



GDPR – everything you ever wanted to ask

Simon Morrissey answers members' burning questions about GDPR – the hot topic taking over from Brexit in every marketing department.

If someone is a client of ours already in what circumstances do we need to get express consent to send them electronic marketing communications? Are we allowed to send them information relating to the services we provide for them even if those materials are considered to be marketing materials?

There is no legal requirement to obtain prior consent to send electronic 'marketing communications' to a 'corporate subscriber'. The legal definition of 'marketing communications' is quite wide; it includes communications asking the recipient to select their marketing preferences and it could also include newsletters depending on the nature of their content.

A 'corporate subscriber' means a limited company or limited liability partnership. The only legal requirement is that the sender must identify itself and provide contact details. However, corporate subscribers do not include sole traders and some forms of partnerships, where the rules applicable to marketing to consumers apply. If the marketing communication is sent to a named individual at a corporate subscriber then such individuals do have a right to object to the receipt of further marketing communications. Therefore such communications should also include an unsubscribe function.

Whilst the rules on business-to-business electronic marketing are more relaxed than the rules applicable to business-to-consumer electronic marketing, the sender should ask itself whether it is good marketing practice to send marketing communications that the recipient has not requested. Therefore, in many cases, businesses choose to adopt the rules applicable to business-to-consumer electronic marketing when marketing to their business customers and contacts.

Are we able to send out a re-permissioning email communication to the contacts in our CRM system after the GDPR legislation comes into effect?

As stated above a re-permissioning communication is deemed to be a 'marketing communication'. Therefore, if your contacts are 'corporate subscribers' you will be able to send a re-permissioning email communication to them after the GDPR comes into effect, unless

they have unsubscribed from further communications from you.

However, the position for re-permissioning of contacts who are not 'corporate subscribers' is trickier: there is no 'grandfathering' provision in the GDPR which means that you must comply with the marketing rules in force at the time the GDPR comes into effect. The GDPR prohibits the use of pre-ticked opt in boxes to indicate consent to receive marketing. The ICO's draft Guidance on consent under the GDPR also states that an implied opt in approach to consent to marketing is also prohibited. Therefore, if you wish to send a re-permissioning email to a non-corporate subscriber where you hold their details under a pre-ticked, or implied opt in, consent to marketing you will not be able to send them a re-permissioning email based on such consents after the GDPR comes into effect.

What changes will I need to make to my data capture scripts and privacy policies on our website?

The GDPR is far more prescriptive with regard to the content of privacy policies compared to current legal requirements. In particular, it is a requirement that privacy policies set out in clear terms the legal rights that a user has in their personal data (such as the right to object where their personal data is used on the basis of consent). It is also a requirement that for each purpose personal data is processed the privacy policy must set out the legal grounds relied upon to legitimise such processing such as consent, legitimate interests or contractual necessity. Above all the information you provide in your privacy policies has to be clear, concise and easy to navigate: burying large amounts of legalese in your privacy policies will not be compliant with the GDPR.

As far as data capture scripts are concerned, these must align with the new rules on consent under the GDPR: for example, your data capture scripts cannot be accompanied by the use of pre-ticked opt in boxes and the scripts themselves will need to contain more detail than has previously been the case, especially where intrusive or unusual processing may arise such as data profiling and aggregation of first party data with a third party data source(s).

A partner met someone at a conference who gave the partner their



Is it good marketing practice to send marketing communications that the recipient has not requested?

business card, what's best practice in terms of gaining their consent?

It would be reasonable for the partner to conclude that the person handing over the business card is indicating their consent to be contacted by the partner. However, it would be good practice to ensure that the first communication sent by the partner provided the recipient with the opportunity to specifically opt in to the receipt of further marketing communications in general or, preferably, marketing communications about specific services via specific communications channels and possibly even the frequency of such communications.

If someone asks to be deleted from our system are there any circumstances when we can ask them if we can keep this data for the purposes of future suppression or do we have to delete them?

Where an individual has requested that their details be removed from your systems you will need to make it clear to the individual that if you delete all data relating to the individual, there is the possibility that you may obtain and process data about that individual in the future.

Alternatively, you could inform the user that to action their request you will need to keep a record of their identity and request to ensure that you are able to delete further data about the individual that may come into your possession in the future. However, you should only keep the minimum data that you require

in order to comply with the request.
What information are we required to hold when it comes to demonstrating whether someone has given their consent or not?

One important change in the GDPR is the record keeping obligations imposed on data controllers and their data processors in relation to the processing of personal data. In particular, where a data controller relies on consent as the lawful ground to process personal data the ICO Guidance on consent requires that a record is kept to demonstrate what the individual has consented to, including what they were told, and when and how they consented. Many existing CRM systems do not have the ability to record this additional information. However, we are beginning to see a number of technology solutions entering the market which contain 'consent management' functionality. These are designed to plug into existing CRM systems but you should carry out a careful evaluation to ascertain whether they do comply with the record keeping requirements of the GDPR.

If someone moves company and they have previously given their consent to receive marketing communications from us, do we need to re-solicit consent?

This will depend on the channel used to market to the individual and the scope of the consent originally obtained from the individual. If the individual is marketed to via their business email address then, from a practical perspective, you will only be able to continue to market to that individual if you have their new email address. Whether you can contact that individual at their new email address depends on the scope of the consent previously given by the individual: whilst prior consent is not required to send an individual marketing communications if they qualify as a 'corporate subscriber', if you have instead sought their express consent then it would not be appropriate to send marketing communications to that individual at their new company if in doing so this conflicted with the scope of that consent.



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