direct marketer has been informed not to make contact, a complaint may be made to the DPC.

14. What procedures exist for complaining to organisations against unsolicited communications?

Where an individual or business receives an unsolicited communication to which they object, they can complain:

- To the sender of the communication.
- To the DPC.
- To both parties.

The DPC will assess the complaint and may seek an amicable resolution. If this cannot be achieved, or is not sought, the DPC has the power to conduct an inquiry (either with or without an accompanying investigation), which may result in an organisation being subject to an administrative fine or other corrective power. Such corrective powers include:

- Issuing warnings or reprimands to an organisation.
- Ordering the organisation to bring its data processing operations into compliance with the GDPR.

A complaint can also be made to the ASAI where a person or body considers a marketing communication covered ASAI Code may be in breach of that Code's provisions. The complaint should be made in writing and set out the details of the grounds of the complaint (there is an online complaint form available).

The ASAI should not be regarded as an arbitration service for disputes between commercially interested parties. However, an intra-industry complaint may be investigated by the ASAI where the interests of consumers are involved. The ASAI will not unnecessarily duplicate the work of other regulatory bodies, so where the complaint is more appropriate for another body the ASAI will endeavour to direct the complainant to the most appropriate body (for example, the DPC).

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