

The Information Regulator  
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By email: [infoREGcomments@justice.gov.za](mailto:infoREGcomments@justice.gov.za)

7 November 2017

Dear Ms Mphelo

## **SUBMISSIONS ON DRAFT REGULATIONS RELATING TO PROTECTION OF PERSONAL INFORMATION**

### **INTRODUCTION**

The **Interactive Advertising Bureau South Africa (IAB SA)** is a member-driven organisation that promotes digital growth in the marketing, advertising and communications sector. We are an independent, voluntary, non-profit association focused on growing and sustaining a vibrant and profitable digital industry within South Africa. The IAB SA currently represents more than 150 members including online publishers, brands and educational institutions, as well as creative, media and digital marketing and advertising agencies. The IAB SA represents the South African digital industry to all sectors, including the marketing and advertising community, the media, the South African government and the public. Our aim is to provide our members with a platform where they can engage and interact with each other and address digital issues of common interest, thereby stimulating learning and growth within the South African digital space. Through our Regulatory Affairs Council, we work to ensure that rights and freedoms pertinent to our members' interests are enhanced and protected.

The IAB SA, as a member of the Press Council of South Africa (**PCSA**), plays an active and critical role in advancing industry best practice and championing the highest possible standards of fairness, transparency, accuracy and honesty in the field of digital communications. The PCSA has a well-established, highly-regarded codes of ethics and plays an important role in upholding a robust self- regime that protects South Africa's democratic values, and in particular balancing our Constitutional freedom of expression with other constitutional rights (including the rights to equality and freedom from discrimination, and the right to privacy). .

The IAB SA endorses the joint submission of the Press Council, Media Monitoring Africa, SANEF and amaBhungane

We appreciate further, the opportunity to provide you, as we hereby do, our submissions on the draft regulations relating to protection of personal information in terms of the Protection of Personal Information Act 4 of 2013 (**the POPIA regulations**) which were recently released for public comment.

We would be very pleased to provide any further information that you may require to support the finalisation of the POPIA regulations and welcome engagement with the Information Regulator to this end.

## **DIRECT MARKETING, CONSUMER PROTECTION AND DIGITAL ECONOMY**

Direct marketing has a bad reputation due to its association with 'spam'. However, direct marketing, when done responsibly, plays an important role in commerce and often it is in consumers' interest to receive direct marketing content. Increasingly, due to the evolution in digital marketing and advanced analytics, direct marketing is used as a means to ensure that consumers are able to access information on goods and services that are suited to their particular needs. The ability to make informed choices is central to consumer protection and access to such information can be beneficial to consumers. Moreover, direct marketing is a legitimate and essential means of communications with consumers and would-be consumers in a digitally led economy.

### **Submission 1**

The approach to regulating direct marketing must acknowledge that direct marketing plays a pivotal role consumer protection and in the economy.

## **REGULATING CONSENT FOR DIRECT MARKETING**

Section 69 of the POPIA requires that a business obtains consent if it wants to conduct direct marketing electronically and that the business can contact the consumer once to obtain consent.

The definition of consent is critical. It is defined as 'any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information'.

Consent must be an expression of will. Consumers must know what they are consenting to.

The Information Regulator in amplifying the nature of consent must take cognisance of international approaches. It is of pivotal importance that the South African approach to consent for electronic direct marketing does not prejudice South African businesses in the global marketplace.

The preamble to the POPIA acknowledges that the POPIA and its regulations must be ‘in harmony with international standards’. This is repeated in section 2 of the Act which states that harmonisation with international standards is one of the purposes of the Act.<sup>1</sup> In our opinion, this means that the Information Regulator ought to undertake a comparative study when making regulations.

We have undertaken a limited comparative study into the consent required for direct marketing in other parts of the world. While it is commonplace for direct marketing to be regulated and for some form of consent to be required, regulators do not generally require that consent must be provided in particular form.

<b>A. The United Kingdom<sup>2</sup></b>	
Legislation name	Privacy and Electronic Communications (EC Directive) Regulations, 2003 (PECR) and the Data Protection Act, 1998 (DPA). <sup>3</sup>
Type of consent required to send direct marketing	<p>Businesses will generally need an individual’s consent before they can send marketing emails. To be valid, consent must be knowingly and freely given, clear and specific.</p> <p>The clearest way of obtaining consent is to invite the customer to tick an opt-in box confirming that they wish to receive marketing messages via specific channels. Consent can also be obtained when the individual clearly and knowingly indicate[s] their agreement by clicking an icon, sending an email, subscribing to a service, or providing oral confirmation.</p> <p>An opt-out box may be used is if the person must take a positive action to submit a form (e.g. click a button), and the business provides a clear and prominent message along the following lines, the fact that a</p>

<sup>1</sup> Section 2(b).

<sup>2</sup> This summary contains excerpts from the Direct Marketing Guidance Version 2.2 dated 19 May 2016 published by the Information Commissioner’s Office and accessed at <https://ico.org.uk/media/for-organisations/documents/1555/direct-marketing-guidance.pdf> on 29 October 2017. However, this guidance may change if the UK adopts the GDPR.

<sup>3</sup> Section 22(2).

	<p>suitably prominent opt-out box has not been ticked might help to establish that by clicking the button was a positive indication of consent:</p> <p><i>'By submitting this registration form, you indicate your consent to receiving email marketing messages from us. If you do not want to receive such messages, tick here: <input type="checkbox"/></i></p>
<p><b>B. European Union</b></p>	
<p>Legislation name</p>	<p>The General Data Protection Regulation 2016/679 (GDPR)<sup>4</sup> entered into force on 24 May 2016 and will apply from 25 May 2018. It repeals the Data Protection Directive 95/46/EC.</p>
<p>Type of consent required to send marketing messages</p>	<p>The GDPR does not specifically require consent for direct marketing when such marketing is a legitimate interest of the business.<sup>5</sup> If direct marketing can reasonably be expected by a data subject in a particular case, consent is not required. However, there is clearly some uncertainty regarding the interpretation of the GDPR in the context of direct marketing.</p> <p>Let's assume that consent is required. Consent in terms of GDPR means 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.<sup>6</sup></p>

<sup>4</sup> The GDPR will apply from 25 May 2018. Until then businesses should act in compliance with the EU Data Protection Directive 95/46/EC and the European Directive 2002/58/EC also known as the e-privacy Directive. The UK's PECR and DPA was derived from the EU Directives and the summary provided for the UK earlier in this document is applicable. Keep in mind that the UK legislation will not be exactly similar to the EU Directives, but rather how they were interpreted and legislated in the UK. A copy of the GDPR can be found at [http://ec.europa.eu/justice/data-protection/reform/index\\_en.htm](http://ec.europa.eu/justice/data-protection/reform/index_en.htm) .

<sup>5</sup> Article 6.

<sup>6</sup> Article 4 definition of 'consent'

	<p>Businesses will not be able to rely on silence or opt-outs and instead an active process such as box-ticking will have to be put in place – according to the GDPR ‘[s]ilence, pre-ticked boxes or inactivity should not therefore constitute consent... If the data subject’s consent is to be given following a request by electronic means, the request must be clear, concise and not unnecessarily disruptive [t]o the use of the service for which it is provided.’<sup>7</sup> A request for consent must be presented in an intelligible and easily accessible form, using clear and plain language.<sup>8</sup></p> <p>Businesses must also be able to demonstrate that consent has actually been given by individuals to the processing of their personal data.<sup>9</sup></p>
<b>C. United States</b>	
Legislation name	CAN-SPAM Act, 2003
Type of consent required to send commercial (marketing) messages	Consent is not required. <sup>10</sup>
<b>D. Australia</b>	
Legislation name	Spam Act, 2003
Type of consent required to send marketing messages	<p>Businesses must have consent to send marketing messages to its customers in Australia. The Spam Act provides for 2 types of consent, express consent and inferred or implied consent.</p> <p>Express consent means a deliberate and intentional opt-in to receiving electronic messages for example ticking a box next to</p>

<sup>7</sup> Paragraph 32 of the introduction / explanation section of the GDPR.

<sup>8</sup> Article 7(2).

<sup>9</sup> Article 7(1).

<sup>10</sup> FTC Fact for Business. The CAN-SPAM Act: A Compliance Guide for Business dated September 2009 and accessed at <https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business> on 29 October 2017.

	<p>a statement seeking permission to send marketing messages. Pre-ticked boxes are not an acceptable way of gaining consent.</p> <p>Inferred consent relies on the existing business or other relationship where there is a reasonable expectation of receiving marketing messages.</p>
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**Submission 2**

Regulation 6 and Form 4 in their current format is not in harmony with international standards. The POPIA requires that the Information Regulator must undertake a comparative study when making regulations. This study should be made public and where the Information Regulator wishes to depart from them, this should be justified.

**DIRECT MARKETING AND OTHER CONSUMER PROTECTION LEGISLATION**

The POPIA is not the only legislation that addresses direct marketing. The Consumer Protection Act 68 of 2008 (the CPA) also regulates, and will continue to regulate, direct marketing. In enacting the CPA, the legislature demonstrated an understanding that a sustainable and profitable digital industry also advances consumer protection. In its preamble it states that:

*‘The people of South Africa recognise...that recent and emerging technological changes, trading methods, patterns and agreements have brought, and will continue to bring, new benefits, opportunities and challenges to the market for consumer goods and services within South Africa; and [t]hat it is desirable to promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation and enhanced performance[.]’*

The legislature also recognised that consumer protection should ‘promote and protect the economic interests of consumers’, and ‘improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their *individual wishes and needs*’.

The CPA recognises the right to privacy and specifically, the ‘right to restrict *unwanted* direct marketing’.<sup>11</sup> It does so by providing that consumers must always be able to unsubscribe from direct marketing. Put differently, the CPA provides that direct marketing is permissible

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<sup>11</sup> Section 11.

unless the consumer has opted out. The approach proposed by the Information Regulator represents a pronounced departure from this approach. However, it is worth noting that the POPIA did not repeal these sections of the CPA.

It is unclear how the two pieces of legislation will operate simultaneously, but this is not the focus of this submission. In terms of section 2(9) of the CPA and section 3(2)(a) of the POPIA both Acts must apply unless they are mutually inconsistent, in which case the Act that provides the most protection to the consumer will apply. It could be argued that in respect of electronic communication, the POPIA is stricter and should apply.<sup>12</sup> Electronic communication includes automatic calling machines, facsimile machines, SMSs or e-mail.<sup>13</sup> The definition of 'electronic communication' is 'any text, voice, sound or image message sent over an electronic communications network which is *stored* in the network or in the recipient's terminal equipment until it is collected by the recipient'.<sup>14</sup> This excludes telemarketing unless the marketer leaves a message.<sup>15</sup> This means that only the CPA will apply to telemarketing and post and that both the CPA and the POPIA will apply to electronic communication. It is arguable that the POPIA provides more protection than the CPA, but in any event, the lack of certainty in this regard will make it difficult for marketers to comply.

The National Credit Act 34 of 2005 similarly provides that consumers must be given the opportunity to 'be excluded from any (i) telemarketing campaign that may be conducted by or on behalf of the credit provider...(iii) any mass distribution of email or SMS messages.' This section also has not been repealed.

### **Submission 3**

The Information Regulator, the National Consumer Commission and the National Credit Regulator should come to an agreement regarding which regulator has jurisdiction over which type of direct marketing.

Specifically, the agreement should address what the requirements are in respect of telemarketing and which regulator will have jurisdiction. A lack of clarity in this regard will make it difficult for consumers to enforce their rights.

## **CONSUMERS REMAIN PROTECTED BY THE REST OF THE POPIA**

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<sup>12</sup> The POPIA provision on direct marketing only applies to electronic direct marketing (section 69(1)).

<sup>13</sup> Section 69(1).

<sup>14</sup> Section 1.

<sup>15</sup> We have encountered arguments that section 69 of the POPIA also applies to other forms of direct marketing. The arguments hinge on the fact that the definition of 'direct marketing' in the POPIA refers to other means of communication. Our counter-argument is that the rest of the POPIA applies to any form of direct marketing, but that section 69 expressly does not. From the briefing sessions we have attended, it appears that the Information Regulator shares our view that section 69 is limited to 'electronic marketing'. What has been left somewhat unclear is when telemarketers will be required to comply.

Strict rules regarding consent to direct marketing is not the only way to protect consumers' privacy. There are many other principles in the POPIA which will also protect consumers from overly intrusive direct marketing:

- The POPIA will severely restrict the ability of businesses to buy and sell personal information (i.e. the selling of leads).
- Businesses will be required to notify consumers of all processing activities including marketing and profiling activities.
- Consumers will be entitled to object to the processing and to unsubscribe.
- Consumers are entitled to know where the information has come from.

#### **Submission 4**

Given the personal data protection offered to consumers in remaining provisions of POPIA, the regulation of direct market must not be over-bearing. Direct marketing can be regulated through the other principles of the POPIA while avoiding over-regulating otherwise compliant direct marketers.

#### **DRAFT REGULATION 6**

We wholeheartedly support the limitation of regulation 6 to 'unsolicited' direct marketing, but we recommend that its implications are made explicit in the regulation to avoid legal uncertainty.

We do have reservations about whether the use of the term 'unsolicited' is uniformly understood. We would recommend the introduction of either a definition or a test for when communication is unsolicited. The dictionary definition of the term is unasked for or unrequested.<sup>16</sup> We are of the view that the term means that Form 4 does not have to be completed if:

- The consumer signed up for or subscribed to direct marketing or communications which may be construed as or contain direct marketing (e.g. newsletters), or
- the direct marketing is sent to a customer who signed up for it during the course of a transaction for goods or services in cases where the consumer approached the supplier of those goods and services.<sup>17</sup>

From the briefing sessions we attended, it would appear that this interpretation is consistent with the Information Regulator's interpretation of the provision. Our submission is simply that this interpretation should be set out explicitly in the regulations.

#### **Submission 5**

<sup>16</sup> Oxford Dictionaries (<https://en.oxforddictionaries.com/definition/unsolicited>).

<sup>17</sup> Where the goods or services are bought as a result of direct marketing, Form 4 may have been completed before the initial approach.



Regulation 6 should contain a test for when direct marketing will be considered unsolicited.

#### FORM 4

We have a number of concerns in relation to Form 4. Cumulatively, these concerns will put South African businesses at an enormous disadvantage as it is highly likely that most consumers will not consent to direct marketing, even when they might otherwise have done so. In other words, the form will result in many unintentional opt outs. Our chief concern is that the form also breaches the POPIA in that it collects personal information which is not justified by the purpose.

#### Submission 6:

We submit that Form 4 should be revised for the following reasons:

- It is not technology neutral. It would appear as if the form was written with a manual process in mind, whereas the lion's share of direct marketing is done via digital channels (and section 69 is specifically referring to 'electronic communications').
  - It will lead to over-collection of personal information. For instance, this form is intended to be used for consent to electronic direct marketing, yet it asks for the address of the data subject. The principle of minimality in the POPIA dictates that a responsible party may only collect personal information which is relevant for the purpose for which it is collected.<sup>18</sup>
  - The form is not in plain language. For the most part, it is a restatement of the legislation. This means that the majority of South Africans will not be able to understand it, which means that it does not meet the requirements in the definition of consent in section 1 of the POPIA as the consent will not be 'informed'.
  - The form is too long. The definitions of 'processing' and 'personal information' is not relevant for the purpose which it is intended to fulfil.
  - The form requires a signature without there being a legal requirement for writing or a signature in the POPIA. In fact, a signature is biometric information and as such is very sensitive. It should never be collected in instances when it is not required.
  - The signature requirement will also make digital consents very difficult to obtain as an advanced electronic signature will be required to comply with the regulation.<sup>19</sup> This is a very onerous requirement.
- The current form will make it very impractical to get direct marketing consent by means of SMS.
  - While we agree that the data subject must be informed which communication channels will be used to direct market to them, we do not support the requirement that the consumer must always be able to select which communication method they

<sup>18</sup> Section 11.

<sup>19</sup> In terms of South African law, an advanced electronic signature is required when legislation requires a 'signature'.

prefer. It is a very onerous obligation to comply with as it introduces a lot of complexity in how consents are stored and maintained. In any event, the list of the methods of communication is incomplete as it does not cater for communication via social media platforms, in application push notifications or other digital communication methods.

- It is unclear when a supplier will have to ask for a new consent due to the fact that the direct marketing campaign relates to different goods or services. This relates to the requirement that the consent must be specific. We would argue that the consent is specific as long as the data subject understands the range of products or services offered by a particular direct marketer and that the data subject does not have to consent separately in respect of each class of goods.

Below are examples of consent to direct marketing which address the concerns raised above:

#### SMS CONSENT

Don't miss out on fantastic deals and product offerings. Get weekly updates. Reply YES to opt in.

#### CONSENT FORM SENT VIA EMAIL

Sign up for our weekly newsletter and promotional information

**SIGN UP**

(Redirects to online consent form)

ONLINE CONSENT

Would you like to receive our weekly newsletter and promotional information?

<input type="checkbox"/>	YES!
<input type="checkbox"/>	NO THANKS

NAME OR USERNAME

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EMAIL ADDRESS

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CELL PHONE NUMBER

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POSTAL ADDRESS

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CITY

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Only collect information for the channels you will actually use, and decide whether you want to allow customers to opt in per channel, or whether it's an all or nothing consent.

Only ask for information you actually need. E.g. if your products or services are geographically bound, you may want to include a 'city' field. Rule of thumb: If you don't actually need the information in order to deliver your product or service, don't ask!

We recommend the inclusion of guidelines to measure whether a particular consent is substantially similar to Form 4.<sup>20</sup> This will ensure that the Regulation allows for degrees of flexibility to ensure that South African direct marketers can continue to compete with their counterparts in other parts of the world, while actively protecting the rights of data subjects.

We suggest:

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<sup>20</sup> These principles are borrowed from the Information Commissioner's Office Draft GDPR consent guidance (<https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/gdpr-consent-guidance/>).

- The subscription mechanism<sup>21</sup> or request for consent must be in plain language. The definition of plain language in the CPA and the NCA is established and should be adopted.
- The subscription mechanism or request for consent must be an active opt in. Only unticked opt-in boxes or similar opt-in methods must be used.
- The consent to direct marketing must not be bundled with other terms and conditions and the subscription must not be a precondition of signing up to a service or purchasing a product. In other words, the consumer must be able to say no.
- It must be informative. It must describe the type of communication the consumer can expect to receive (e.g. a newsletter or promotional mail), the communication channel (which should be technology neutral rather than limited to the currently available methods) which will be used and the frequency of communication.
- The direct marketing consent must make it clear who the organisation is and any third parties who will be sending direct marketing based on the subscription or consent.
- Only the personal information needed to send the direct marketing must be requested. For instance, if the direct marketing will always be sent via e-mail the responsible party should not ask for a telephone number too. If multiple channels will be used, the responsible party must decide whether it is able to allow for a consent per channel (i.e. the consumer wants to receive e-mail, but not SMSs) or whether it is an 'all or nothing' consent.
- If other information is requested for other purposes (e.g. for profiling the customer), those purposes must either be disclosed in the form itself, or the customer must be directed to a privacy notice.<sup>22</sup>
- The consumer must be informed of the right to unsubscribe and how to exercise it. It must be as easy to unsubscribe as it is to subscribe. A simple and effective consent withdrawal method must be in place.
- Whether the technology used by the responsible party is digital or manual, the responsible party must be able to keep records to demonstrate what the individual consented to, what they were told and when and how they consented.

## IN CONCLUSION

Thank you for the opportunity to make these submissions. Should you wish to discuss this further please contact us. We would also welcome any opportunity to make oral submissions if you intend to hold hearings on the Regulations.

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<sup>21</sup> When a consumer signs up to receive a newsletter, they do not expressly have to 'consent to receive it'. The action of subscribing is consent.

<sup>22</sup> We prefer 'privacy notice' or 'privacy statement' over the traditional 'privacy policy'. In any event it is the document in which the notification requirements in terms of s 18 of the POPIA are satisfied.



Yours faithfully

**ELIZABETH DE STADLER**  
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