



# OPTIONS FOR THE REVIEW OF COMMERCIAL USE OF PERSONAL DATA (DIRECT MARKETING) LAWS IN KENYA

## POLICY BRIEF

By Joshua Kitili



**Strathmore University**

*Centre for Intellectual Property and  
Information Technology Law*

# TABLE OF CONTENTS

<b>1. INTRODUCTION</b>	<b>3</b>
<b>2. APPROACH</b>	<b>4</b>
<b>3. DIRECT MARKETING LEGAL PROVISIONS IN KENYA</b>	<b>4</b>
3.1 THE CONSTITUTION OF KENYA	4
3.2 THE DATA PROTECTION ACT AND DATA PROTECTION (GENERAL) REGULATIONS	4
3.2.1 LAWFUL, FAIR AND TRANSPARENT PROCESSING	5
3.2.2 PURPOSE LIMITATION	6
3.2.3 DATA MINIMIZATION	6
3.2.4 DATA ACCURACY	6
3.2.5 DATA RETENTION	7
3.2.6 DATA SECURITY, INTEGRITY AND CONFIDENTIALITY	7
3.3 THE KENYA INFORMATION AND COMMUNICATION (CONSUMER PROTECTION) REGULATIONS, 2010 (KICA REGULATIONS)	7
<b>4. KEY FINDINGS</b>	<b>8</b>
<b>5. POLICY RECOMMENDATIONS</b>	<b>9</b>
5.1 DIRECT MARKETING DEFINITION	9
5.2 DEFINITION OF UNSOLICITED COMMUNICATION	9
5.3 PRIVACY SAFEGUARDS	9
5.4 SENDER'S DETAILS AND CONTACTS	10
5.5 DIRECT MARKETING CONDITIONS	10
5.6 CONSENT ACQUISITION REQUIREMENTS	10
5.7 DIRECT MARKETING GUIDELINES FOR SPECIFIC COMMUNICATION MODES	11
5.8 DIRECT MARKETING PROHIBITION	11
5.9 SENDER'S OBLIGATIONS	11
<b>6. CONCLUSION</b>	<b>12</b>

## I. Introduction

Commercial use of personal data or direct marketing has been defined as the ‘distribution of products, information and promotion by aiming interactive communication with the consumers.’<sup>1</sup> It has also been defined as the practice of ‘sending promotional messages directly to the consumers in an individual basis and not based on a large extent.’<sup>2</sup> Commercial use of personal data may entail relational marketing, research, advertisements, conversion and maintenance, among other activities.<sup>3</sup> Direct marketing includes activities like forecast analysis, the compilation of lists, creation and implementation of the important campaign for the audience and the efforts for the fulfilment of the analytical marketing’s activities,<sup>4</sup> with the most common form being direct mail, social media marketing, Email marketing and SMS marketing.<sup>5</sup> The reach, and therefore, the success or failure, of a direct marketing campaign may be impacted on legal compliance by the marketer.<sup>6</sup> For example, unlawful marketing - where a marketer shares personal data belonging to a data subject with others not complying with regulatory requirements – may result in a wider audience than its lawful counterpart.<sup>7</sup>

The benefits of direct marketing have led companies to embrace it. Advertising agencies have also embraced this strategy, and most now have a ‘department for direct marketing’.<sup>8</sup> The importance of direct marketing to a marketer is that it allows him to promote the product or service directly to his target audience and also measure results quickly.<sup>9</sup> Other benefits to a marketer include: ‘high segmentation and targeting, enables a marketer to optimize his marketing budget, enables a marketer to increase sales with current and former clients, upgrade loyalty strategies, create new business opportunities and also to test and analyse results.’<sup>10</sup>

The increased use of digital platforms in Kenya has changed the manner in which marketing is conducted. Many companies and individuals have embraced direct marketing because it is affordable; enables one to attract new customers fast, and one can reach target customers efficiently. It is important, however, to ensure that the privacy of data subjects on these platforms is not infringed upon as personal data is used for marketing purposes. Kenya has legislations in place that regulate the direct marketing activities. These include the Constitution of Kenya 2010, the Data Protection Act 2019 together with the Data Protection (General) Regulations 2021 and the Kenya Information and Communication (Consumer Protection) Regulations 2010 (KICA Regulations).

1 Halit Karaxha, Sejd Tolaj and Arjan Abazi, The Role of Direct Marketing in Relation with the Consumers in Kosovo <[https://www.researchgate.net/publication/305744468\\_The\\_Role\\_of\\_Direct\\_Marketing\\_in\\_Relation\\_with\\_the\\_Consumers\\_in\\_Kosovo#:~:text=Direct%20Marketing%20is%20the%20practice,than%20using%20a%20mass%20medium](https://www.researchgate.net/publication/305744468_The_Role_of_Direct_Marketing_in_Relation_with_the_Consumers_in_Kosovo#:~:text=Direct%20Marketing%20is%20the%20practice,than%20using%20a%20mass%20medium)> accessed 3 January February 2023

2 ibid

3 ibid

4 ibid

5 StudySmarter, Direct Marketing <<https://www.studysmarter.co.uk/explanations/marketing/integrated-marketing-communications/direct-marketing/>> accessed 3 February 2023

6 ICTLC, The legality of disclosure by transmission of personal data for direct marketing purposes under Italian Data Protection Law <<https://www.ictlc.com/the-legality-of-disclosure-by-transmission-of-personal-data-for-direct-marketing-purposes-under-italian-data-protection-law/?lang=en>> accessed 3 February 2023

7 ibid

8 ibid

9 Berta Campos, What is Direct Marketing? Benefits, Steps and Examples (21 January 2022) <<https://www.cyberclick.net/numericalblogen/what-is-direct-marketing-benefits-and-steps-to-campaign>> accessed 30 January 2023

10 ibid

Although these laws play a pivotal role in curbing the misuse of personal data by companies and marketers, it is necessary to identify any legislative gaps that exist to ensure that data subjects are adequately protected.

This policy brief summarises the findings from a study done by CIPIT on the commercial use of personal data (direct marketing) in Kenya and outlines identified policy recommendations.

## 2. Approach

A doctrinal analysis was done by CIPIT on the existing Kenyan legislations to identify the direct marketing provisions. The laws analysed include the Constitution of Kenya 2010, the Data Protection Act 2019 together with the Data Protection (General) Regulations 2021 and the Kenya Information and Communication (Consumer Protection) Regulations 2010 (KICA Regulations). Policy recommendations were deduced by performing a comparative analysis of Kenyan and other jurisdictions laws to identify any existing gaps in the Kenyan legislations. The jurisdictions that supplemented this study include: the United States, the United Kingdom, Singapore, South Africa, Egypt, the European Union and Estonia.

## 3. Direct Marketing Legal Provisions in Kenya

### 3.1 The Constitution of Kenya

The right to privacy is provided in Article 31 of the Constitution of Kenya. Article 31 (c) and (d) deal with the constituent elements of the right to privacy which include the right not to have information concerning one's family or private affairs unnecessarily required or revealed. The right also protects the privacy of individuals' communications from infringement. Marketers should therefore obtain the consent of data subjects when engaging in direct marketing practices. This right affects direct marketing practices especially where the marketing 'comprises unsolicited communications.'<sup>11</sup> Unsolicited communication is communication that has not been requested by the recipient. It may include SMS messages, electronic mail or even web-based advertisements.

### 3.2 The Data Protection Act and Data Protection (General) Regulations

The Data Protection Act, 2019 and the Data Protection (General) Regulations, 2021 lack a specific definition of "direct marketing".<sup>12</sup> However, since marketers are involved in the collection and processing of personal data, they are regarded as data controllers or data processors.<sup>13</sup> The Data Protection (General) Regulations provides that where personal data of a data subject is used to advance commercial or economic interests, the data controller or data processor shall be deemed to have used it for commercial purposes.<sup>14</sup>

11 Cliffe Dekker Hofmeyr, Direct Marketing in Kenya <<https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2021/TMT/Downloads/Technology-Media-Telecommunications-Alert-22-November-2021.pdf>> accessed 24 February 2023

12 Mutie Advocates, Data Privacy for Online Marketers < <https://www.mutie-advocates.com/data-privacy-for-online-marketers/>> accessed 3 February 2023

13 The Data Protection Act 2019, section 2 defines a data controller as a 'natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purpose and means of processing personal data.' A data processor is defined as a natural or legal person, public authority, agency or other body which processes personal data on behalf of the data controller.'

14 The Data Protection (General) Regulations 2021, regulation 14(1)

The regulations also provide that direct marketing entails the following activities:

- Sending a catalogue through any medium addressed to a data subject.<sup>15</sup>
- Displaying an advertisement on an online media site where a data subject is logged on using their personal data.<sup>16</sup>
- Sending an electronic message to a data subject about a sale or other advertising material relating to a sale using personal data provided by a data subject.<sup>17</sup>

As a data processor, a marketer should realise that each processing activity requires a legal basis such as ‘consent or legitimate interest’.<sup>18</sup>

The processing of personal data should also be in compliance with general data protection principles. These principles are contained in the Data Protection Act, 2019 and also the General Data Protection Regulations (GDPR).<sup>19</sup> They include; lawful, fair and transparent processing<sup>20</sup>; purpose limitation<sup>21</sup>; data minimization<sup>22</sup>; data accuracy<sup>23</sup>; data retention<sup>24</sup>; and data security, integrity and confidentiality.<sup>25</sup> These principles are explained at length below.

### 3.2.1 Lawful, Fair and Transparent Processing

Marketers who use personal data for direct marketing activities should ensure that it is processed in a lawful, fair and transparent manner. The Data Protection Act provides that a data processor shall ensure data is processed ‘lawfully, fairly and in a transparent manner in relation to any data subject.’<sup>26</sup> Lawful processing occurs where a data subject consents<sup>27</sup> or if it is essential for the performance of a contract or compliance with a legal obligation.<sup>28</sup> It also occurs where the purpose is to protect the data subject’s vital interests<sup>29</sup> or to perform a task carried out in the public interest<sup>30</sup> and also for legitimate interests’ purposes.<sup>31</sup>

According to the Data Protection Act, a data processor bears the burden of proof in establishing that a data subject consented to the processing of their personal data.<sup>32</sup> Further, the Data Protection (General) Regulations provides that the data subject’s consent is required for direct marketing purposes.<sup>33</sup> A marketer should therefore be certain that a data subject has consented and cannot

<sup>15</sup> *ibid* section 14 (2) (a)

<sup>16</sup> *ibid*

<sup>17</sup> *ibid*

<sup>18</sup> Brokers Ireland, Brokers Ireland Guidance on Direct Marketing < <https://brokersireland.ie/wp-content/uploads/2020/09/Brokers-Ireland-Marketing-Guidance-July-2020.pdf>> accessed 3 February 2023

<sup>19</sup> Article 5(1) enshrines the principles relating to processing of personal data and they include lawful, fair and transparent processing, collection of personal data for specified, explicit and legitimate purposes, data minimization, data accuracy, storage limitation and data security and confidentiality

<sup>20</sup> David Normoyle, Data Privacy for Marketers (20 June 2022) < <https://digitalmarketinginstitute.com/blog/data-privacy-for-marketers>> accessed 3 February 2023.

<sup>21</sup> *ibid*

<sup>22</sup> *ibid*

<sup>23</sup> *ibid*

<sup>24</sup> *ibid*

<sup>25</sup> *ibid*

<sup>26</sup> Data Protection Act 2019, section 25 (b)

<sup>27</sup> *ibid* section 30 (1) (a)

<sup>28</sup> *ibid* section 30 (1) (b) (i) and (ii)

<sup>29</sup> *ibid* section 30 (1) (b) (iii)

<sup>30</sup> *ibid* section 30 (1) (b) (iv)

<sup>31</sup> *ibid* section 30 (1) (b) (vii)

<sup>32</sup> *ibid* section 32(1)

<sup>33</sup> Data Protection (General) Regulations 2021, regulation 15(1)(c) provides that, ‘A data controller or data processor may use personal data other than sensitive personal data concerning a data subject for the for the purpose of direct marketing where the data subject has to the use or disclosure of personal data for the purpose of direct marketing.’

assume through interactions with a customer(s).<sup>34</sup> As a marketer, it is fundamental to provide data subjects with an opportunity to withdraw consent since the Data Protection Act accords them with the right to withdraw consent.<sup>35</sup> In order to ensure compliance, an opt-in option should be given in the data collection process.<sup>36</sup>

The Data Protection (General) Regulations provide that where a data controller or data processor uses personal data for direct marketing purposes, he/she should provide 'a simplified opt-out mechanism for the data subject to request not to receive direct marketing communications or where the data subject has not made an opt-out request.'<sup>37</sup> According to section 16(1) of the Regulations, an opt-out mechanism should be clear, visible and not complex. It should also have an opting-out procedure that requires minimal time and effort; provide a direct and accessible communication channel; be free or involve a nominal cost to the data subject; and accessible to people with disability.

### 3.2.2 Purpose Limitation

This principle requires data controllers or data processors to collect personal data for 'explicit, specified and legitimate purposes'.<sup>38</sup> Therefore, the personal data should be used for purposes 'informed to the user'.<sup>39</sup> For instance, if data is collected for research purposes, it cannot be used for marketing purposes.<sup>40</sup> In cases where a marketer wants to use the collected data for other purposes, he should obtain new consent from the data subject.<sup>41</sup>

### 3.2.3 Data Minimization

This principle requires data controllers or processors to ensure that personal data is 'adequate, relevant, and limited to what is necessary in relation to the purposes for which it is processed.'<sup>42</sup> This is applicable to both data collection and sharing of the data. Applying this to direct marketing, the customers should be informed how their data will be utilized and also be assured that the data will not be used for further purposes.<sup>43</sup>

### 3.2.4 Data Accuracy

This principle mandates data controllers or processors to ensure that personal data is accurate and where necessary kept up to date.<sup>44</sup> A marketer should ensure that the data collected remains accurate and if there is personal data which is inaccurate, it should be corrected or erased. This is because accurate decisions cannot be made based on inaccurate data.<sup>45</sup>

34 Normoyle (n 20)  
 35 Data Protection Act, 2019 section 32 (2)  
 36 Normoyle (n 20)  
 37 Data Protection (General ) Regulations 2021, regulation 15 (d) and (e)  
 38 Data Protection Act 2019, section 25 (c)  
 39 Normoyle (n 20)  
 40 ibid  
 41 Normoyle (n 20)  
 42 Data Protection Act 2019, section 25 (d)  
 43 Normoyle (n 20)  
 44 Data Protection Act 2019, section 25(f)  
 45 Normoyle (n 20)

### 3.2.5 Data Retention

This principle protects the personal data of data subjects from being stored for unnecessarily long periods. It requires data controllers or data processors not to retain the data subjects' personal data for 'no longer than is necessary.'<sup>46</sup> A company engaged in direct marketing practices should have a data retention policy that is shared with customers so that they are aware of the extent that their data will be used.<sup>47</sup> The policy should describe the kind of data that will be collected, reasons for collecting it and the storage period.<sup>48</sup>

### 3.2.6 Data Security, Integrity and Confidentiality

Any personal data that is collected needs to be adequately protected by the data controller or data processor. A business that engages itself in direct marketing practices should ensure that appropriate technical or organisation measures are employed to protect against unlawful processing of personal data or accidental loss or damage.<sup>49</sup> In addition to the provisions discussed and principles that a marketer is required to comply with, it is fundamental for any data processor to acknowledge that a data subject is entitled to certain rights that are enumerated in the Data Protection Act.<sup>50</sup> A marketer should therefore keep this in mind when processing personal data.

## 3.3 The Kenya Information and Communication (Consumer Protection) Regulations, 2010 (KICA Regulations)

In the KICA Regulations, direct marketing is discussed in the context of unsolicited communications. The KICA Regulations provide that it is an offence for a person who uses automated calling systems, facsimile or emails for direct marketing purposes without obtaining consent from the recipient.<sup>51</sup> Also, the sending of emails for direct marketing purposes while concealing the identity of the sender is regarded as an offence.<sup>52</sup> The opt-in principle is a requirement that automated direct marketing schemes in Kenya should incorporate so as to give subscribers the opportunity to 'accept or reject inclusion in a marketer's mailing list'.<sup>53</sup> The regulations however do not regard it as an offence where the direct marketing schemes have defaulted on the opt-in provision.<sup>54</sup>

46 Data Protection Act 2019, section 25 (g)

47 Normoyle ( n 20)

48 ibid

49 Normoyle ( n 20)

50 Section 26 enumerates these rights and some of them include the right to object to the processing of personal data, correction and deletion of false or misleading data.

51 The Kenya Information and Communication (Consumer Protection) Regulations 2010, regulation 17 (1).

52 ibid section 17(2)

53 ibid section 17 (4)

54 Hofmeyr ( n 11)

## 4. Key Findings

The analysis of the direct marketing laws determined:

- i. There are four laws which are applicable to direct marketing in Kenya. They are: the Constitution of Kenya, 2010, the Data Protection Act, 2019, the Data Protection (General) Regulations, 2021 and the Kenya Information and Communication (Consumer Protection) Regulations, 2010.
- ii. The data protection principles enshrined in the Data Protection Act, 2019 play a pivotal role in the regulation of direct marketing practices. Data controllers or data processors should comply with the principles when processing personal data for direct marketing practices.
- iii. Key definitions which are fundamental ingredients of direct marketing are not included in the Data Protection (General) Regulations, 2021, the Data Protection Act, 2019 and the KICA Regulations. The laws instead incorporate specific direct marketing provisions. Although the provisions are fundamental for the regulation of direct marketing practices, definitions provide a better understanding to a reader as to how words or phrases should be interpreted. It is therefore necessary to amend the above laws to include the missing definitions.
- iv. The consent requirements provided in the Data Protection Act, 2019 and the Data Protection (General) Regulations, 2021 are not expansive enough and therefore modifications need to be done to tailor them for direct marketing purposes.
- v. The Data Protection (General) Regulations, 2021 and the KICA Regulations have not clearly incorporated the sender's obligations in direct marketing practices. The sender is an important party in the commercial use of personal data and therefore has to meet some requirements or obligations. This also coincides with instances when direct marketing practices are prohibited. Amendment of the laws to factor in both provisions is thus necessary for robust direct marketing laws.
- vi. Numerous jurisdictions have updated their privacy laws to emulate the General Data Protection Regulation (GDPR) which came into effect in 2018. This entails direct marketing provisions that have been included in privacy laws to protect consumer data and also measure up with global marketing privacy standards. Jurisdictions with direct marketing provisions in their legislations include: the United States (CAN-SPAM ACT 2003 and also Federal and State Regulations), United Kingdom (UK GDPR and Privacy and Electronic Communications Regulations 2003 (as amended) (PEC Regulations), South Africa (Protection of Personal Information Act 2013) and Egypt (Personal Data Protection Law 2020).
- vii. The existence of big data has transformed how marketing is conducted. The shift from traditional mode of marketing to commercial use of personal data has had a global impact on the legal landscape. This can be illustrated by the regulatory initiatives implemented by other countries to regulate direct marketing for instance the United Kingdom, USA, South Africa and Egypt are just some of the countries that have direct marketing laws.



## 5. Policy Recommendations

### 5.1 Direct Marketing Definition

In the United Kingdom, the Data Protection Act 2018 defines direct marketing as, ‘the communication (by whatever means) of advertising or marketing material which is directed to particular individuals.’<sup>55</sup> This definition of direct marketing covers most types of advertising, marketing or promotional material ‘that can be directed toward a user via electronic communication for instance through emails.’<sup>56</sup> Direct marketing is also defined in South Africa’s Protection of Personal Information Act, 2013 (POPIA). According to the Act, direct marketing means approaching a data subject either in person, by mail or by electronic communication for the purpose of promoting or advertising goods or services to the data subject or requesting them to donate.<sup>57</sup> Compared to the two legislations above, the Kenya Data Protection Act, 2019 lacks a concise definition of what direct marketing encompasses. This is fundamental since it informs marketers of whether the practices they engage in amount to direct marketing and it also enables a data subject to be aware of what direct marketing entails. It is therefore imperative to borrow a leaf from jurisdictions like the United Kingdom and South Africa and include the definition in the legislation.

### 5.2 Definition of Unsolicited Communication

Similar to the Kenya Data Protection Act is the KICA Regulations which also lacks crucial definitions in the sphere of direct marketing. The actions that constitute unsolicited communication are described in the Regulations but the definition of unsolicited communication is not provided. Contrary to this, the Singapore Spam Control Act, 2007<sup>58</sup> defines what unsolicited means. The Singapore Act provides that, ‘an electronic message is unsolicited if the recipient did not request to receive the message or consent to the receipt of the message’.<sup>59</sup> In order to grasp the gist of what unsolicited communication entails in direct marketing, a comprehensive definition of it in the Regulations will suffice.

### 5.3 Privacy Safeguards

To protect data subjects against intrusion of their privacy, the Kenya Data Protection (General) Regulations should include a provision that requires appropriate safeguards to be put in place by data controllers or data processors. This will aid in curbing intrusion of privacy through sending unsolicited communications for direct marketing purposes. An illustration of this is the ePrivacy Directive (Privacy and Electronic Communications Directive 2002/58/EC)<sup>60</sup> which provides that, ‘safeguards should be provided for subscribers against intrusion of their privacy by unsolicited communications for direct marketing purposes in particular by means of automated calling machines, telefaxes and emails including SMS messages...’<sup>61</sup>

55 Section 122(5)

56 Securiti, UK Guide on Direct Marketing via Email (28 December 2022) <<https://securiti.ai/blog/uk-guide-on-direct-marketing-via-email/>> accessed 27 February 2023

57 Protection of Personal Information Act 2013, section 1

58 Singapore Statutes Online, Spam Control Act 2007 <<https://sso.agc.gov.sg/Act/SCA2007>> accessed 27 February 2023

59 Section 5(1)(a) and (b)

60 EUR-Lex,ePrivacy Directive <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02002L0058-20091219>> accessed 27 February 2023

61 Recital 40

## 5.4 Sender's Details and Contacts

The Data Protection (General) Regulations and the KICA Regulations should also include provisions that require any communication to contain the details of the sender and also an address or contact detail that a recipient may use to send a request that such communication ceases. The provision on unsolicited communications should include the above-mentioned details since it is currently succinct and fundamental details have not been included.

South Africa's POPIA<sup>62</sup> has a section focusing mainly on direct marketing by means of unsolicited electronic communications. Section 69 (4)(a) and(b) of the South African Act provides that, 'any communication for the purpose of direct marketing must contain details of the identity of the sender or on whose behalf the communication has been sent and an address or other contact details to which the recipient may send a request that such communications cease.' Further, the South African Act defines an automatic calling machine as a machine that 'is able to do automated calls without human intervention'.<sup>63</sup>The Data Protection (General Regulations) 2021 on the other hand don't provide the definition of what automated calling systems is.

## 5.5 Direct Marketing Conditions

Borrowing a leaf from Egypt's Personal Data Protection Law, 2020,<sup>64</sup> a few amends can be made to Regulation 15 of the Data Protection (General) Regulations to include other conditions that must be met for direct marketing to take place and these include the identity of the sender, the address of the sender and a clear indication that the purpose of communication is for direct marketing.<sup>65</sup>

## 5.6 Consent acquisition requirements

One of the conditions for using personal data for commercial purposes is if the data subject has consented to it as provided in section 37(1) (a) of the Data Protection Act and regulation 15 (1) (c) of the Data Protection (General) Regulations. However, they both do not state how the consent will be obtained for direct marketing purposes and therefore marketers may find it difficult to prove that data subjects consented to the use of their personal data for a 'specified purpose'.<sup>66</sup> To fill this gap and to curb direct marketing text messages to data subjects it will be prudent to require written consent from data subjects or consumers. This aids marketers in proving that they indeed received consent from the data subjects and also consumers are able to rely on it to prove whether or not they consented to the use of their personal data for direct marketing purposes.

62 South African Government, Protection of Personal Information Act 2013 < <https://www.gov.za/documents/protection-personal-information-act>> accessed 27 February 2023

63 Section 69 (5)

64 International Labour Organisation, Egypt-Law 151/2020 on the Protection of Personal Data < [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=111246&p\\_count=7&p\\_classification=01](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=111246&p_count=7&p_classification=01)> accessed 27 February 2023

65 Article 17 of the Personal Data Protection Law provides that, 'any electronic communication for the purpose of direct marketing to the data subject shall be prohibited unless the following conditions are met: (1) Obtaining the consent of the data subject (2) the communication shall include the identity of the sender (3) the sender shall have a valid and complete address to be reached (4) a clear indication that the purpose of communication is for direct marketing and (5) setting clear and uncomplicated mechanisms to allow the Data subject to opt-out or withdraw his/her consent in relation thereto.

66 Data Protection Act 2019, section 32(1)

An illustration for this is the United States Telephone Consumer Protection Act, 1991 (TCPA)<sup>67</sup> which requires that businesses get express written consent from consumers before they send them marketing text messages.<sup>68</sup> According to the TCPA regulations, prior express written consent requires ‘a written agreement, signed by the consumer that includes among other things the telephone number that specifically authorizes telemarketing by automatic dialling/texting or pre-recorded voice’.<sup>69</sup>

### 5.7 Direct Marketing guidelines for specific communication modes

The direct marketing provisions in the Data Protection (General) Regulations are applicable generally and not specifically to the mode of communication. The benefit of having specific direct marketing guidelines for the specific modes of communication is that the manner of obtaining consent or opting out may vary from one mode of communication to another for instance it may be different in Emails, text messages and telemarketing.

Contrary to the Data Protection (General) Regulations in Kenya, the United States has direct marketing laws applicable to the different modes of communication. For instance, the Controlling the Assault of Non-Solicited Pornography and Marketing Act 2003 (CAN-SPAM Act) is a federal law which applies ‘labelling and opt-out requirements to all commercial email messages.’<sup>70</sup> The Act allows a company to send commercial emails to any recipient provided the recipient ‘has not opted out of receiving such emails from the sender’.<sup>71</sup> The TCPA on the other hand is applicable to advertising via SMS while Federal and state telemarketing laws are applicable to telemarketing.

### 5.8 Direct Marketing Prohibition

The Data Protection (General) Regulations should also include a provision that deals with prohibition of direct marketing practices. This is important so that direct marketing requirements for instance consent requirements are met and also to ensure compliance by marketers. An illustration of this is the Electronic Communications Act, 2005<sup>72</sup> of Estonia which prohibits the use of electronic contact details for direct marketing if the sender cannot be identified, direct marketing does not include opt-out instructions and the recipient has opted out of receiving direct marketing.<sup>73</sup>

### 5.9 Sender’s Obligations

The Personal Data Protection Law, 2020<sup>74</sup> from Egypt incorporates some crucial obligations that the sender of any direct marketing communication should comply with. This not only enhances privacy protection of a data subject but also proves that the sender obtained consent before engaging in direct marketing practices. It, therefore, protects both the sender and the data subject. This is illustrated in

67 Cornell law School, 47 U.S. Code § 227- Restrictions on use of telephone equipment <<https://www.law.cornell.edu/uscode/text/47/227>> accessed 28 February 2023

68 Act-on, Must-Know SMS Marketing Regulations in the U.S <[https://act-on.com/blog/sms-marketing-regulations/#:~:text=The%20Telephone%20Consumer%20Protection%20Act%20\(TCPA\)%20is%20a%20United%20States,sending%20them%20marketing%20text%20messages.](https://act-on.com/blog/sms-marketing-regulations/#:~:text=The%20Telephone%20Consumer%20Protection%20Act%20(TCPA)%20is%20a%20United%20States,sending%20them%20marketing%20text%20messages.)> accessed on 28 February 2023

69 Sutherland, TCPA Best Practices: Consent, Compliance, Communication <[https://us.eversheds-sutherland.com/PracticesIndustries/Litigation/portal-resource/TCPA%20Best%20Practices\\_Consent.%20Compliance.%20Communication#:~:text=Under%20TCPA%20regulations%2C%20%E2%80%9Cprior%20express,as%20a%20condition%20of%20purchase.](https://us.eversheds-sutherland.com/PracticesIndustries/Litigation/portal-resource/TCPA%20Best%20Practices_Consent.%20Compliance.%20Communication#:~:text=Under%20TCPA%20regulations%2C%20%E2%80%9Cprior%20express,as%20a%20condition%20of%20purchase.)> accessed 28 February 2023

70 DLA, Electronic Marketing <<https://www.dlapiperdataprotection.com/index.html?t=electronic-marketing&c=US&c2=KE>> accessed 28 February 2023

71 ibid

72 Riigi Teataja, Electronic Communications Act <<https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513012020007/consolide>> accessed 28 February 2023

73 Aleksander Tsuiman, Data Protection in Estonia: Overview (12 August 2020) <[https://www.cobalt.legal/files/data\\_protection\\_in\\_estonia\\_overview\\_12\\_08\\_2020.pdf](https://www.cobalt.legal/files/data_protection_in_estonia_overview_12_08_2020.pdf)> accessed 28 February 2023

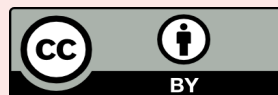
74 International Labour Organisation (n 64)

Article 18 of the Egypt Personal Data Protection Law which provides that, ‘the sender of any electronic communication for the purpose of direct marketing shall specify a defined marketing purpose, not disclose the contacts of the data subject and maintain electronic records evidencing the consent of the data subject to receive electronic marketing communication and any amendments thereof or his or her non-objection to its continuity for a duration of 3 years from the date of last communication’. The incorporation of a similar provision in the Data Protection (General) Regulations will play a pivotal role especially in proving that consent was obtained because of maintaining electronic records that backup any arising claims.

## 6. Conclusion

The direct marketing provisions provided in the various identified laws play an important role in the regulation of direct marketing and are therefore key in the protection of data subjects’ personal data. External jurisdictions have also made an effort to protect data subjects in the commercial use of personal data and some of these jurisdictions have well-drafted laws that address direct marketing practices comprehensively. To enhance privacy protection of data subjects and to ensure accountability among data processors or controllers, it is prudent to perform a comparative analysis as has been illustrated in this study so as to identify provisions which can be tweaked to improve regulation of the commercial use of personal data in Kenya. By implementing the recommendations identified, direct marketing regulations will address fundamental aspects thus protecting data subjects efficiently.

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**Strathmore University**

*Centre for Intellectual Property and  
Information Technology Law*

Ole Sangale Rd, Madaraka Estate.  
P.O Box 59857-00200, Nairobi,  
Kenya.

**Tel:** +254 (0)703 034612

**Email:** [cipit@strathmore.edu](mailto:cipit@strathmore.edu)

**Website:** [www.cipit.strathmore.edu](http://www.cipit.strathmore.edu)