



Strathmore University

*Centre for Intellectual Property and
Information Technology Law*

COMMERCIAL USE OF PERSONAL DATA (DIRECT MARKETING) IN KENYA

**SMALL AND MEDIUM-SIZED
ENTERPRISES (SME) MANUAL**

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1. AN OVERVIEW OF SMES AND DIRECT MARKETING

SME is an acronym for small and mid-size enterprises. They are businesses that have assets, revenues and a certain number of employees that fall below a certain level which varies across countries.¹ Different countries and also industries have their own criteria for determining an SME.² An example of this is in the European Union where a business that has less than 250 employees is considered an SME while in the United States it may have up to 1200 employees.³

In Kenya, the Micro and Small Enterprises Act 2012, defines a small enterprise as one whose annual turnover ranges between five hundred and five million Kenyan shillings while the number of employees ranges between 10-50 people.⁴ Medium-sized enterprises are not covered in the Act although the Public Finance Management Act 2022 defines a medium size enterprise as a firm, trade or business activity that has an annual turnover of between five and one hundred million Kenya shillings.⁵ It also has between 51-250 employees.⁶

SMEs are fundamental especially in job creation and in Kenya their Gross Domestic Product (GDP) is estimated at 40%.⁷ They also constitute 98% of businesses in Kenya and they have an annual job creation of 30 % of all new jobs.⁸ Majority of SMEs in Kenya are in the informal sector and they are popularly referred to as jua kali.⁹ Some of the challenges that SMEs face include inadequate management training in that, many founders of these businesses operate the businesses by learning and unlearning along the way.¹⁰ This affects good operations and key legal requirements may be overlooked thus tremendously affecting the businesses.¹¹

Other challenges that SMEs in Kenya face include rapid development in technology and changes in laws and regulations. As technology continues to advance globally, most services have become digitized. Many SMEs unfortunately cannot invest in these new innovations. An example of this is a small business in the rural area that cannot benefit from internet investment due to lack of technology in the area.¹² Another key

¹ Susan Ward, *What are SMEs?* (29 June 2020) <<https://www.thebalancemoney.com/sme-small-to-medium-enterprise-definition-2947962>> accessed 29 May 2023.

² *ibid.*

³ *ibid.*

⁴ Section 2.

⁵ *Public Finance Management Act 2022, section 2.*

⁶ *ibid.*

⁷ Dr. Francis Omondi, Dr. Perez A. Onono and Dr. Sarah Barasa, *A gendered analysis of institutional and government small and medium enterprises-related policies in Kenya* (27 September 2022) <<https://kenya.oxfam.org/latest/publications/gendered-analysis-institutional-and-government-small-and-medium-enterprises#:~:text=Further%2C%20SMEs%20constitute%2098%20percent,by%20both%20men%20and%20women4.>> accessed 29 May 2023.

⁸ *ibid.*

⁹ Aksa Bilal, *Challenges faced by SMEs in Kenya* <<https://aaeafrica.org/kenya/challenges-faced-by-smes-in-kenya/>> accessed 29 May 2023.

¹⁰ *ibid.*

¹¹ *ibid.*

¹² Kasiinsight, *Challenges of doing business in Kenya* (30 October 2021) <<https://www.kasiinsight.com/post/challenges-of-doing-business-in-kenya>> accessed 29 May 2023.

challenge that is worth noting is the new laws and regulations that are formulated by parliamentarians to regulate operations of enterprises.¹³ Although crucial for regulation, they eventually pile up and cause administrative overload since the compliance costs are in most cases disproportionately higher than for large entities.¹⁴

Considering that data has become a key ingredient in the digital world, businesses that also include SMEs are utilizing personal data to advertise products to potential customers. In a Kenyan study that was carried out on the influence of e-marketing on the performance of small and medium enterprises in Kenya, the findings indicated that SMEs in Kenya that are keen on adopting e-marketing strategies achieved above average performance compared to the ones that did not.¹⁵ SMEs are now using various direct marketing tools to reach customers for instance in Nairobi county it has been observed that SMEs are utilising online marketing to enhance customer bonding activities.¹⁶ This has been facilitated by the use of social media, email and even text messaging applications.¹⁷ The use of social media by SMEs also enables them to access many service providers as well as gain a better understanding of customers' needs that eventually enhance effective relationships.¹⁸ Thus, in light of this, it is fundamental for SMEs to grasp what is meant by the commercial use of personal data and its ingredients.

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'.¹⁹

The purpose of this manual is to inform SMEs of the legal and regulatory landscape that govern the commercial use of personal data, enable SMEs to grasp fundamental terminologies involved in direct marketing and the data protection requirements that they are supposed to comply with when engaging in direct marketing practices.

¹³ *ibid.*

¹⁴ Simon White, *The SME Test: Assessing the impact of new laws and regulations on SMEs* (20 November 2021) <<https://simon-white.au/2021/11/20/sme-test/>> accessed 29 May 2023.

¹⁵ Kimathi Doreen Kawira, Prof. Elegwa Mukulu and Prof. Romanus Odhiambo, 'Effect of Digital Marketing on the Performance of MSMEs in Kenya' (2019) 2(1) *Journal of Marketing & Communication* 1-23.

¹⁶ Judy Wanyoike and Peter Paul Kithae, 'Social Media networks and SME Performance in the International Arena: A case of SMEs operating in Kamukunji Area of Nairobi County, Kenya' (2019) 4(5) *European Journal of Business and Management Research* 1-8

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ 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.> accessed 29 May 2023.

2. DEFINITION OF KEY TERMINOLOGIES

2.1 Direct marketing/commercial use of personal data

The Kenya Data Protection Act, 2019 lacks a concise definition of what direct marketing encompasses. However, in simple terms, direct marketing is a form of advertising that enables businesses to communicate with customers ‘in a one-to-one capacity.’²⁰ Through it, businesses can inform customers about products and services without the need for a third party to create their advertisements.²¹ Legal contextualization of direct marketing can be illustrated in the UK Data Protection Act 2018 which defines direct marketing as ‘the communication (by whatever means) of advertising or marketing material which is directed to particular individuals.’²² The common forms of direct marketing include direct mail, social media marketing, Email marketing and SMS marketing.²³

2.2 Data

In simple terms, data is information that has been translated in a manner that is efficient for processing.²⁴ The Kenya Data Protection Act 2019 defines it as information which has been processed through an automatic equipment in response to instructions that have been given for that purpose.²⁵ Data may include text, web activity records as well as audio and video information.²⁶

2.3 Personal Data

The Data Protection Act 2019 defines personal data as ‘any information relating to an identified or identifiable natural person.’²⁷ Example of this includes identification card number, location data, home address and even an email address.

2.4 Data Controller

This is defined as a natural, legal person or any other body either alone or jointly with others that determines the purpose and means of processing personal data.²⁸ In simple terms, a data controller is the one who decides the kind of data that will be collected and how it will be processed.²⁹ An example of this is a marketing research agency that has been entrusted with personal information, social media platforms

²⁰ CopyPress, *Direct Marketing: Definition and Examples* (27 April 2022) <<https://www.copypress.com/kb/content-marketing/direct-marketing-definition-and-examples/>> accessed 29 May 2023.

²¹ *ibid.*

²² Section 122 (5).

²³ StudySmarter, *Direct Marketing* <<https://www.studysmarter.co.uk/explanations/marketing/integrated-marketing-communications/direct-marketing/>> accessed 29 May 2023.

²⁴ Jack Vaughan, *What is Data?* <<https://www.techtarget.com/searchdatamanagement/definition/data#:~:text=In%20computing%2C%20data%20is%20information,converted%20into%20binary%20digital%20form.>>> accessed 29 May 2023.

²⁵ Section 2.

²⁶ Vaughan (n 24).

²⁷ Section 2.

²⁸ Data Protection Act 2019, section 2.

²⁹ TermsFeed, *Chapter 3: Data Controllers vs Data Processors* <<https://www.termsfeed.com/ebooks/gdpr-business/chapter/c3-gdpr-data-controllers-vs-data-processors/>> accessed 29 May 2023.

that enable advertisers to target specific audiences and also e-commerce companies that collect customer data to facilitate marketing campaigns.

2.5 Data Processor

This is defined as a natural, legal person or any other body that processes personal data on behalf of the data controller.³⁰ Basically, they take information already collected by a data controller and use it to accomplish tasks on behalf of the data controller.³¹ They should process the data according to the instructions that they have been given.³² An example of this is a marketing agency.

2.6 Data Subject

The Act defines a data subject as an 'identified or identifiable person who is the subject of personal data.'³³ In direct marketing, an example of a data subject would be a customer.

2.7 Data brokers

These are individuals or companies that collect an individual's personal information then sell it to companies, individuals or the government who then use the information for commercial, surveillance or social purposes.³⁴ In direct marketing, data brokers may provide services like selling a list of contact details.

2.8 Sensitive Personal data

This is data that reveals a person's race, health status, genetic data, biometric data, ethnic social origin or even the sexual orientation of a data subject.³⁵ To illustrate this, data subjects should not receive targeted advertisements that correspond to their health conditions when accessing a healthcare company website.³⁶

2.9 Unsolicited Communication

KICA Consumer Protection Regulations 2010 have a provision on unsolicited communication but lack a definition of what it entails. In simple terms, unsolicited communication is communication that has not been requested by the recipient. It may include SMS messages, electronic mail or even web-based advertisements.

³⁰ Data Protection Act 2019, section 2.

³¹ TermsFeed (n 29).

³² *ibid.*

³³ Data Protection Act 2019, section 2.

³⁴ Mugambi Laibuta, *Data Brokers and Direct Marketing* <<https://www.laibuta.com/data-protection/data-brokers-and-direct-marketing/>> accessed 29 May 2023.

³⁵ Data Protection Act 2019, section 2.

³⁶ Mutie Advocates, *Data Privacy for Online Marketers* <<https://www.mutie-advocates.com/data-privacy-for-online-marketers/>> accessed 29 May 2023.

2.10 Profiling

According to the Data Protection Act, this entails any form of automated processing of personal data that consists of the use of personal data to evaluate certain personal aspects relating to a natural person.³⁷ In simple terms, profiling entails the evaluation of an individual's personal data to analyse or predict certain aspects about a person such as their habits, personality, political beliefs and many other aspects.³⁸ An example of profiling is where a purveyor that deals with expensive jewellery items uses psychographic profiling to market to people that have purchased similar products in the past.³⁹

2.11 Consent

This refers to the manifestation of express, unequivocal, free, specific and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data relating to the data subject.⁴⁰

2.12 Automated Calling Systems

This is also referred to as an automated phone system or automated voice call service and it utilises technology to place numerous calls at once to a group of contacts.⁴¹ In marketing, a company can use an automated calling system to send numerous text messages or make automated phone calls so as to promote new products or services.⁴²



³⁷ Section 2.

³⁸ Privacy International, *Why we are concerned about profiling and microtargeting in elections* <<https://privacyinternational.org/news-analysis/3735/why-were-concerned-about-profiling-and-micro-targeting-elections>> accessed 30 May 2023.

³⁹ Chron Contributor, *Examples of a Market Segmentation Profile (10 December 2020)* <<https://smallbusiness.chron.com/examples-market-segmentation-profile-11936.html>> accessed 30 May 2023

⁴⁰ Data Protection Act 2019, section 2.

⁴¹ OnSolve, *What is an Automated Phone Call System?* <<https://www.onsolve.com/glossary/automated-phone-call-system/>> accessed 30 May 2023.

⁴² Livevox, *Automated Calling System: What is It?* <<https://livevox.com/automated-calling-system-what-is-it/#gref>> accessed 30 May 2023.

3. DIRECT MARKETING (COMMERCIAL USE OF PERSONAL DATA)

3.1 Introduction

Direct marketing has been defined as a practice of ‘sending promotional messages directly to the consumers on an individual basis and not based on a large extent.’⁴³ The commercial use of personal data comprises a number of aspects that include: relational marketing, the process of research, advertisements, conversion and maintenance.⁴⁴ In Kenya, the Data Protection Act 2019 lacks a concise definition of what direct marketing encompasses. However, in the African region, South Africa’s Protection of Personal Information Act 2013 (POPIA) defines direct marketing as 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.⁴⁵

It involves the presentation of information about a company, product or service to target customers without the use of an advertising middleman.⁴⁶ In simple terms, it is a targeted form of marketing that presents information of potential interest to a customer who has been identified as being a likely buyer.⁴⁷ It also customizes campaigns to the recipient.⁴⁸ An example of direct marketing is in a case where subscribers of teen magazines receive Facebook advertisements for acne medication that they may require based on their age.⁴⁹ Netflix also uses direct marketing by sending personalised emails to users according to their preferences.⁵⁰ Through the use of data analytics, it is possible for Netflix to deliver targeted messages.⁵¹

Direct marketing also differs with direct advertising in that direct advertising involves mass distribution of sales and promotional material through either post, email, newspapers or telephone.⁵² As a result of its generalized nature, it is almost impossible to target segments for this type of advertising.⁵³ It is also important to note that the principles involved in direct marketing are similar to traditional marketing in that: the product must fill a need; the market should be segmented by income, geography and other factors; and there should also be adequate ‘after-sales service and support.’⁵⁴

43 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> accessed 6 June 2023.

44 *ibid.*

45 Protection of Personal Information Act 2013, section 1.

46 Dr. Shyama Prasad, *Direct Marketing and Selling* <<http://www.dspmuranchi.ac.in/pdf/Blog/Direct%20Marketing.pdf>> accessed 6 June 2023.

47 *ibid.*

48 *ibid.*

49 *ibid.*

50 Studysmarter, *Direct Marketing* <<https://www.studysmarter.co.uk/explanations/marketing/integrated-marketing-communications/direct-marketing/>> accessed 6 June 2023.

51 *ibid.*

52 Prasad (n 46).

53 *ibid.*

54 Chirantan Basu, *What are Direct Marketing Tools? (26 September 2017)* <<https://bizfluent.com/info-7825922-direct-marketing-tools.html>> accessed 6 June 2023.

Direct advertising involves mass distribution of sales and promotional material through either post, email, newspapers or telephone.

3.2 Tools for Direct Marketing

Direct marketing tools are the techniques or strategies employed by businesses to reach out to potential customers and also promote products or services directly to them.



Figure 1: An illustration of direct marketing tools

- i. **Direct Mail** - This refers to a message that has been sent to potential buyers through mail.⁵⁵ It can take the form of an announcement, offer or reminder.⁵⁶ It advertises the organisation including its products and services.⁵⁷
- ii. **Telemarketing** - This involves contacting customers through the phone to sell them products or services.⁵⁸ Companies may use employees or automated machines to reach out to many customers at one time.⁵⁹ Examples of telemarketing include inbound and outbound calls. Inbound calls are initiated by the customer by calling a company directly or setting up time for the company to call them.⁶⁰ Outbound calls are also referred to as cold calling and in this case the company contacts the customer directly.⁶¹ For telemarketing to be successful, customer's data must be well researched so

⁵⁵ ABCofmarketing. What are the major Direct Marketing tools or channels? <<https://www.abcofmarketing.com/what-are-major-direct-marketing-tools-or-channels/>> accessed 6 June 2023.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ Deepak Raj, 5 Best Tools For Direct Marketing With Advantages in Detail (18 November 2022) <<https://findinsights.in/tools-for-direct-marketing/>> accessed 6 June 2023.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ *ibid.*

- that an organisation can rely on it.⁶²
- iii. **E-mail Marketing** - This is a cost effective tool in direct marketing and in this case, a company contacts customers by sending email messages to them.⁶³ A customer may subscribe to a company's email list or companies may opt to purchase a list of verified customer's emails through a mailing list service.⁶⁴ Examples of email marketing include electronic newsletters, advertisements and promotional emails.
 - iv. **Mobile Marketing** - This refers to any promotional activity that occurs on smartphones and other handheld devices that include tablets and other mobile phones.⁶⁵ The methods that marketers may use to reach out to potential buyers include messages like SMS, mobile-optimized ads, mobile applications and push notifications.⁶⁶ The mobile applications may for instance automatically detect an individual's location and display a suitable promotion message.⁶⁷
 - v. **Online Marketing** - This is also referred to as internet marketing and it is 'an art and science of selling products and services over the internet.'⁶⁸ The art involves identifying marketing strategies that are appealing to the target audience and translating them into sales while science entails research and analysis essential to measure the success of those strategies.⁶⁹ Some of the methods of conducting online marketing include the use of social media sites like Facebook, Instagram or twitter and also the use of search engine optimization (SEO).⁷⁰
 - vi. **Catalogue Marketing** - This involves the creation of products or merchandise catalogues by a seller then selling directly to a customer.⁷¹ They are usually in printed form but can be distributed online or through digital channels.⁷²
 - vii. **Direct Response Marketing** - This type of marketing is intended to evoke an instant response by encouraging potential customers to take a specific action.⁷³ Some of the actions that potential customers may take include calling a number or visiting a website address. For example, some television advertisements include a toll-free marketing number that customers can call to buy a product that has been advertised.⁷⁴

62 ABCofMarketing (n 55).

63 *ibid.*

64 Indeed, 11 Types of Direct Marketing (10 March 2023) <<https://www.indeed.com/career-advice/career-development/types-of-direct-marketing>> accessed 6 June 2023.

65 Adjust, What is Mobile Marketing? <<https://www.adjust.com/glossary/mobile-marketing/>> accessed 6 June 2023.

66 *ibid.*

67 ABCofMarketing (n 55).

68 Susan Ward, What is Online Marketing? (15 February 2023) <<https://www.thebalancemoney.com/online-marketing-2948352>> accessed 6 June 2023.

69 *ibid.*

70 *ibid.*

71 MBASKool, Catalogue Marketing (20 January 2022) <<https://www.mbaskool.com/business-concepts/marketing-and-strategy-terms/1586-catalogue-marketing.html>> accessed 6 June 2023.

72 *ibid.*

73 MarketingEvolution, Direct Response Marketing and Advertising (20 July 2022) <<https://www.marketingevolution.com/marketing-essentials/direct-response>> accessed 6 June 2023.

74 ABCofMarketing (n 55).

3.3 Features of Direct Marketing

The features of direct marketing that distinguish it from other types of marketing include:

- i. **Targeting** - Through targeted messages, marketers can attract and engage customers since targeted messaging is more likely to be directed to the intended audience compared to general mass messaging.⁷⁵ Basically, targeting enables marketers to focus on sending promotional messages to interested customers.
- ii. **Audience Segmentation** - This entails dividing an audience based on similar characteristics for direct marketing purposes.⁷⁶ This enables marketers to create personalised promotional messages suitable for the categorised audience.⁷⁷
- iii. **Lack of an intermediary:** Intermediaries act as middlemen in the various stages of the distribution chain. This is common in the traditional mode of marketing for example in real estate transactions agents may represent the landlord and in return they are paid a commission for each transaction that they have mediated. Unlike this form of marketing that requires an intermediary, direct marketing does not need one since they can contact customers directly through the use of multiple channels and this also helps in cutting extra costs.⁷⁸
- iv. **Customer oriented:** This means that marketers can identify the preferences of a customer and 'provide tailored solutions to them.'⁷⁹ This creates a deeper connection between the business and the audience.
- v. **Track of performance:** Since direct marketing enables a business to engage directly with customers, it can monitor, analyse and compare the result of a marketing campaign to a previous one.⁸⁰



⁷⁵ StudySmarter (n 50).

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ Lapaas, *What is Direct Marketing? Complete Guide* <<https://lapaas.com/direct-marketing/>> accessed 6 June 2023.

3.4 Benefits of Direct Marketing

The transition to modern market relations by businesses globally will also force SMEs in Kenya to adapt to the new conditions and developments in the marketing sector. The emergence of customers' need for more individual services requires marketers to use modern methods of product marketing.⁸¹ The use of modern technologies enables companies to personalise products, services, communications and even prices thus creating favourable conditions for implementing direct marketing concept in many markets.⁸²

Direct Marketing is a useful tool for SMEs because it can enable them to:

- i. Focus limited resources where there is a likelihood of producing results.⁸³
- ii. Measure campaigns success accurately by analysing responses.⁸⁴
- iii. Test the marketing audience to assess the best response rates before developing a full campaign.⁸⁵

Some of benefits that SMEs can derive from the use of direct marketing include:

- i. Flexible targeting: Direct marketing enables businesses to identify, isolate and communicate with well-defined markets.⁸⁶
- ii. Multiple Uses: Apart from selling, direct marketing can be used to: test new and trial products, reward existing customers so as to gain their loyalty, collect data for future marketing campaigns and segment a customer base.⁸⁷
- iii. Cost-Effectiveness: The tools used for direct marketing reduce the costs incurred in marketing for instance e-mail marketing.⁸⁸
- iv. Rapid Delivery: Direct marketing is swift and also flexible in achieving results.
- v. Targeting of Messages: Direct marketing enables marketers to target different messages suitable for different recipients.⁸⁹
- vi. Relationship Building: Direct marketing enables marketers to initiate and develop meaningful dialogue with new customers.⁹⁰
- vii. Testing Capability: Direct marketing enables marketers to find the most suitable marketing tool by testing severally and narrowing it down.⁹¹
- viii. Ease of Management: Marketers are able to gain greater control and accountability compared to other marketing techniques.⁹²

81 Olha Matviets and Viktoriia Kipen, *The features of direct marketing and personal selling as a form of marketing communications* (18 June 2021) <<http://elar.khmnu.edu.ua/bitstream/123456789/11085/1/1/D0%91%D0%BE%D0%BB%D0%B3%D0%B0%D1%80%D1%96%D1%8F%20%D0%B7%20%D0%9A%D1%96%D0%B-E%D0%B5%D0%BD%D1%8C%202021.pdf>> accessed 6 June 2023.

82 *ibid.*

83 Dr. K.S. Chandrasekhar and Vinay Raj, 'Direct Marketing and Importance of Pitch Processing' (2014) 3(2) *International Journal of Advanced Research in Management and Social Sciences* 25-38.

84 *ibid.*

85 *ibid.*

86 *ibid.*

87 *ibid.*

88 *ibid.*

89 *ibid.*

90 *ibid.*

91 *ibid.*

92 *ibid.*

4. LEGAL ELEMENTS IN DIRECT MARKETING

4.1 Direct Marketing Laws in Kenya

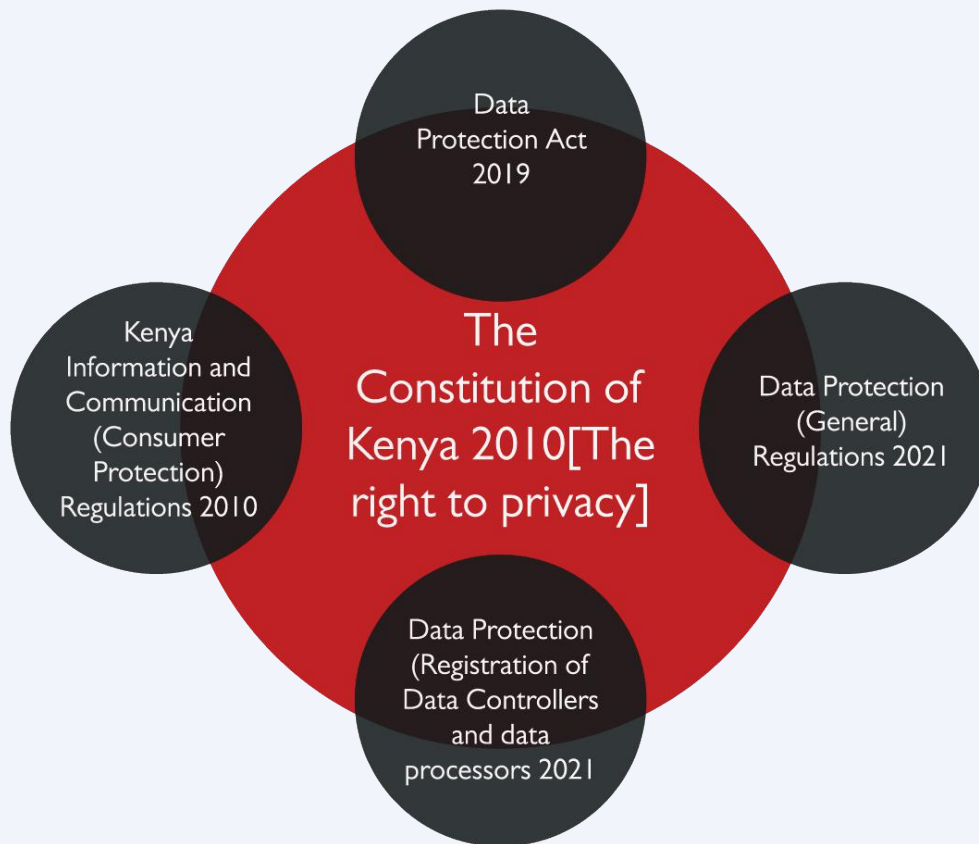


Figure 2: An illustration of direct marketing laws in Kenya and their interconnection with the Constitution of Kenya

In Kenya, SMEs should be aware of the legal frameworks applicable to direct marketing so as to ensure compliance. 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 Consumer Protection Regulations). The Constitution plays a fundamental role since it has rights accorded to every citizen and these rights include the right to privacy which plays an important role in direct marketing practices, especially where the marketing comprises 'unsolicited communications.'⁹³

The Data Protection Act 2019 gives effect to the right to privacy provisions found in the Constitution of Kenya 2010. It also makes provisions for the regulation of the processing of personal data which includes the rights of data subjects and the obligations of data

⁹³ Cliffe Dekker Hofmeyr, *Direct Marketing in Kenya* < <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/news/publications/2021/TMT/Downloads/Technology-Media-Telecommunications-Alert-22-November-2021.pdf> > accessed 29 May 2023.

controllers and data processors.⁹⁴KICA Consumer Protection Regulations discusses direct marketing in the context of unsolicited communications. The Data Protection (General) Regulations 2021 and The Data Protection (Registration of Data Controllers and Data Processors) 2021 are subsidiary legislations to the Data Protection Act 2019 and therefore supplement the provisions already provided in the Data Protection Act. These laws are examined in detail below.

4.1.1 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.'⁹⁵Unsolicited communication is communication that has not been requested by the recipient. It may include SMS messages, electronic mail or even web based advertisements.

4.1.2 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".⁹⁶ Since marketers are involved in the collection and processing of personal data, they are regarded as data controllers or data processors.⁹⁷ The Data Protection (General) Regulations provides that where a data controller or data processor uses personal data belonging to a data subject to advance commercial or economic interests, the data controller or data processor shall be deemed to have used it for commercial purposes.⁹⁸The Regulations also provide that direct marketing entails the following activities:

- i. Sending a catalogue through any medium addressed to a data subject.⁹⁹
- ii. Displaying an advertisement on an online media site where a data subject is logged on using their personal data.¹⁰⁰
- iii. 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

⁹⁴ The Data Protection Act 2019, preamble.

⁹⁵ Hofmeyr (n 93).

⁹⁶ Mutie Advocates (n 36).

⁹⁷ 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.'

⁹⁸ The Data Protection (General) Regulations 2021, regulation 14(1).

⁹⁹ *ibid* section 14 (2) (a).

¹⁰⁰ *ibid*.

subject.¹⁰¹

As a data processor, a marketer should realise that each processing activity requires a legal basis such as ‘consent or legitimate interest’.¹⁰² The processing of personal data should also be in compliance with general data protection principles. These principles are contained in section 25 of the Data Protection Act, 2019 and they include; processing in accordance to the right to privacy; lawful, fair and transparent processing; collection of personal data for specified, explicit and legitimate purposes; data minimization, data accuracy and storage limitation.

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

KICA Consumer Protection Regulations discuss direct marketing in the context of unsolicited communications. It provides 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.¹⁰³ Also, the sending of emails for direct marketing purposes while concealing the identity of the sender is regarded as an offence.¹⁰⁴ 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’.¹⁰⁵ The regulations however do not regard it as an offence where the direct marketing schemes have defaulted on the opt-in provision.¹⁰⁶

4.1.4 The Data Protection (Registration of Data Controllers and Data Processors) Regulations 2021

The Regulations supplement section 18 of the Data Protection Act which deals with the registration of data controllers and data processors. The Regulations provide the procedure involved in the registration of data controllers and data processors. This is important especially if an SME mainly uses direct marketing techniques to target prospective customers. The third schedule of the regulations provides that businesses which are wholly or mainly in direct marketing should register as data controllers or data processors.

¹⁰¹ *ibid.*

¹⁰² 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

¹⁰³ The Kenya Information and Communication (Consumer Protection) Regulations 2010, regulation 17 (1).

¹⁰⁴ *ibid* section 17(2).

¹⁰⁵ *ibid* section 17 (4).

¹⁰⁶ Hofmeyr (n 93).

4.2 Type of data suitable for Direct Marketing

SMEs that utilise direct marketing techniques to approach customers should realise that they cannot use any kind of data for direct marketing purposes. Regulation 14 of the Data Protection (General) Regulations 2021 provides that data controllers or data processors may only use personal data for direct marketing purposes.¹⁰⁷ According to the Regulations, marketing is not direct where personal data has not been used or disclosed to identify or target particular recipients.¹⁰⁸

4.3 Categories of personal data

Personal data may be divided into two categories namely:

- i. **General personal data:** This is concerned with personal identification details like name, date of birth, residence, mobile number and email address.
- ii. **Sensitive personal data:** This is information that is considered as sensitive and that should be processed with extra care. It includes genetic data, biometric data, health data, sexual orientation, ethnic origin, political opinions and religious or philosophical beliefs.¹⁰⁹

The use of sensitive personal data for direct marketing purposes is prohibited.¹¹⁰ The Data Protection (General) Regulations 2021 provide that data processors or data controllers may use personal data other than sensitive personal data for direct marketing purposes.¹¹¹

4.4 Collection of Personal Data for Direct Marketing Purposes

The Data Protection Act 2019 provides that personal data shall not be used for commercial purposes unless the person has obtained express consent from the data subject or the person is authorised to do so and the data subject is aware of such use.¹¹² For direct marketing purposes, collection of personal data may be done where:

- i. It is obtained directly from the data subject.¹¹³
- ii. It is already contained in a public record.¹¹⁴
- iii. A data subject has consented to its collection from another source.¹¹⁵
- iv. A data subject has intentionally made the data public.¹¹⁶

¹⁰⁷ Mutie Advocates (n 36).

¹⁰⁸ Data Protection (General) Regulations 2021, regulation 14(3).

¹⁰⁹ UCL, Personal Data Overview <<https://www.ucl.ac.uk/data-protection/guidance-staff-students-and-researchers/practical-data-protection-guidance-notice/personal-data>> accessed 9 June 2023.

¹¹⁰ Mutie Advocates (n 36).

¹¹¹ Regulation 15(1).

¹¹² Section 37(1) (a) and (b).

¹¹³ Data Protection Act 2019, section 28(1).

¹¹⁴ Ibid section 28 (2) (a).

¹¹⁵ Ibid section 28 (2) (c).

¹¹⁶ Ibid section 28 (2) (b).

SMEs that collect personal data for direct marketing purposes should be transparent with the customers since they have a “right to be informed” as to how their personal information will be used. Before collection of personal data, the Data Protection Act 2019 provides that data controllers or data processors (in this case SMEs) are required to inform data subjects of a list of information that they should be aware of. Some of this information includes:

- i. The rights of data subjects.¹¹⁷ An example would be the right to object to direct marketing.¹¹⁸
- ii. The fact that personal data is being collected.¹¹⁹
- iii. The purpose for collecting the personal data.¹²⁰ An example would be in order to send postal marketing or profile customers’ buying habits.¹²¹
- iv. The third parties that personal data will be transferred to.¹²²
- v. Entities that may receive the collected personal data for instance other organisations for direct marketing purposes.¹²³

The Data Protection (General) Regulations 2021 also provide that data controllers or data processors may collect personal data indirectly from any other person, publications or databases and information associated with web browsing.¹²⁴ Where personal data is collected indirectly, the data controller or data processor is required to inform the data subject of the collection within fourteen (14) days.¹²⁵ The Regulations also provide that the new purpose for collecting personal data should be compatible with the initial purpose.¹²⁶ If the new purpose is not compatible with the initial purpose then a data controller or data processor is required to obtain fresh consent from the data subject.¹²⁷ An example of this is where a business X obtains from a database customer data like mobile phone numbers or email addresses whose initial purpose was to process orders. If the business plans to use the collected data for direct marketing purposes like sending promotional offers, they are supposed to obtain explicit consent from the customers.

In cases where a business obtains personal data for direct marketing purposes from a data broker, it is upon the data broker to prove that free, prior and informed consent was obtained from individuals that will receive the targeted messages.¹²⁸ Data brokers should also inform data subjects that their personal data will be used for marketing or other commercial purposes.¹²⁹ An SME that uses data broking services to engage

¹¹⁷ Data Protection Act 2019, section 29 (a).

¹¹⁸ ICO, Direct marketing detailed guidance <<https://ico.org.uk/media/for-organisations/direct-marketing-guidance-and-resources/direct-marketing-guidance-1-0.pdf>> accessed 9 June 2023.

¹¹⁹ Data Protection Act 2019, section 29 (b).

¹²⁰ Ibid section 29 (c).

¹²¹ ICO (n 118).

¹²² Data Protection Act 2019, section 29 (d).

¹²³ Data Protection Act 2019, section 29 (e).

¹²⁴ Regulation 6(1) (a) (b) and (d).

¹²⁵ Regulation 6(3).

¹²⁶ Regulation 6(4).

¹²⁷ Regulation 6(5).

¹²⁸ Laibuta (n 34).

¹²⁹ Ibid.

in direct marketing should ensure that the personal data being offered complies with the Data Protection Act 2019. An SME should be satisfied that the personal data was collected lawfully and fairly and that the individuals involved understood that their personal information would be shared for direct marketing purposes.¹³⁰



¹³⁰ ICO, Organisations using marketing services of data brokers: what you need to know <<https://ico.org.uk/for-organisations/direct-marketing-and-electronic-communications/organisations-using-marketing-services-of-data-brokers/>> accessed 20 June 2023.

5. DATA PROTECTION PRINCIPLES

Some of the principles that SMES should consider when handling personal data include:

5.1 Lawful, Fair and Transparent Processing

SMEs that 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.’¹³¹ Lawful processing occurs where a data subject consents¹³² or if it is essential for the performance of a contract or compliance with a legal obligation.¹³³ It also occurs where the purpose is to protect the data subject’s vital interests¹³⁴ or to perform a task carried out in the public interest¹³⁵ and also for legitimate interests’ purposes.¹³⁶

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.¹³⁷ Further, the Data Protection (General) Regulations provides that the data subject’s consent is required for direct marketing purposes.¹³⁸ A marketer should therefore be certain that a data subject has consented and cannot assume through interactions with a customer(s).¹³⁹ 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.¹⁴⁰ In order to ensure compliance, an opt-in option should be given in the data collection process.¹⁴¹

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.’¹⁴² 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

¹³¹ Data Protection Act 2019, section 25 (b).

¹³² *ibid* section 30 (1) (a).

¹³³ *ibid* section 30 (1) (b) (i) and (ii).

¹³⁴ *ibid* section 30 (1) (b) (iii).

¹³⁵ *ibid* section 30 (1) (b) (iv).

¹³⁶ *ibid* section 30 (1) (b) (vii).

¹³⁷ *ibid* section 32(1).

¹³⁸ 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 purpose of direct marketing where the data subject has to the use or disclosure of personal data for the purpose of direct marketing.’

¹³⁹ David Normoyle, Data Privacy for Marketers (20 June 2022) < <https://digitalmarketinginstitute.com/blog/data-privacy-for-marketers> > accessed 3 June 2023.

¹⁴⁰ Data Protection Act, 2019 section 32 (2).

¹⁴¹ Normoyle (n 139).

¹⁴² Data Protection (General) Regulations 2021, regulation 15 (d) and (e).

with disability.

5.2 Purpose Limitation

This principle requires data controllers or data processors to collect personal data for ‘explicit, specified and legitimate purposes’.¹⁴³ Therefore, the personal data should be used for purposes ‘informed to the user.’¹⁴⁴ For instance, if data is collected for marketing purposes, it cannot be used for research purposes.¹⁴⁵ In cases where a marketer wants to use the collected data for other purposes, he should obtain new consent from the data subject.¹⁴⁶

5.3 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.’¹⁴⁷ 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.¹⁴⁸

5.4 Data Accuracy

This principle mandates data controllers or processors to ensure that personal data is accurate and where necessary kept up to date.¹⁴⁹ SMEs involved in direct marketing 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.¹⁵⁰

5.5 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.’¹⁵¹ Any business 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.¹⁵² The policy should describe the kind of data that will be collected, reasons for collecting it and the storage period.¹⁵³

¹⁴³ Data Protection Act 2019, section 25 (c).

¹⁴⁴ Normoyle (n 139).

¹⁴⁵ *ibid.*

¹⁴⁶ Normoyle (n 139).

¹⁴⁷ Data Protection Act 2019, section 25 (d).

¹⁴⁸ Normoyle (n 139).

¹⁴⁹ Data Protection Act 2019, section 25(f).

¹⁵⁰ Normoyle (n 139).

¹⁵¹ Data Protection Act 2019, section 25 (g).

¹⁵² Normoyle (n 139).

¹⁵³ *ibid.*

5.6 Data Security, Integrity and Confidentiality

Any personal data that is collected needs to be adequately protected by the data controller or data processor. An SME 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.¹⁵⁴ 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.¹⁵⁵ A marketer should therefore keep this in mind when processing personal data.



¹⁵⁴ Normoyle (n 139).

¹⁵⁵ 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.

6. DIRECT MARKETING CONDITIONS/PERMITTED COMMERCIAL USE OF PERSONAL DATA

In order for direct marketing to take place, certain conditions as provided in the Data Protection General Regulations must be met by the data controller or data processor. These are:

- i. Collection of personal data from the data subject:** The data controller or data processor can use personal data collected from the data subject for direct marketing purposes.¹⁵⁶
- ii. Notification of the data subject:** A data subject should be notified that direct marketing is one of the purposes for which personal data is collected.¹⁵⁷
- iii. Consent:** A data subject should have consented to the use or disclosure of personal data for direct marketing purposes.¹⁵⁸
- iv. Opt-out mechanism:** A data controller or data processor should provide a simplified opt out mechanism for the data subject so as to request not to receive direct marketing communications.¹⁵⁹ The data controller or data processor may still use the data subject's personal data for direct marketing purposes where the data subject has not made an opt-out request.¹⁶⁰

The Data Protection General Regulations 2021 also prohibit transmission of communication for purposes of direct marketing through electronic mail where:

- i.** The identity of person on whose behalf the communication has been sent has been disguised or concealed.¹⁶¹
- ii.** A valid address is missing especially one that may be used by recipients to request that such communications cease.¹⁶²
- iii.** There is use of automated calling systems without human intervention.¹⁶³

It is important for SMEs to note that using personal data for direct marketing purposes without a data subject's consent is an offence and upon conviction one can get a fine not exceeding twenty thousand shillings or an imprisonment term not exceeding six months or both a fine and imprisonment.¹⁶⁴

¹⁵⁶ Regulation 15(1) (a).

¹⁵⁷ Regulation 15(1) (b).

¹⁵⁸ Regulation 15(1) (c).

¹⁵⁹ Regulation 15 (1) (d).

¹⁶⁰ Regulation 15(1) (e).

¹⁶¹ Regulation 15 (3) (a).

¹⁶² Regulation 15 (3) (b).

¹⁶³ Regulation 15 (3) (c).

¹⁶⁴ Regulation 15 (4).

7. CONSENT REQUIREMENTS

Under section 37(1)(a) of the Data Protection Act 2019 and Regulation 15 (1) (c) of the Data Protection General Regulations 2021 one should seek a data subject's consent to use or disclose his or her personal data for purposes of direct marketing. The elements of a valid consent are provided in section 2 of the Data Protection Act and it should be:

- i. Expressly provided by a data subject.
- ii. Unequivocal, free, specific and informed indication of the data subject's wishes.
- iii. Made through a statement or by a clear affirmative action signifying agreement to the processing of personal data.

The Data Protection Act 2019 provides that a data processor or data controller bears the burden of proof for establishing a data subject's consent to the processing of their personal data.¹⁶⁵ A data subject also has the right to withdraw consent at any time.¹⁶⁶ Some examples of lawful consent include 'clicking an opt-in button or link, signing a consent statement, responding to an email requesting consent and selecting from yes or no options.'¹⁶⁷

The action a data subject takes to agree to have their personal data processed should be through an opt-in mechanism and here the data subject takes a positive action to indicate that they have consented.¹⁶⁸ Opt-in consent is whereby one asks for someone's consent or permission before using their data for marketing.¹⁶⁹ KICA regulations provide that automated direct marketing schemes are to be based on an opt-in principle whereby potential subscribers are accorded the opportunity to accept or reject inclusion in a marketer's mailing list.¹⁷⁰ An opt-out consent is whereby 'consent is in the affirmative by default unless data subjects take action to withdraw it.'¹⁷¹ Opt-out options are offered to the consumer in two ways:

- i. **Pre-emptive opt-out** is whereby a consumer unticks or unchecks a pre-selected checkbox indicating their refusal to data processing.¹⁷²
- ii. **Consent withdrawal** is where users are provided with the option of withdrawing their permission or changing their preferences concerning treatment of their personal data.¹⁷³

¹⁶⁵ Section 32 (1).

¹⁶⁶ Section 32(2).

¹⁶⁷ Luke Irwin, *GDPR: When do you need to seek consent?* (6 January 2022) <<https://www.itgovernance.eu/blog/en/gdpr-when-do-you-need-to-seek-consent>> accessed 21 June 2023.

¹⁶⁸ Margaret Zalo, *Opt-in or Opt-out? Demystifying proposed consent requirements for direct marketing in Kenya* (16 June 2021) <<https://cipit.strathmore.edu/opt-in-or-opt-out-demystifying-proposed-consent-requirements-for-direct-marketing-in-kenya/>> accessed 21 June 2023.

¹⁶⁹ Securiti, *Opt In vs Opt Out Consent: What's the Difference?* (29 August 2022) <<https://securiti.ai/blog/opt-in-vs-opt-out/#:~:text=aim%20to%20achieve,What%20is%20Opt%20In%3F&use%20their%20data%20for%20marketing.>> accessed 21 June 2023.

¹⁷⁰ Regulation 17 (4).

¹⁷¹ Zalo (n 168).

¹⁷² Securiti (n 169).

¹⁷³ *ibid.*

Regulation 16(1) of the Data Protection General Regulations 2021 enumerates the features of an opt-out message and it provides that an opt-out mechanism shall:

- i. Have a visible, clear and an easily understood explanation of how one can opt out.
- ii. Include a simplified process of opting out.
- iii. Provide a communication channel that is direct and accessible.
- iv. Not be charged and if necessary require a data subject to incur a nominal cost.
- v. Be accessible to individuals with disability.

A data controller or data processor should also include a statement that is prominently displayed or draws the attention of a data subject to the fact that the data subject may make an opt-out request.¹⁷⁴In complying with an opt-out requirement, the Data Protection General Regulations 2021 provide that a data controller or data processor may:

- i. Clearly indicate in direct marketing messages that a data subject may opt out of receiving future messages by replying with a single word instruction in the subject line.¹⁷⁵
- ii. Ensure that there is an existing link prominently located in the email that takes a data subject to a subscription control centre.¹⁷⁶
- iii. Clearly indicate that a data subject may opt out from future direct marketing through replying to a direct marketing text message with a single word instruction.¹⁷⁷For example, TO OPT OUT SEND STOP TO 88888¹⁷⁸
- iv. Inform the recipient of a direct marketing phone call that they can verbally opt out from future calls.¹⁷⁹
- v. Include in each message instructions on how a data subject can opt out from future direct marketing.¹⁸⁰

A data controller or data processor is supposed to comply with an opt-out request within seven (7) days of receipt of the request.¹⁸¹ Once a data subject has opted out, the data controller or data processor should not send any future communication to the data subject.¹⁸²

¹⁷⁴ Data Protection General Regulations 2021, Regulation 17 (1).

¹⁷⁵ Regulation 17 (2)(a).

¹⁷⁶ Regulation 17 (2) (b).

¹⁷⁷ Regulation 17 (2)(c).

¹⁷⁸ Mutie Advocates(n 36).

¹⁷⁹ Regulation 17 (2)(d).

¹⁸⁰ Regulation 17 (2)(e).

¹⁸¹ Mutie Advocates (n 36).

¹⁸² *ibid.*

8. RIGHTS OF A DATA SUBJECT IN DIRECT MARKETING

When processing personal data for direct marketing purposes, a data controller or data processor should take into consideration that a data subject is entitled to certain rights as provided in the Data Protection Act 2019. These rights are enumerated in section 26 of the Act and they consist of the right:

- i. To be informed of how the personal data will be used.
- ii. To access personal data that is in the custody of a data controller or data processor.
- iii. To object to the processing of all or part of their personal data.
- iv. To correction of misleading or false data.
- v. To deletion of any false or misleading data belonging to a data subject.

In addition to these rights, the Data Protection Act 2019 also provides that a data subject also has the right to withdraw consent at any time.¹⁸³ Pertaining direct marketing specifically, the Data Protection General Regulations 2021 provides that the right to object apply as an absolute right where processing is for direct marketing purposes and this includes profiling to the extent that it is related to such direct marketing.¹⁸⁴ Where the data subject objects, personal data will not be used for direct marketing purposes.¹⁸⁵



¹⁸³ Data Protection Act 2019, section 32(2).

¹⁸⁴ Regulation 8(4).

¹⁸⁵ Regulation 8(5).

9. PROFILING IN DIRECT MARKETING

Profiling is defined in section 2 of the Data Protection Act 2019 and it entails any form of automated processing of personal data that consists of the use of personal data to evaluate certain personal aspects relating to a natural person. The purpose of profiling is to predict a person's behaviour and take appropriate decisions concerning it.¹⁸⁶ Customer profiling is a marketing strategy that uses data to form a picture of the ideal customer that will interact with a marketer's product or service.¹⁸⁷ Some of the strategies that can be employed in customer profiling include psychographic, customer typology and consumer characteristics.¹⁸⁸

Psychographic strategy is concerned with how, when and why people make purchases.¹⁸⁹ The consumer typology method analyses customers according to motivation, their mindset and how they engage.¹⁹⁰ This method distinguishes between the various categories of customers namely: loyal, discount, impulse and need-based consumers.¹⁹¹ Customer characteristics strategy on the other hand focuses on the traits that influence the buying decisions of a customer.¹⁹² It identifies characteristics like convenience-driven, connectivity driven and personalisation driven.¹⁹³ An example of profiling technologies is placing tracking cookies on a customer's hard drive so as to gather enough data to develop a customer's profile for direct marketing purposes.¹⁹⁴ Some of the harms associated with profiling customers include:

- i. Interference with customers' rights for instance right to adequate notice and also the right to give consent before collection of their personal data for commercial purposes.¹⁹⁵
- ii. Pervasive and non-transparent commercial observation of consumer behaviour for instance surveillance of customer's use of the internet.¹⁹⁶
- iii. Increased generation of unwanted commercial solicitations for instance online spam.¹⁹⁷
- iv. Data security concerns for instance there is a risk of identity theft.¹⁹⁸
- v. Customers risk being exposed to unfair commercial practices like price discrimination among customers.¹⁹⁹

¹⁸⁶ Mailjet, *GDPR and Profiling* <<https://www.mailjet.com/resources/learn/gdpr/profiling/#:~:text=GDPR%20and%20Profiling&text=Profiling%20is%20defined%20by%20more, and%20take%20decisions%20regarding%20it.>> accessed 22 June 2023

¹⁸⁷ SurveyMonkey, *What is Customer Profiling?* <<https://www.surveymonkey.com/market-research/resources/what-is-customer-profiling/#:~:text=Customer%20profiling%20is%20a%20marketing, to%20reach%20your%20ideal%20customers.>> accessed 22 June 2023.

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.*

ibid.

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ King Nancy J and Jessen Pernille Wegner, *Profiling the Mobile Customer-Privacy Concerns When Behavioural Advertisers Target Mobile Phones* <<https://ir.library.oregon-state.edu/downloads/vh53ww39w>> accessed 22 June 2023.

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.*

The Data Protection Act 2019 provides that where a decision is solely based on automated processing including profiling and significantly affects a data subject, then a data subject has the right not to be subject to that decision.²⁰⁰ An automated individual decision making is defined in the Data Protection General Regulations 2021 as a decision that is made by automated means without any human involvement.²⁰¹ The exemption for this is where the decision is necessary for performing a contract between the data subject and data controller, it is authorised by law and the data subject has consented.²⁰² The right to object to processing including profiling for direct marketing purposes is reiterated in regulation 8(4) of the Data Protection General Regulations 2021. The Regulations supplement the provisions of section 35 of the Data Protection Act by providing that a data controller or data processor should ensure that the rights of a data subject to oppose profiling, especially for marketing purposes are present.²⁰³ It is also important to note that profiling a child for direct marketing purposes is prohibited.²⁰⁴



²⁰⁰ Section 35 (1).

²⁰¹ Regulation 22(1).

²⁰² Section 35 (2) (a) (b) and (c).

²⁰³ Regulation 22(2) (c) (ii).

²⁰⁴ Data Protection General Regulations 2021, regulation 13 (2)(b).

10. PRIVACY POLICY & DIRECT MARKETING

A privacy policy is a legal statement that elucidates how a company collects, handles, processes and respects data subjects' (its customers) personal data on a website or app.²⁰⁵ Privacy policies might be referred by other names like privacy statement, privacy page, privacy notice or privacy information.²⁰⁶ Privacy policies are fundamental so as to comply with the applicable data privacy law and also to build trust between a business and its customers.

The Data Protection Act 2019 provides that a data subject has the right to be informed of the use to which their personal data is to be put.²⁰⁷ Additionally, Regulation 23 of the Data Protection General Regulations provide that a data controller or data processor shall develop, publish and regularly update a policy reflecting their personal data handling practices.

Therefore, an SME that is involved in direct marketing practices should publish a privacy policy on their website and mobile app if they have any. According to regulation 23(2) of the Data Protection regulations, the policy should include:

- i. The nature of personal data collected
- ii. How a data subject can access their personal data and exercise their rights
- iii. Complaints handling mechanisms
- iv. Lawful purposes for processing personal data
- v. Obligations or requirements in cases where personal data is to be transferred outside the country, to third parties or other data controllers or data processors that are located outside Kenya and if possible specify the recipients.
- vi. The data retention period and schedule.
- vii. Collection of personal data from children and the applicable criteria.



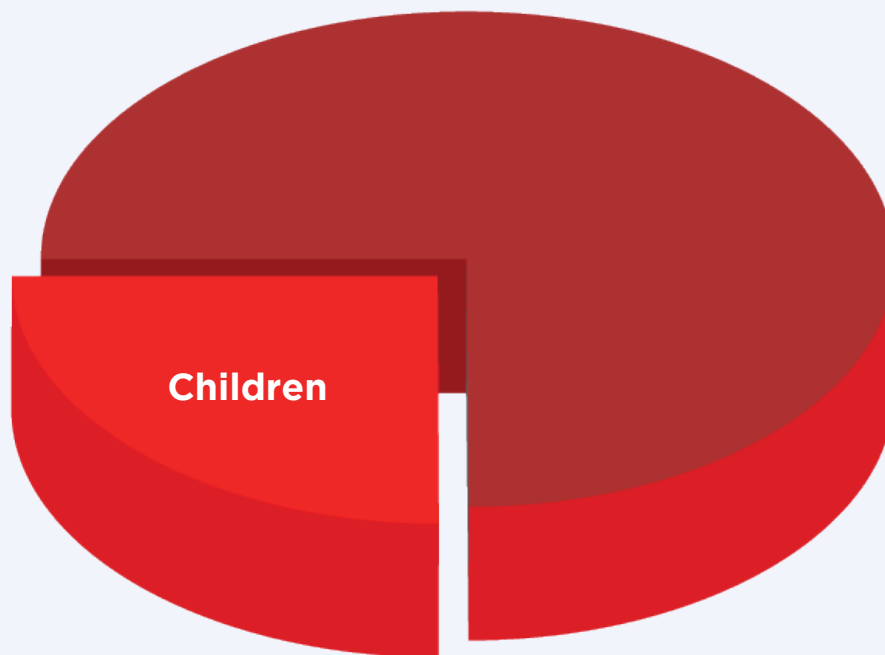
²⁰⁵ *ContractsCounsel, Privacy Policy* <<https://www.contractsounsel.com/t/us/privacy-policy>> accessed 22 June 2023.

²⁰⁶ *ibid.*

²⁰⁷ Section 26(a).

11. CUSTOMER SEGMENTS EXEMPTED FROM TARGETING

The Data Protection Act 2019 provides that a data controller or data processor shall not process personal data relating to a child unless the child's parent or guardian has given consent and the processing protects and advances the best interests of the child. Pertaining to direct marketing, the Data Protection General Regulations prohibit profiling a child for direct marketing purposes.²⁰⁸



²⁰⁸ Regulation 13 (2) (b).

12. REGISTRATION OF DATA CONTROLLERS AND DATA PROCESSORS

The Data Protection Act 2019 provides that a person shall not act as a data controller or data processor unless they have registered with the Data Commissioner.²⁰⁹ The Data Commissioner considers the following during registration namely: nature of industry, volumes of data processed, whether sensitive personal data is being processed and any other criteria that the Data Commissioner may specify.²¹⁰ The Data Protection (Registration of Data Controllers and Data Processors) Regulations 2021 supplement the provisions on data controllers and data processors provided in the Data Protection Act. The Regulations provide that a person shall register as a data controller if they determine the purposes and means for processing personal data.²¹¹ One can register as a data processor if they process personal data on behalf of the data controller excluding the data controller's employees.²¹² The Regulations also provide that one can register as both a data controller and data processor with regard to any processing operations and they shall pay the requisite fees.²¹³ The Data Protection (Registration of Data Controllers and Data Processors) Regulations 2021 also enumerate how registration should be done.

The Office of the Data Protection Commissioner published a Guidance Note on Registration of Data Controllers and Processors²¹⁴ to assist entities in determining whether they are Data Controllers or Data Processors. According to the Guidance Note, the Data Protection (Registration of Data Controllers and Data Processors) Regulations 2021 detail the requirements of registration including the entities that must register and those that are exempt. The Guidance Note is pivotal especially for SMEs involved in direct marketing that are not certain on whether they should register as data controllers or data processors. For instance, it lists a number of sectors that should be registered as data controllers or data processors. Some of these sectors include political canvassing, education, health administration, hospitality, direct marketing and many others.¹

²⁰⁹ Section 18(1).

²¹⁰ Data Protection Act 2019, section 18(2).

²¹¹ Data Protection (Registration of Data Controllers and Data Processors) Regulations 2021, Regulation 4(2) (a).

²¹² *ibid* regulation 4(2) (b).

²¹³ *ibid* regulation 4(3).

²¹⁴ Office of the Data Protection Commissioner, Guidance Note on Registration of Data Controllers and Data Processors <<https://www.odpc.go.ke/download/guidance-note-on-registration-of-data-controllers-and-data-processors/?wpdmdl=7665&refresh=649437b8af28a1687435192>> accessed 13 July 2023



13. DIRECT MARKETING OFFENCES

Legislations that encapsulate offences related to direct marketing include the Data Protection Act 2019, Data Protection (General) Regulations 2021 and KICA Consumer Protection Regulations. The Data Protection Act provides general offences on unlawful disclosure of personal data. According to the Act, a data controller who discloses personal data in a manner that is incompatible with the purpose of the data collection commits an offence.²¹⁵ Also, a data processor who discloses personal data without the authority of a data controller likewise commits an offence.²¹⁶ These provisions thus call for adequate protection of personal data especially by SMEs involved in direct marketing practices. The penalty for committing an offence or contravening the Act is a fine not exceeding three million shillings or an imprisonment term not exceeding 10 years or both.²¹⁷ The court may also order forfeiture of any equipment used in the commission of an offence or prohibit any act to stop a continuing contravention.²¹⁸

The Data Protection General Regulations specifically make it an offence to use personal data for commercial purposes without obtaining a data subject's consent.

²¹⁵ Section 72(1).

²¹⁶ Section 72(2).

²¹⁷ Section 73(1).

²¹⁸ Section 73(2)(a) and (b).

A fine not exceeding twenty thousand or an imprisonment term not exceeding six months or both a fine and imprisonment are the applicable penalties for such a case.²¹⁹ KICA Consumer Protection Regulations also make it an offence to use automated calling systems without human intervention, facsimile machines or electronic mail for direct marketing purposes without prior consent of a subscriber.²²⁰ Also, sending an electronic mail for direct marketing purposes while disguising or concealing the identity of the sender on whose behalf the communication is made or without a valid address is also an offence.²²¹ In cases where the appropriate penalty for an offence is not indicated, KICA Consumer Protection Regulation provide that a person will be liable on conviction to a fine not exceeding Ksh 300,000 or an imprisonment term not exceeding 3 years or both.²²²



²¹⁹ Data Protection General Regulations 2021, regulation 15(4).

²²⁰ KICA Regulations, regulation 17(1).

²²¹ KICA Regulation, regulation 17 (2).

²²² Regulation 23(3).

APPENDIX 1

Direct Marketing Checklist

The checklist below has been formulated in compliance with the Data Protection Act 2019 and the Data Protection General Regulations 2021. Businesses engaging in direct marketing should ensure that certain parameters are fulfilled in order to comply with the law. The thematic areas of this checklist form part and parcel of the essential requirements involved in direct marketing practices. The checklist intertwines provisions of both legislations cohesively thereby enabling marketers to comply with the law and also avoid sending unsolicited communication to potential customers.

Consent

- We give people the discretion to opt in.
- We use clear and easily understandable language.
- We name third parties whom the data may be shared with.
- We offer individuals the opportunity to opt-out.
- We specify the mode of communication (for example by text, email, phone etc.)
- We don't charge individuals who want to opt-out.
- We inform individuals that they can verbally opt-out from future direct marketing phone calls.
- We provide instructions on how individuals may opt-out from future direct marketing messages.
- We ensure individuals have given consent where their data has been collected from other sources.
- We list down individuals who opt-out.
- Where consent is withdrawn, we take appropriate action.

Recording Consent

- We keep a record of how we obtained consent from an individual.
- We keep a record of the information they were provided with.

Rights of a data subject

- We inform people reasons for collecting the data and how it will be utilized.
- We inform people that they have the right to withdraw consent.
- We inform individuals that they have the right object to the processing of all or part of their personal data.

Profiling

- We inform people how profiling personal data is conducted and the reasons for it.
- Individuals can opt-out.

Data handling practices

- We incorporate a privacy policy in our platforms.
- We collect only necessary data.
- We employ appropriate measures to protect personal data.
- We don't store personal data for longer than is necessary.



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