Data Capture statements – Consent and Legitimate Interests

Introduction

Here are some suggestions for data capture statements using legitimate interests opt-out and consent opt-in. These are only intended as guidance and each company should ensure the opt-out/opt-in clauses it provides correspond to the type of business it is operating and the purposes for which the data will be used in the future.

We are happy to look at any proposed opt-out / opt-in clauses prior to publication and to provide further guidance. Email legaladvice@dma.org.uk

You will need to decide which legal basis you will use for your marketing communications. If you want to use legitimate interests, you should carry out a legitimate interests assessment, documenting the process and recording the outcome. The DPN Guide to Legitimate Interests has a template LIA. <https://www.dpnetwork.org.uk/dpn-legitimate-interests-guidance/> If you want to use consent, then again document your discussions and record the decision. The ICO has guidance on the legal basis for processing under GDPR in their Guide to the GDPR on their website. <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/>

Once you have decided which legal basis you are going to use for your processing, you need to develop your data capture statements to collect marketing permission in accordance with the rules on consent or legitimate interests.

The Privacy and Electronic Communications Regulations were implemented in the UK on 11 December 2003. They will continue to be in force after the GDPR comes in on 25th May 2018, but will be affected by many of the rules in the GDPR. These Regulations state that the use of email addresses and/or mobile numbers for sms for direct marketing purposes may only be allowed in respect of recipients who have given their prior consent, such consent will be to the GDPR standard (i.e. opted-in to receiving such communications). An exception is allowed (i.e. an opt-out box can still be provided) where the details are collected in the course of a sale or a negotiation for the sale of a product or a service. This will be based on the legitimate interests of the business.

Where a company wants to pass email addresses and/or mobile numbers for sms for direct marketing purposes to third party companies then the recipient must give their prior consent, and again consent to the GDPR standard (i.e. opt-in) to such transfer. The opt-in must be worded in such a way as to specifically name the third party that will receive the email addresses/mobile numbers and you must state the types of products/services the recipient can expect to receive from these named third parties.

It should also be noted that, regardless of the legal basis you are using for your marketing, all email and SMS communications sent must include an unsubscribe or opt-out mechanism. Un-subscribing or opting-out of electronic communications must be free of charge and easy to use.

Consent

Consent under GDPR must be “freely given, specific, informed and unambiguous indication of the data subject’s wishes”. It should be made “by a statement or by a clear affirmative action”. Therefore you need to get the individual to do something, like tick a box or provide their contact data.

1. Direct marketing from company only.

We would like to send you information about our [specify products/services]/ [offers]/ [competitions]. If you are happy to hear from us for this purpose, please tick to say how you would like us to contact you:

 Post Email Telephone SMS Automated call

You can change your mind at any time. We will not pass your data to third parties. To learn more about how we handle your data, please refer to our privacy policy at xxxx.xxxxx

1. Direct marketing from company and third parties.

We would like to send you information about our [specify products/services]/ [offers]/ [competitions]. If you are happy to hear from us for this purpose, please tick to say how you would like us to contact you:

 Post Email Telephone SMS Automated call

We would also like to pass your contact data to X, Y and Z so they can contact you with details of their [specify products/services]/ [offers]/ [competitions]. If you are happy to hear from these companies for this purpose, please tick to say how you would like to be contacted.

 Post Email Telephone SMS Automated call

You can change your mind at any time. To learn more about how we handle your data, please refer to our privacy policy at xxxx.xxxxx

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Legitimate Interests

Legitimate interests requires a balance between the interests of the business to send direct marketing and the rights of the individual not to receive it.

Article 6 1(f) states:

‘‘processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of Personal Data, in particular where the data subject is a child.’

Recital 47 provides further explanation:

‘The legitimate interests of a controller, including those of a controller to which the Personal Data

may be disclosed, or of a third party, may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller.’

You need to show that the processing is necessary and a balancing test has been carried out. A Legitimate Interests Assessment should be carried out on any processing that you want to use the legitimate Interests legal basis for. The DPN Guidance on Legitimate Interests provides advice on how to assess whether the processing is necessary and a LIA template to carry out the balancing test. <https://www.dpnetwork.org.uk/dpn-legitimate-interests-guidance/>

Direct marketing from company only (soft opt-in used for email and sms)

We would like to send you information about [specify products/services]/ [offers]/ [competitions]. If you would prefer not to hear from us in this way please tick the relevant box/es below:

 Post Email Telephone SMS

You can change your mind at any time. To learn more about how we handle your data, please refer to our privacy policy at xxxx.xxxxx

Direct marketing from company and third parties

We would like to send you information about [specify products/services]/ [offers]/ [competitions]. If you would prefer not to hear from us in this way please tick the relevant box/es below:

 Post Email Telephone SMS

We would also like to pass your contact data to other companies in the ( state small industry sectors) so they can contact you with details of their [specify products/services]/ [offers]/ [competitions]. If you would prefer not to hear from these companies for this purpose, please tick the relevant box/es below.

 Post Telephone

You can change your mind at any time. To learn more about how we handle your data, please refer to our privacy policy at xxxx.xxxxx.