#### Data Compliance Briefing number 3/2024 *October 2024*

## Using data to engage with non-members - what are the rules?

An increasingly dispersed workforce means that there are challenges to the traditional union organising model of in-person engagement. Since COVID many workers now work remotely. This makes the informal conversations with new starters or non-members, which have been the bedrock of traditional recruitment, less likely to take place.

Electronic communication has become even more important. The ability to email members is essential to the way that we engage with members and non-members as a union. We need to ensure that the non-members personal data we use to communicate with them electronically is compliant with data protection laws.

**The Law**

The regulations that cover the use of personal data when contacting individuals electronically are:

* UK General Data Protection Regulations (UK GDPR)
* The Privacy and Electronic Communications Regulations (PECR)

PECR covers the use of electronic communications for direct marketing purposes.

**This briefing provides an overview of the rules for engaging non-members by email.** It is important that Prospect upholds these rules, but they do not mean we cannot engage with non-members electronically – we just need to do so carefully.

The guide is designed to help us do our job effectively, in line with the law and to continue to build the union in these different times. If in doubt, please check with the Data Protection Compliance Officer, Tracey Hunt (datacompliance@prospect.org.uk) before you send anything out.

### Key points

These are the key points you need to know:

* This briefing applies to **contacting non-members.**
* You can use work-based emails (not personal emails) to contact non-members.
* Individuals have the right to opt out of receiving emails at any point.
* If individuals opt out of receiving emails you should keep a list, so they are not contacted again.
* **These emails need to include specific information about why they are included** – see details below.
* These emails can include information about work related issues and benefits of membership.
* We can ask members to forward on emails to work-based addresses for colleagues and non-members, subject to details later in this briefing.
* If a non-member signs up for an event, such as on Eventbrite, we are creating a mailing list and so we become the data controller. This will require specific information to be included on the sign-up page.
* You can contact new joiners via information provided by HR or the employer for the purposes of industrial relations.
* Restrictions do not apply to posting information on digital noticeboards or adverts on intranets and similar online employer provision.
* If you keep a list of non-members details this will be subject to UK GDPR requirements as you will be holding personal data.
* You should also refer to your collective agreement to check on what type of communication is allowed using workplace systems.

### Work-based email addresses

* Work email addresses can be used to contact non-members because they are not subject to the same requirements as personal email addresses under PECR.
* Work email addresses must include the name of the company and has either org – co – com or gov at the end (they are treated as corporate addresses).
* If an individual’s name is included in the address, then it is still subject to the UK GDPR as this would be defined as personal data. (ie joe.smith@prospect.org.uk).
* However, there is specific information that has to be provided to an individual as set out below.

If the employer provides reps with information on new staff members and have informed staff that their data will be shared with the recognised trade union eg in the privacy notice. Then you can contact non-members directly in the workplace.

**Direct Marketing**

The definition of direct marketing is “the communication (by whatever means) of advertising or marketing material which is directed to particular individuals”

This covers all types of advertising, marketing or promotional material. It includes:

* Commercial marketing (eg promotion of products and services); and
* The promotion of the aims and ideals of an organisation (eg fundraising or campaigning).

For a trade union this would include promoting the benefits of being a trade union member, events that we organise, and non-union services we offer.

### What information do you need to include when contacting non-members?

When sending emails to non-members in the workplace, it should always include the following:

* Clearly identify the sender – Your details and Prospect’s contact details.
* Clear information about how their data will be used eg to send further emails, to provide further information about the work of the union.
* A link to the Prospect privacy notice.
* Clear information about how to opt out of further communications.

We have included examples of how you may present this information later in the briefing.

If you want to collect their personal email addresses in order to contact them future, you can ask them to provide this information and ask them to consent for this address to be used for further communications.

### Sole Traders/Freelances/Partnerships

Sole traders are treated as individuals under PECR so the rules on direct marketing would apply to their email addresses. Even if they are using a company name in their email address, as set out above, but you know they are a sole trader then you would still have to treat them as an individual under the regulations, and you would need their consent to contact them for direct marketing purposes.

### Using Eventbrite sign-up forms

If you are asking non-members to sign-up for an event then this is, in effect, building a data list. Information needs to be provided at the point of sign-up asking for consent to contact them again and specifying the reasons.

This is the standard wording we have been using on Eventbrite sign-up pages:

Please note that when you sign up to this event Prospect will use the email you sign up with to contact you further about the event. We will use the email you register here for the purposes of this event.[View our privacy notice](https://d28j9ucj9uj44t.cloudfront.net/uploads/2020/10/webinar-privacy-notice.pdf)

Please be aware that that Eventbrite and Zoom will be processing data on our behalf when you use their services.

*This is the link for our webinar privacy notice:* [*https://library.prospect.org.uk/download/2021/00186*](https://library.prospect.org.uk/download/2021/00186)

If this is your first time using a sign-up form or you are not familiar with the wording, please contact the DPCO on datacompliance@prospect.org.uk before you send anything out.

### Individual members/reps contacting others about joining

Any member or rep can choose to email non-member colleagues about Prospect should they wish to do so. They should include:

* Who they are.
* Why they are emailing.
* Give the recipient to opportunity to say they would like not to be contacted about this in future.

If you use an email footer which includes an invitation to join the union (for example in Union Week), you may wish to include the required information. An example of the text required is provided later in this briefing.

### Asking members to forward on or send emails to non-members

Viral marketing is when an organisation asks another individual to forward marketing messages to their friends, colleagues etc. An organisation would still be responsible for the message, and it would still need to comply with PECR.

We can ask members to forward emails to non-members on a work-based email address, subject to clear information about why and how they have been contacted.

Again, any email should include the required information.

We cannot ask members to forward emails to personal addresses for non-members unless we have clear consent from the recipient to do so.

We cannot ask members to provide contact details of friends or colleagues unless we are sure that we have their explicit consent to contact them. The PECR marketing rules apply in this situation, and we would need a record of their consent to have their details passed on.

### The right to opt-out

UK GDPR gives individuals the right to object at any time to processing of their personal data for the purposes of direct marketing.

It must be as easy to withdraw consent as it is to give it.

If someone asks not to be contacted again, we must ensure that we comply with their wishes. Even if there is no written objection, as soon as an individual says they don’t want to receive texts or emails, and the instruction should be recorded to prevent further communications.

### Record Keeping

There is a requirement under PECR to keep records of consent to receive marketing.

Details that should be kept are: name, date opted in, what type of communication consented to, date opted out.

**Example of the information that should be included in an email to non-members on a work email address – this is an example footer for an email but the text could also be included in the body of the email.**

[Name of Rep]

[Branch Details]

[Email address]

Address: Prospect, 100 Rochester Row, London W1P 1JP, Tel: 0300 600 1878 or 0207 902 6600

This email has been sent to you by your local Prospect Representative. We use this email to keep you informed about the work of Prospect in [name of organisation], and the benefits of union membership.

For further information about how Prospect handles personal data please see our privacy notice <https://www.prospect.org.uk/privacy>

**Unsubscribe**

If you wish to unsubscribe please reply to this email, putting unsubscribe in the subject line and clicking the tick box below.

Please unsubscribe me from the mailing list 🞎

If you would prefer us to contact you via a personal email address, please contact me indicating your consent and details of your personal email. You can withdraw your consent at any time.

## Appendix: Briefing on the Privacy and Electronic Communications (PECR) Regulations

This briefing provides further details on the operation of the PECR marketing rules and how they relate to GDPR and non-members.

### Introduction

The Privacy and Electronic Communications Regulations became law in 2003 and works side-by-side with the UK General Data Protection Regulations (UK GDPR) and the Data Protection Act (DPA) 2018. This regulation sets out more specific privacy rules on the following areas:

* Direct marketing calls, emails, texts and faxes;
* Cookies and similar technologies that track information about people accessing a website or other electronic services;
* Keeping communications services secure; and
* Customer privacy as regards traffic and location data, itemised billing, line identification, and directory listings.

The aim of this briefing is to highlight the direct marketing aspect of the regulations and how they will affect the work of the union.

It is important to remember that when contacting members and non-members we must comply both with PECR and UK GDPR/DPA.

The ICO has responsibility for enforcing this regulation, and breaches can lead to criminal prosecution, non-criminal enforcement, audits, and fines up to £500,000.

### Overview

* PECR applies if we are sending unsolicited direct marketing by electronic means. This includes telephone calls, emails, texts, picture messages, video messages, voicemails, direct messages via social media or any type of electronic message.
* A key element of direct marketing is that it must be directed to an individual, therefore blanket marketing will not be subject to PECR, for example leaflets, magazine inserts, adverts on a website.
* The basis for direct marketing under PECR is consent. Organisations must not send marketing texts or emails to individuals without their specific consent. There is a limited exception for previous customers, known as the soft opt-in.
* Direct marketing also includes promoting an organisation’s aims and ideals. This means that PECR will apply to the promotional, campaigning activities of not-for-profit organisations, which includes trade unions, charities and political parties.
* Marketing leads – Neither the DPA nor PECR ban the use of marketing lists, but organisations must ensure lists are compiled fairly and reflects an individual’s wishes. Suppression lists should be used to ensure compliance.

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| **METHODS THAT CAN BE USED TO CONTACT MEMBERS AND NON-MEMBERS FOR DIRECT MARKETING PURPOSES** |
| Communication Method | Member | Non-member |
| Post | Not covered by PECR need to comply with UK GDPR | Not covered by PECR need to comply with UK GDPR |
| Email | Can use details if they have consented to receive marketing | Can use details if they have consented to receive marketing. Use workplace email address |
| Text, and other messages to mobile phones, voicemail | Can use details if they have consented to marketing | Can use details if they have consented to receive marketing |
| Phone call | Can use details, unless member has indicated they do not want to receive calls or have registered with TPS. | Can use details unless we have grounds to believe they don’t want to be contacted. Cannot use phone number if registered with TPS. |

### What is Direct Marketing?

Direct marketing is defined in section 122(5) of the Data Protection Act 2018 as:

‘The Communication (by whatever means) of advertising or marketing material which is directed to particular individuals’.

This covers not only the advertising or marketing of goods and services, but also the promotion of the aims and ideals of an organisation, eg fundraising and campaigning.

PECR rules apply to unsolicited marketing messages.

* An unsolicited message is any message that has not been specifically requested.
* Even if a member has opted-in to receiving marketing from us, it still counts as unsolicited.
* Solicited means an individual has specifically requested particular information.

### Not for Profit Organisations

As a trade union we offer a service to our members as part of their subscription, including commercial benefits.

Any message sent by the union, which contains any promotional material will be covered by these regulations including information about what we do, the benefits of union membership and it will also cover Prospect’s campaigning activities and the promotion of our aims and ideals.

Examples

Prospect Plus emails to members setting out the benefits of the Prospect Plus website is direct marketing.

A union communication contacting individual members in order to encourage them to write to their MP on an issue or attend a public meeting is also direct marketing.

### Legal Basis

Under UK GDPR all organisations must have a legal basis to process personal data. Central to the PECR rules on direct marketing is that it requires individuals to consent to receive any marketing communication. This applies to both non-members, and members.

However, other types of communications are based on a different legal basis.

* Contractual – information about the work of branches on pay, disputes etc.
* Legal – industrial action ballots, elections and suppression lists.
* Legitimate Interest – contacting non-members in workplaces with information about work related issues, training courses.

### Consent

UK GDPR defines consents as: “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”.

The requirements for valid consent are that it must be:

### Freely Given

Individuals must:

* Have a genuine choice and control over whether to consent or not to consent to their personal data being used by us for direct marketing purposes;
* be able to refuse consent to direct marketing without detriment; and
* be able to withdraw consent at any time.

### Specific and Informed

The request for consent must include:

* Name of the organisation who wants to rely on the consent.
* The purpose of the processing – need to be specific about why you want to use data for direct marketing. There must be a clear statement of what an individual is consenting to.
* The types of processing activity. Where possible you should get consent for each separate type of processing ie, emails, texts etc.
* Right to withdraw consent at any time and how to do so.

### Unambiguous indication

Consent must be a clear, affirmative act, where there is a deliberate and specific action to agree to direct marketing communications.

* There must be an indication signifying agreement – consent must be a positive action, eg ticking a box, submitting a form, or responding to an email.
* UK GDPR bans pre-ticked opt in boxes. Equally, opt-out boxes are not seen as compliant with the rules of consent, as failure to tick the box does not imply consent.
* Cannot rely on silence, inactivity or default settings.
* Failing to opt-out of direct marketing is not valid consent.
* Consent cannot be bundled up as a condition of service, unless it is necessary.

The ICO Code of Practice on Direct Marketing, however, contains stricter rules on consent for electronic marketing calls or messages:

* An individual must give consent to the organisation sending the marketing.
* An individual must give consent to messages specifically from the sender of the message.
* The context of the communications must indicate consent is ongoing, ie consent may be only for a one-off message.
* An individual must give consent to the type of communication being used, ie consent to emails cannot be used to send text messages.

### Indirect Consent

This covers consent given to one organisation to receive marketing from another organisation, and mainly applies to brought-in mailing lists or contact lists supplied by third parties.

PECR specifically requires that individuals have notified the sender organisation that they consent to messages being sent from them. Therefore, unless the consent to receive the marketing is very clear and precise, organisations cannot use lists provided by third parties, unless the individuals would have anticipated that their details would be passed to the organisation and that they consented to messages from them.

This could apply to internal company lists used by reps to contact non-members.

However, as the information contained on internal email lists are publicly available these can be used to contact individuals. If you collect the data to create a mailing list then the rep will become the data controller, and therefore subject to the regulations.

### Workplace Communications

* Union recognition agreements – sets out what access reps have to internal computer/email systems to contact staff.
* Employer has informed staff eg by a privacy notice that their data will be shared and used by the recognised trade union.
* The language of messages should be considered carefully when making contact ie keep it about workplace issues.
* If you collect data to create a mailing list, then this will be subject to UK GDPR and the union will then become the data controller.
* To comply with the regulations when making first contact with non-members reps will need to disclose source of data, provide a link to our privacy notice, and provide them the ability to opt-out from further communications.

### Special Category Data

Targeting emails to members or non-members based on ethnicity, sexuality, disability would be subject to the special category requirements of UK GDPR. Therefore, the legal basis to contact members would be legitimate trade union activities. To contact non-members explicit consent would be required to send direct marketing communications to them, if you are contacting them on a personal email address.

### Service Messages

Communications sent to members for administrative or customer service purposes are not subject to direct marketing rules. However, if the message contains text that actively promotes or encourages an individual to do something ie to use a particular service or highlights the benefits of the union then that communication is considered to be direct marketing. This will depend on the phrasing, tone and context of the message.

Example: If we contact a member by email to remind them their subscription is liable for lapsing but include information about the benefits of union membership and offers a discount to renew, then this will be direct marketing.

### The right to opt-out

UK GDPR gives individuals the right to object at any time to processing of their personal data for the purposes of direct marketing.

It must be as easy to withdraw consent as it is to give it.

Even if there is no written objection, as soon as an individual says they don’t want to receive texts or emails, this will override any existing consent or soft-opt in under PECR and they must cease, and the instruction should be recorded to prevent further communications.

### Record Keeping

There is a requirement under PECR to keep records of consent to receive marketing:

Details that should be kept are: Name, date opted in, what type of communication consented to, date opted out.

Suppression List

It is important to keep details of non-members who have opted out or not responded to emails requests so they can be removed from any further communications. This type of list would be covered by the UK GDPR principle to keep accurate records. This is also permissible under PECR, as a suppression list has a legal purpose, ie it is required under PECR to ensure individuals are not contacted, and therefore this is deemed not to be for direct marketing purposes.

### Electronic Communications (email, text)

**Members**

We have procedures and systems in place to ensure members can manage their own data and record their consent to what communication they want to receive.

When emailing it is important to ensure that the correct information is used so members are not contacted when they have opted-out.

All communications should contain the following:

* Clearly identify the sender – Prospect’s contact details.
* A link to the Prospect privacy notice.
* Clear information about how to opt out of further communications.

**Note**

No response to an email is not consent, and individuals who do not respond should be removed from any mailing list and added to a suppression list.

### Soft opt in

Although marketing texts or emails can only be sent with specific consent, there is an exception called ‘soft opt-in’. This means you can send marketing texts or emails if:

* The contact details of the individual were obtained during a sale (or negotiation for a sale) of a product or service to that person.
* Organisations are only marketing their own similar products or services; and
* Individuals are given the opportunity to opt out of the marketing when first collecting their details and in every message after that.
* A record is kept of individuals who have consented.
* A record is kept of individuals who have not responded or have opted out.

This only applies to commercial marketing for products or services. Therefore, as we offer a service through membership of the union, we should be able to use this exemption. This exception cannot be used for communications promoting campaigns, aims and ideals of Prospect.

Organisations cannot rely on the soft-opt in if the contact details are obtained from a third party. The contact details must have been collected directly from the individual.

To trigger the soft opt-in, all an individual need to have done is contact us to express an interest in taking up membership ie by asking for more details of what is offered. There must be some sort of express communication about the services on offer.

Example

Non-member contacts us about vocational training courses. We can keep their details to contact them to offer them similar products, even if they did not opt out of marketing messages. However, cannot use these details to contact them about joining the union, as this would be breach of PECR and UK GDPR, as the offer must be similar to the initial enquiry.

### Viral Marketing

Viral marketing is when an organisation asks another individual to forward marketing messages to their friends, colleagues etc. An organisation would still be responsible for the message, and it would still need to comply with PECR.

Another form of viral marketing is to ask other individuals to provide the contact details of friends or colleagues. PECR rules will apply, and you would have to be sure that you had their consent to contact them.

If individuals are encouraged to send marketing message on the behalf of others, then it must still comply with PECR, ie they must have consent of the individual to do so.

Therefore, a rep should be able to forward an email to a colleague as long as:

* The initial email contains no marketing information about joining Prospect or the benefits of joining, unless using a workplace address.
* The email is only to provide information about workplace issues; care should be taken with the wording any email.
* It requests permission to contact the individual again with information about Prospect.
* A link to Prospect’s privacy notice.
* An option to opt out of any future mailings.

**Note**

Under Trade Union and Labour Relations (Consolidation) Act 1992 unions have the right to negotiate on the following areas. Therefore, these are issues that can be legitimately communicated to members and to non-members.

* Terms and conditions
* Physical conditions
* Engagement, non-engagement, termination, suspension of employment, duties of employment, allocation of workplace duties
* Discipline
* Employees membership or non-membership of a trade union
* Facilities for a trade union
* Machinery for negotiation
* Recognition

### Research/Surveys

Direct marketing rules do not apply if an organization undertakes market research although you still need to comply with the UK GDPR.

However, the direct marketing rules will apply if any message contains any promotional material, or the process collects data to be used in future marketing exercises.

### Telephone Calls

PECR also covers phone calls that are unsolicited.

You cannot make phone calls to:

* Anyone who has told us they don’t want to be called.
* To any personal number registered with Telephone Preference Service (TPS) or Corporate Telephone Preference Service (CTPS), unless the person has specifically consented to receiving a call.

Therefore, calls to members whether defined as marketing or not will not be prevented by the number being registered with TPS, as they would have consented to calls by providing us with their phone number, and indicated their preferences, if they have provided a work or private number.

Example: Calling a member regarding their subscription coming to an end to get them to rejoin and at the same time promoting the benefits of membership. This would be a marketing call so subject to PECR.

If making an unsolicited call to a non-member you need to check telephone number against TPS list to see if they are registered. If they are then you would need specific consent to call them. This would only apply to marketing calls, and not to any other type of call.

You can make calls to a number that is not listed on TPS, but this must comply with GDPR:

* If the individual has not objected to calls in the past,
* We have an existing relationship with the person we are calling, and they might reasonably expect such a call from us, and
* we have given them the chance to opt out when collecting their details.

**Note** If calling a number back this is a solicited call and not subject to PECR.

### Online Marketing

Targeting online adverts to individuals would be covered by PECR, but non-targeted marketing would not. PECR does not have specific rules on direct marketing online, but it does contain specific rules on cookies.

### Marketing by Mail

PECR does not cover marketing by mail, but mailings must comply with the UK GDPR.

UK GDPR gives the individual the right to object at any time to the processing of personal data for the purposes of direct marketing.

### Lead Generation and Marketing Lists

Sources for marketing leads include public directories, people who have contacted us in the past, registered on a website, subscribed to an offer. These can be used legitimately as provided directly but will have to comply with UK GDPR – ie provide a privacy notice to explain clearly how data will be used. At this stage should also request consent to contact them in future.

Organisations can keep lists for marketing purposes, but how these lists are put together is important.

A good contact list will be up-to-date, accurate and will therefore be compliant with the law.

### Directly

If details are collected directly from an individual these can be used legitimately. However, must abide by PECR and UK GDPR, which means providing a clear explanation about how their data will be used for marketing purposes and clear consent to the type of communication they want to receive.

### Indirectly

Contact details can be collected indirectly, ie from public directories, etc. In using these lists would still need to comply with PECR and UK GDPR. If collecting contact details indirectly, you need to consider would the individual expect their details to be used in this way, if not then this would be a breach of UK GDPR.

However, in making contact you would need to provide a privacy notice as soon as possible, as under UK GDPR you are required to provide a privacy notice either in the first communication or within 28 days. You would also need obtain consent to send any marketing material.