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POPI Act and Electronic Direct Marketing - YES Cold Calls are allowed



Direct Marketing is defined in the Protection of Personal Information Act (POPIA) as marketing aimed at an individual with the direct or indirect purpose of selling goods or services or to solicit a donation of some sort from the data subject.

In a previous article we defined and discussed *the different forms of direct marketing* as well as the general legislative guidelines around this type of marketing.

One form of direct marketing is Electronic Direct Marketing.

Since the enactment of the Protection of Personal Information Act (POPIA) there have been concerns on how legislation would affect general Electronic Direct Marketing practices.

A contentious question that we also address is whether what is popularly known as **cold calling** would be affected by section 69 of POPIA. Some consumers still have a misconception regarding the legality of cold calling. The good news for telemarketers and consumers (in some cases) is: ***Yes, cold calling is still allowed under POPIA!*** Of course, there are rules that regulate the practice under the ***Protection of Personal Information Act*** in addition to other legislation that was in place before POPIA was introduced.

In this article, we aim to clarify uncertainty surrounding Direct Marketing with the focus on Electronic Communication.

What is Electronic Communication?

POPIA defines Electronic Communications as any text, voice, sound or image message sent over an electronic communication network which is **stored** (yes, one word in law can make a big difference) in the network or in the recipient's terminal equipment until it is **collected** (another simple but important word) by the recipient.

What is Electronic Direct Marketing?

The distinction between Electronic Direct Marketing and other forms of Direct Marketing is important – the critical section of POPIA which regulates Electronic Direct Marketing only applies to Direct Marketing which is conducted through Electronic Communication.

It is also important to distinguish between Electronic Communication that is targeted at a data subject (individual, rather than a group) and that which is done through mass media (targeted at a large audience). New trends in the social media space call for a proper distinction between these two forms of Electronic Communication.

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Section 69 of POPIA and the forms of Electronic Direct Marketing

Section 69 of POPIA gives us a glimpse into the various forms of Electronic Direct Marketing, including the following:

- e-mail, SMS, fax;

As technology keeps evolving, new forms have emerged which include, Social Media Direct Messages (DMs) and push notifications. The list is not exhaustive as technological innovations keep blurring the lines between electronic mass media communication and Electronic Direct Marketing. Trying to determine if the following trends fall under the categorisation of section 69 of POPIA may be a challenge:

- livestreams; display banners; geo tags, etc

Electronic Communication - ‘stored’ vs ‘collected’

We pointed out two important words in the definition of Electronic Communication which must be read with section 69 of POPIA: **‘stored’** and **‘collected’**. It is crucial to always query the existence of these two words before classifying a business practice as Direct Marketing through Electronic Communication.

There is a lot of activity on social media platforms but only a few of these activities will fall under Electronic Direct Marketing if we apply these two words strictly.

- To use a simple analogy: ***Imagine social media platforms as physical streets, roads or the highways that we walk or drive on in our day-to-day activities, and scrolling as the act of travelling on these “streets”.***
- Data subjects will come across a lot of content as they navigate these social media “streets”. Such content is seldom, if ever, targeted at an individual (it is made available to one data subject as well as countless others who happen to pass through that street), nor does it meet the criteria of “store” and “collect” mechanisms as defined by POPIA. We all happen to be seeing the content because we are passing (scrolling) through that “street”/”road” as we would adverts and banners on the highways and roads.

Most of us are being exposed to the content because of our online activities and in some instances, it is a matter of exposing ourselves to the content for various reasons. For this reason, they satisfy the concept of mass media consumption rather than the individualist nature of Electronic Direct Marketing.

Solicited and Unsolicited Direct Marketing through Electronic Communication

According to section 69 of POPIA, Direct Marketing through Electronic Communication is Unsolicited unless–

1. the data subject (the recipient) has given consent;

OR

2. the data subject is a customer of the responsible party (the sender);

AND

a) the contact details of the data subject were obtained during the sale of the responsible party's **own similar** product or service

AND

b) the data subject was given an opportunity to object to Direct Marketing–

- when the contact details were collected

AND

- on every occasion of the Electronic Direct Marketing Communication sent to the data subject.

Our next blog in this four-part series will explain more on the rules on opt-on and opt-out.

Does Cold Calling fall under Direct Marketing?

Cold calling is defined as the sales technique used by telemarketers whereby they call "individuals who have not previously expressed interest in the offered products or service". It is basically Unsolicited Direct Marketing through telephone calls.

- Cold-calling or any Direct Marketing done through telephone calls does not fall under the definition of Unsolicited Electronic Direct Marketing as defined by section 69 of POPIA.
- Messages are not stored on an electronic system or server and the recipient does not need to collect the message. SMSs, however, would fall under Electronic Direct Marketing as stated before.

Does it mean that this business practice can be applied in an unbridled manner? No, this is not the case! It is reassuring, however, that when POPIA was enacted, considerable attention was given to the telemarketing industry which contributes greatly to the growth and sustainability of the South African economy.

We all have to make that first phone call at some point and there are rules around this. Look out for our guide to telemarketing in the near future!

In conclusion

Direct Marketing through Electronic Communication is central to industry and in this age of technology, its role in the growth of sales and business survival cannot be overstated. *The introduction of POPIA means that companies must be more vigilant in their use of this business practice in order not to upset their prospective and current customers and, so doing, suffer reputational damage.* We advise businesses to formulate a marketing strategy which breaks down the categories of Direct Marketing best suited to their industry and also identify current and prospective customers into categories and ensure that their contact records are filed separately. Ensure you have a compliance framework for implementing the Direct Marketing strategy together with the relevant consent forms.

SERR Synergy gives holistic guidance on how to deal with all aspects of Information Compliance which helps industry to focus on their core business while being reassured that they do not find themselves in Compliance woes. Make sure you don't miss our other article where will break down the rules around **opt-in** and **opt-out**.

About the Author: Pedzisai Maririmba joined SERR Synergy as a Learnership Project Manager in 2016. She then moved to the Information Compliance Department where she now serves as an Information Compliance Advisor. She is an Admitted Attorney of the High Court of South Africa and holds an LLM from the University of Pretoria, an LLB from UNISA and a BSc (Hons) in Media and Society Studies from the Midlands State University. Pedzisai is passionate about Legal Compliance encompassing POPIA, PAIA, Consumer Protection and Cyber Security.

Sources:

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