

GDPR  
and Email  
Marketing

May  
25th



## Introduction

Disclaimer: This document is focused on email marketing and GDPR, particularly consent. There are many other aspects to GDPR if you process data. This is not an all inclusive document and I am not a legal adviser.

**The current Data Protection Act 1998 (“DPA”), will soon to be replaced with the General Data Protection Regulation 2016 (“GDPR”).**

GDPR will come into effect across the EU, on 25th May 2018. GDPR puts the ‘data’ subject centre stage – enabling proper management and responsibility concerning personal data.

### Why is this necessary?

**57% of consumers don’t trust brands to use their data responsibly.** (Chartered Institute of Marketing)

**Original DPA is out of date!** When it was created a little over 1% of the population had Internet access, 1 in 5 households had a mobile phone (and Snake was the game of choice!). SMS was just being introduced.

The sheer **volume of data** available today vastly outweighs anything we have known in the past and the law needs to catch up.

### Summary

If you cannot **prove** your recipients have **actively opted in** for **all communications** you send them, you need to **refresh permission** before May 2018 or, in most cases, **delete them** from your database.



PREPARING FOR MAY 2018  
**GDPR PRINCIPLES**  
THE FOUNDATIONS OF GDPR  
WWW.THEVIRTUALMARKETEER.CO.UK

**LAWFULNESS, FAIRNESS AND TRANSPARENCY**

**PURPOSE LIMITATIONS**

**DATA MINIMISATION**

**ACCURACY**

**STORAGE LIMITATION**

**INTEGRITY AND CONFIDENTIALITY**

# Marketing Consent – an overview

There are 6 lawful basis for processing data which will apply in different scenarios.

Consent is one basis, but will be one of the most used by marketers.

In summary, consent for data processing (e.g. sending marketing communications) must be:



Specific – if processing has multiple purposes, **consent should be granted for each**  
Unbundled – separate consent **for each channel**



Unambiguous – not hidden in **complex legal jargon** terms and conditions  
Informed – **identify yourself** as the data controller and 3<sup>rd</sup> parties who will access data



Freely given – **cannot be a precondition of using a service**



Documented (**doesn't** have to be in **writing**). Include suppression lists.



Affirmative action – **silence, prechecked** boxes are not a valid form of consent

**Double Opt In** (when someone confirms their intentions by clicking a link in an email after initial sign up) is a great way to ensure consent is affirmative but do bear in mind that the original opt in must also meet the right criteria (unambiguous, unbundled, freely given etc).

## GDPR definition of consent

"any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her."

There is some ambiguity surrounding B2B Marketing and conflicting information from the DMA and DPN as to whether B2B data is included.

A named corporate email can be linked to an individual so should be processed under GDPR and sole traders should be treated as B2C even under today's law.



## What does this mean for marketing, particularly email?

Consent is the biggest area of discussion for marketers since the data subject must give explicit consent to have their data processed for the marketing communications (there is an exception) and this must be documented by the data controller.

A data subject can withhold consent for processing data. As an organisation you are not allowed to stop them using a service if they choose to do this. For example, you cannot make marketing consent a condition of using a service (even for free).

Organisations also need to be specific and transparent about what will happen with the data they collect – particularly with respect to profiling for example.

### But isn't this the end of marketing, particularly email?

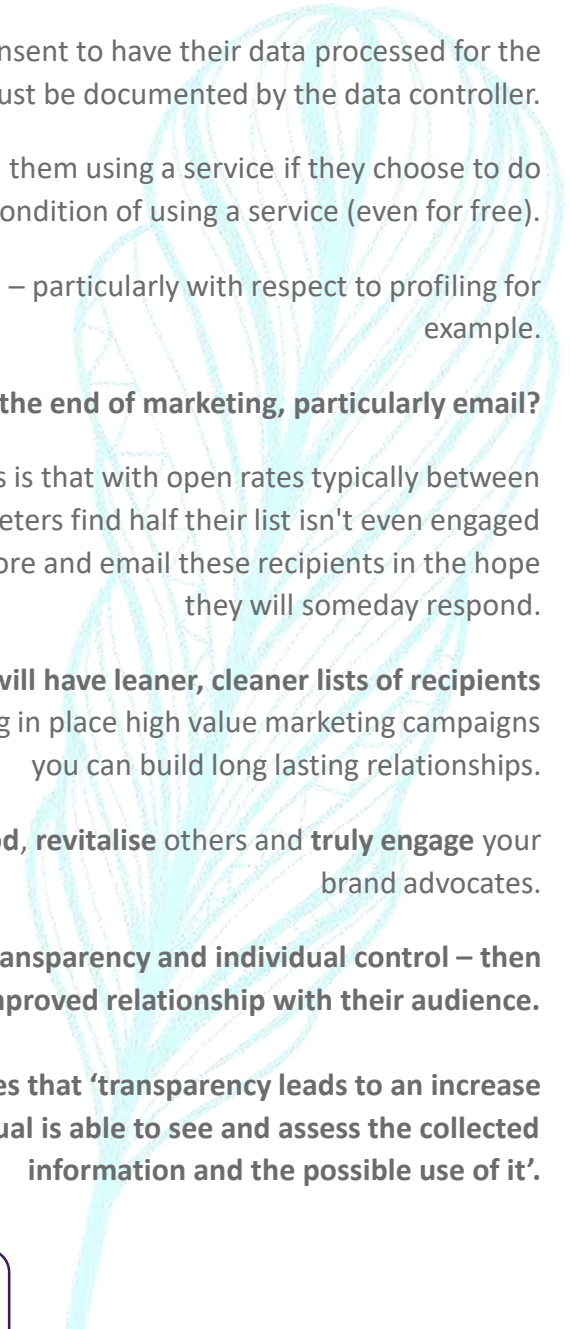
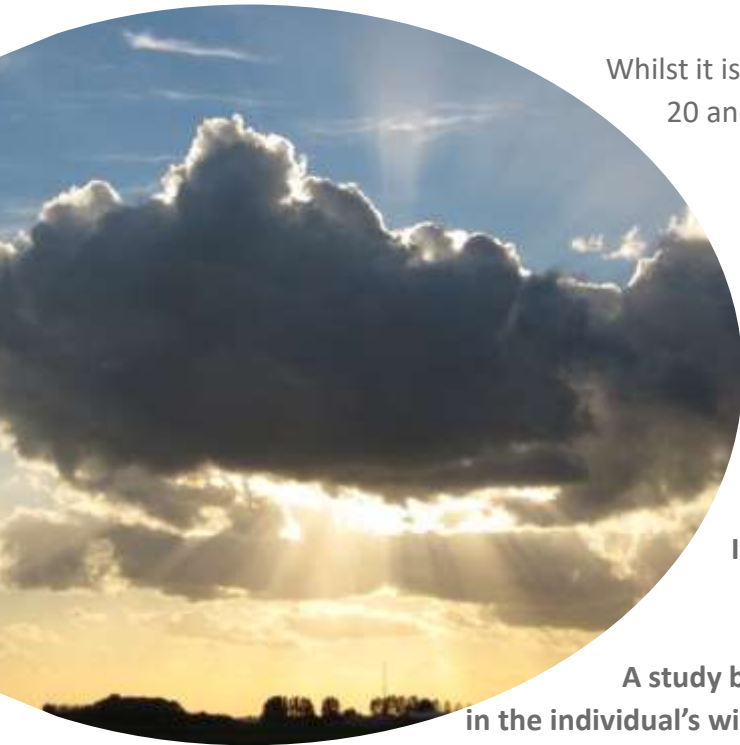
Whilst it is true email lists will decrease in size, the flip side of this is that with open rates typically between 20 and 30% for most email marketing campaigns many marketers find half their list isn't even engaged with the brand. Many organisations are paying to store and email these recipients in the hope they will someday respond.

The silver lining, is that moving forward **marketers will have leaner, cleaner lists of recipients** more likely to be engaged and purchase. By putting in place high value marketing campaigns you can build long lasting relationships.

This is a chance to get **rid of the dead wood**, **revitalise** others and **truly engage** your brand advocates.

If GDPR is able to achieve what it is aiming to – data transparency and individual control – then email marketers can expect a much improved relationship with their audience.

A study by the [Thurgau Institute of Economics](#) (2015) concludes that 'transparency leads to an increase in the individual's willingness to share personal information as the individual is able to see and assess the collected information and the possible use of it'.



# Communicating Consent

Whilst it is important to meet GDPR standards, you also need to be realistic about how interested recipients really are in the way you handle their personal data. (How often do we read the small print after all?) The majority are only wanting an overview of what they're signing up to or purchasing so ensure you let them know in a succinct and transparent manner.

ICO recommends 2 stage approach to gaining consent (or a layered notice).

The image shows a registration form with the following fields: Title (dropdown menu with 'Mr' selected), Name (text input with 'Joe Bloggs'), Email address (text input with a cursor and a blue circular icon), Username (text input), Password (text input), and Confirm password (text input). A yellow 'Create account' button is at the bottom. A callout box with a yellow border points to the email address field, containing the text: 'We use your email address as part of allowing you access to your account, and in order to contact you with important information about any changes to your account. Please follow this link for further information.'

- 1. SET EXPECTATIONS.** Keep the first page concise and transparent, but ensure people know what they are signing up to, how you will use their data and include links to detailed information.

If you don't provide the necessary information, then consumers are unlikely to be fully informed and the consent cannot be considered valid.

Bear in mind that sharing details needs unbundled informed consent as do separate channels.

**2. PLAIN TALKING DETAIL.** Your privacy policy should offer clarification and detail, expanding on what is already understood and expected from the point of collection. You must give data subjects the right to object to processing for direct marketing as well as to “**profiling** to the extent it is related to direct marketing”. (See [DMA](#) for more info).

**Include your contact details** as a data controller and your Data Protection Officer (DPO) if appropriate. What data is collected and stored. How will you **use** data collected; under what circumstances will you **share** data; How data will be used and **processed** for marketing purposes (and shared for processing); How you'll keep data **up to date** (and how individuals can update it); How you'll safeguard information; data **subjects rights**; Existence of **automated decision-making**.

If you are meeting people at events and getting consent in person or on the phone, you may want to get permission to send one email and use that email to get further consent so you have documented evidence they know what to expect and have explicitly agreed to it.



# Consent Examples

Not compliant

GDPR Compliant

This SuperOffice example explains the need for consent to be freely given. You cannot make marketing a condition of service access (even if it's free!)



Compare the market offer an easy, aesthetically pleasing way to give people preferences for different marketing channels.

## Sign up for The Guardian Today

Get our daily email of editors' picks and the biggest headlines each morning.

✉ Email address

Giving an email address and clicking sign up is itself an affirmative action but check the wording is compliant based on how you will use the data.

Below is the consent statement:

*The personal information you have provided will help us to deliver, develop and promote our products and services. Submitting your details indicates that you have read and agree to our [privacy policy](#) and [cookie policy](#). Please read these to access your data rights.*

Purpose for processing data

Unambiguous, positive indication of consent

Important link to privacy 'fair processing information'

# The role of Email Service Providers

Email Service Providers are great to help you manage your marketing list. Most will help you by:

- Keeping an electronic record of opted-in recipients via forms
- Storing email addresses you import (but you should note the source as a separate field)
- Automating a double opt-in process for you
- Automating the opt-out process
- Helping you to create landing pages, and grow your list!

But they don't do it all. Wording on your forms is still your own and you are responsible for the source of any imported data!

Check what services are offered by your own email service provide and how they can assist you.

Email Service Providers offer technology that allows you send to send emails and manage your email database. Examples include [Mailerlite](#), [Freshmail](#), [GetResponse](#), [Dotmailer](#) and [Mailchimp](#).



If you use third party tools and marketing technology providers, it's important to establish that they are ready for GDPR and compliant.

It is best to clarify:

- How they store/process data to ensure GDPR compliancy
- Who is the point of contact and what are the processes followed in the case of a data breach
- How you delete and download data if required and in what format

## Other sources of support

There are a range of other services that can help you with your marketing and GDPR compliance.

Look at how you store your data and in particular how opt outs are managed. Ensure any external agencies are communicating with each other in line with GDPR processing requirements.

If you want to do a data audit, talk to organisations like [The Business Train](#) who offer an audit of all your systems, will act as your Data Protection Officer and provide ongoing support.

## Current Data

Can you prove **GDPR compliant** consent for current contacts? **A recent data audit W8 found that 75% of data is NOT GDPR compliant.**

### Refreshing permission

If you cannot prove explicit opt-in consent for marketing that is GDPR compliant, refresh their marketing permission.

Under current law you can approach B2B customers and prospects for consent **as long as they have not previously opted out.** With B2C recipients they need to have opted in for marketing already (but the rules are not as strict as they will be under GDPR – it can be implied rather than explicit).

When Canada changed their data protection law, re-permissioning campaigns typically were delivered opt-in rates between 5 and 50% so you may need to run a number of campaigns to maximise responses.



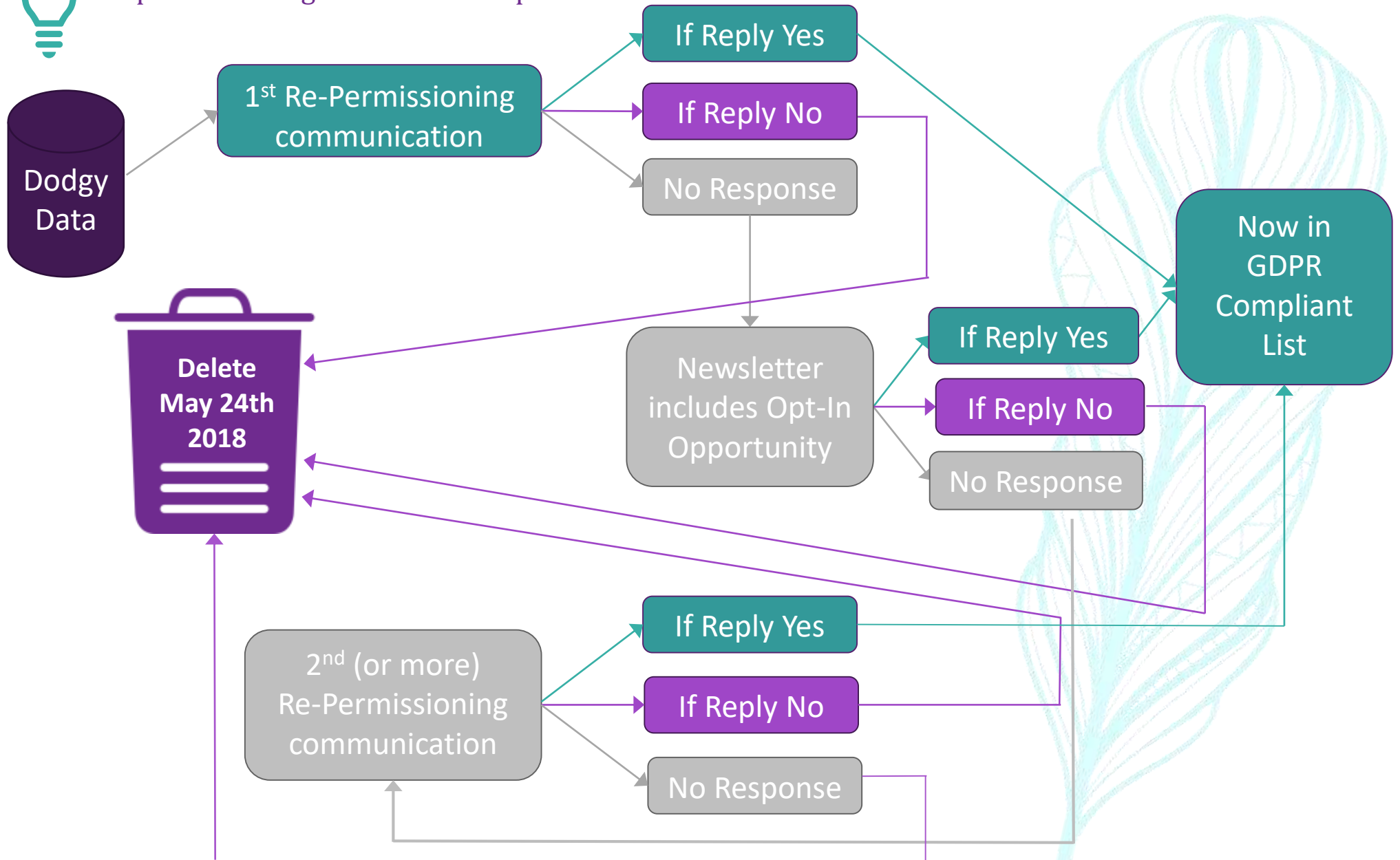
### GDPR consent compliant lists

- Put all your data in one place and ensure previous opt outs are removed.
- Send an email explaining what you are doing and asking them to re opt in. Transparency breeds trust so this can be effective
- Include relevant copy in your newsletter communications to help them re opt in.
- Produce content that asks for email address to receive and includes an opt-in option for marketing and newsletter. This will entice new as well as engage existing recipients.





## Re-permissioning workflow example



# Re-permissioning



## Your permission please

We have been emailing you for sometime but need to refresh your consent to ensure we are GDPR compliant. To ensure you get your messages after May, 2018 please

**Confirm your permission**

### What can you expect from us?

A regular newsletter containing news on IP and Google as well as useful tips on IP using Google products and services. Also some inspiring images and tours, letting you go anywhere from your desk.

### Why are we doing this?

Under new Data Protection Regulations (GDPR) we need to be able to prove we have permission to email everyone in our database. Because of the way we collected data in the past (at events and conferences) not everyone had proof of consent associated with them and we would like to take this opportunity to ensure we are emailing only those who really want to hear from us!

### Questions?

Call us on 0200 286 2113 or email [info@strikingplaces.com](mailto:info@strikingplaces.com)

## About Us



A simple and straightforward email that is transparent about what you are doing is best initially.

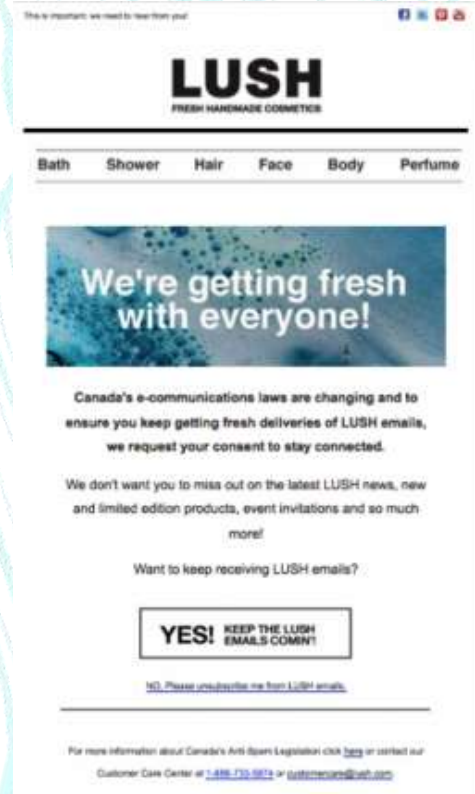


- Target your best recipients with a more personal approach
  - Remind them of the value you offer
  - You may need to use a variety of strategies to maximise opt ins.
  - Check out [Manchester United's video](#) for an innovative approach
- If a straightforward approach doesn't work, produce content that you send via email and include an opt-in option for marketing on landing page.
  - Remember that consent must be freely given, so you will need to be careful about incentivising opt in
- Consider sending direct mail as well
- The more times you communicate this message between now and May 18, the more GDPR compliance you will be able to demonstrate and the more opt ins you will get if you consider that people respond to different messaging and timing.



An opt in email series may be more effective than a whitepaper in building up brand familiarity.

Marketing consent would still be separate but you have multiple opportunities to ask



## Breathing space with legitimate interest?

One option outside of consent worth investigating for marketing to *current* customers, even if they haven't been re-permissioned is *Legitimate Interest*. There are elements surrounding this that need further clarification and in reality probably needs case law for full clarity. GDPR specifically references direct marketing as a possible scenario for [legitimate interest](#), provided that the conditions described are met.

Do bear in mind that to use there needs to be an existing relationship, balance of interests, expected and appropriate processing and without infringement of individual rights and freedoms. You also need to issue an updated privacy notice to clarify what their details will be used for, where it will be stored and also how to unsubscribe from the various uses their details are being put to.

Given the lack of clarity and room for ambiguity, it would be recommended that you keep an eye out for the latest guidance as things evolve.

Also look into The Privacy and Electronic Communications Regulations (PECR) which sits alongside the Data Protection law and is also being updated in line with GDPR.

Rules for email and SMS come under PECR. It is set to expand to cover additional communications, BUT obligations under GDPR when collecting personal data will apply.

### Legitimate Interest

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.

Such legitimate interest could exist for example where there is a **relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client or in the service of the controller.**

At any rate the existence of a legitimate interest would need careful assessment including whether a **data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place.**

The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing.

...

**The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.**

## Additional GDPR considerations

**Data portability:** Under GDPR, individuals will be able to request access to their data 'in an electronic format', which they can transfer to another data controller (such as when switching service providers).



**Data Protection Officers (DPO):** Public companies, or companies whose main activities involve data processing and monitoring will now need to appoint a DPO rather than notifying local Data Protection Authorities of their activities.

**Privacy by design:** Data compliance and data protection must now be considered from the start when designing new systems. Organisational and technical processes must be considered to ensure personal data is secure and that only data that is 'absolutely necessary for the completion of duties' is held.



**Right to access:** Under GDPR, data controllers (companies that hold personal data) must be able to provide (for free) a copy of an individual's data if requested. Individuals may find out what personal data of theirs is being processed, where and why.

**Right to erasure:** The 'right to be forgotten' allows individuals to request that a data controller deletes their personal data; preventing them and related third parties from accessing or processing their information.

**Data breach notification:** This means customers and data controllers must be notified of data breaches (leaks, hacks, or lost data - such as information on a lost USB stick) within 72 hours.

### Cookie Consent

Since you cannot assume consent, cookie consent will need to be revisited with your website department. Only when visitors agree can you start tracking.



### Purchased lists

Whilst there may be some purchased data lists available post GDPR they are likely to be of extremely poor quality. If it is something you are considering, do it beforehand working on opting-in as much as data as possible before May 2018.

After GDPR comes into play, look at carefully selected partners to run relevant and joint promotions with which meet GDPR requirements.

## Next steps

### Update consent and privacy policies

Ensure that all data you collect moving forward matches the required explicit consent and communicates the right information where you collect data as well in your privacy policies and cookie policies.

Ensure you are tracking the wording when people opted in as well keeping a record of when and where for each individual.

The onus is on you to prove consent if there is any question.

Check any service level agreements with 3<sup>rd</sup> party providers to protect your data.

### Bring current data up to scratch

What data have you got and what do you use it for?

If you cannot prove explicit consent – re-permission your list now.

If permission isn't given by May 25<sup>th</sup> 2018, consider if you can process under a different basis (such as legitimate interest) or delete the data (unless you need to retain for other reasons such as legal processing)

### Look at the other aspects of GDPR including how to protect data during processing and breach procedures.

Please note I am not a legal adviser so if you have any concerns regarding your own situation, you should seek legal counsel. There is constantly new advice and new information coming out about GDPR so do keep an eye out for any updates.

Primary sources of information include:

[The Information Commissioner](#)

[The Data Protection Network](#)

[The Direct Marketing Association](#)



joolz@thevirtualmarketeer.co.uk



01707 258 959



uk.linkedin.com/in/joolzjoseph



@vmarketeer

