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# Excessive or not, it's the law

## Corporate new year's wishes at risk under GDPR European privacy rules

**2018 was the year of entry into force of the GDPR, a piece of legislation that brought about significant changes to the way in which personal data are to be handled. As many contact details and email addresses of your business contacts in the EU will undoubtedly fall within the scope of protection of the GDPR, the GDPR may also impact your practice of sending out corporate new year's wishes. As many of the wishes we have received seemed to lack one or more essential points to be GDPR-compliant, now may be a good time to sit down with your communications team to check whether you have been doing it right!**

Season's greetings are likely to be considered as a form of direct marketing. Although generally intended to wish a specific individual well, they also serve as a gentle reminder for the recipient of the existence of your organization and the goods and services you have to offer. Direct marketing is considered to have a high privacy invasive potential and is therefore highly regulated by the European Union.

### Corporate new year's wishes to individuals

Nevertheless, some good news to start off with: the GDPR only applies to your corporate new year's wishes! The GDPR explicitly contains an exception for data processing for purely personal or household activities and therefore its rules do not apply to season's greetings you send to your family or friends.

Moreover, the GDPR only aims to protect contact details that relate to an identifiable natural person. Data that do not relate to an individual but rather to a corporate entity

are not protected by the GDPR. The rules explained below will for example not apply to wishes sent to an email address such as info@company.com as this email address usually cannot be traced back to a specific individual.

### Need for legitimate processing ground

One of the key principles of the GDPR is that you can only process or use personal data if you have a legitimate ground to do so. The legitimate processing grounds are exhaustively listed in Article 6 GDPR. The sending of new year's wishes can either be based on informed, opt-in consent from the data subject (Article 6.1(a) GDPR) or, alternatively, on the legitimate interests pursued by the sender (Article 6.1(f) GDPR).

As season's greetings are intended as a friendly surprise, having to get prior opt-in consent from the data subject before being able to send out your wishes is often undesirable and sometimes not even lawful<sup>1</sup>. In addition, relying on consent as processing ground also poses a huge administrative burden on your organization as you must record when consent was given and/or withdrawn. Unless you have already obtained a general GDPR-compliant consent for sending all kinds of direct marketing messages to the data subject, using consent as a processing ground is often not ideal.

Relying on legitimate interests, on the other hand, requires a balancing act between the interests pursued by the sender and the potential harm to the fundamental rights and freedoms of the recipient data subject. This means that, before being able to use your legitimate interests as processing ground, you will need to prepare a so-called

legitimate interest assessment report. In such report you must amongst others document that the data subject would reasonably expect to receive new year's wishes from you, that your use of the data subject's contact details is proportionate and that it has minimal privacy impact. In Recital 47 the GDPR explicitly acknowledges that the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest, however, also specifying that such legitimate interest is more likely to exist where the data subject and the sender already are in a business relationship together.

In any case, whatever processing ground you rely on, when personal data are processed for direct marketing purposes, the data subject has an absolute right to object to receive any further marketing communication from you at any time (i.e. the right to opt-out or unsubscribe). When a data subject exercises his/her opt-out right, you cannot send him/her any future marketing communication, including future new year's wishes.

### Be transparent

The GDPR also puts transparency high on the banner. Article 13 GDPR, for example, explicitly requires you to communicate to the data subjects on the intended use of their personal data, as well as the legitimate processing ground you would base such use on. Such communication must happen at the moment the personal data are collected and is most frequently done by providing the data subjects with a privacy notice.

Ideally, your privacy notice is made as

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specific and detailed as possible, especially when it comes to privacy sensitive topics such as direct marketing. If you already know up-front that you would like to use contact details of your customers to send them new year's wishes, it is recommended to inform them of this fact in your privacy notice. At the very least, your privacy statement should contain a more general statement that the data subject's contact details may be used for direct marketing purposes.

If your privacy notice does not contain such general or specific statement referring to the (potential) use of the data subject's contact details for direct marketing purposes, you will need to inform the data subject in another way prior to sending out your wishes.

## Additional rules for electronic messages

For new year's wishes sent electronically (e.g. via email, text message, Whatsapp, Facebook or Skype) some additional rules will have to be considered. These rules follow from the ePrivacy Directive (i.e. Directive 2002/58/EC on privacy and electronic communications) read together with the GDPR and the new proposal for an ePrivacy Regulation.

Article 13 ePrivacy Directive allows you to send electronic direct marketing messages only to data subjects who have provided you with their prior and informed opt-in consent. In other words, for electronically sent wishes consent of the data subject (Article 6.1(a) GDPR) is in principle the only legitimate processing ground. But there is one exception to this rule...

Where all of the following conditions are met, it is possible to send electronic new year's wishes without the prior consent of the data subject (and thus to rely on your legitimate interests instead):

- (i) You have obtained the electronic contact details directly from the data subject in the context of a prior sale of a product or a service (i.e. the data subject is already your customer);
- (ii) You use these electronic contact details for direct marketing of you own similar products or services (i.e. you send out wishes to promote the organization with whom the data subject has an existing customer relationship);
- (iii) Data subjects are given the opportunity to object to receive communication from the sender both at the time when their

contact details are collected and on the occasion of each further communication (i.e. each electronic message you send, must contain an unsubscribe button).

It is clear from these conditions that this so-called "existing customer exception" or "soft opt-in rule" can only be used when you have obtained the electronic contact details directly from the data subject himself/herself. This exception cannot be used in relation to contact details purchased from third parties. The sending of direct marketing messages to data subjects whose details you have obtained from a marketing agency is therefore only possible if you (or the marketing agency) have received prior opt-in consent to do so from the data subject.

In addition, when combining the existing customer exception with the rules contained in Article 6 GDPR, it is clear that even although you do not need consent in this case, you will always need to draft a legitimate interest assessment report prior to sending out your mailing.

## Putting everything together

Please remember that neither the GDPR, nor the ePrivacy Directive, prevents you from sending out your season's greetings. Also, neither piece of legislation allows you to send out your season's greetings exclusively when you have received consent from the data subject to do so. Only when you like to send your wishes electronically and cannot rely on the existing customer exception, consent will be mandatory.

In addition, before sending out your season's greetings mailing, you might also want to give the following points some careful consideration:

- (i) Reflect on what you would like to use the data subject's contact details for before collecting them. It is recommended to communicate as specific and detailed as possible about the way in which you would like to use the data subject's contact details. In this respect, please also note that consent is only validly given if the data subject is informed about what he/she is consenting to. Preferably, such communication is done by providing a privacy notice when collecting the contact details or at least before using them to send out your wishes. For electronically sent wishes it can be considered good practice to include a link the privacy notice in your message.
- (ii) Try to select the best method to send out your new year's wishes. Season

greetings sent by post are less regulated than greetings sent by email because they do not fall under the additional rules of the ePrivacy Directive. If you only have a limited number of wishes to send, sending them by regular post might thus be a more convenient option. If you choose to send your wishes electronically, please always include an unsubscribe option directly in your email or message.

- (iii) Choose the best processing ground to match your sending method. Whatever processing ground you choose (in case of postal wishes) or must use (in case of electronic wishes), make sure you have put the right documentation and systems in place to prove your GDPR compliance before sending out your wishes. When relying on consent, good consent management is a must. When relying on legitimate interests, you must always have a legitimate interest assessment report on file.
- (iv) Irrespective of the sending method or processing, always respect the wishes of the data subject. When a data subject opts-out or unsubscribes from receiving your marketing communication or wishes, this must be respected at all times (i.e. no sending of season's greetings next year).

Many of the electronic greetings we received were lacking a reference to the privacy notice and/or did not contain any unsubscribe option. Although it is perfectly possible that from an internal perspective you are GDPR compliant (e.g. because you have a legitimate ground to send your greetings, you have your privacy in order and you have a solid consent management system), without these two very visible references the greetings themselves will not pass the GDPR test.

And last but not least, we would very much like to thank you for all your kind wishes (which we are happy to receive in the future as well) and off course also wish you all the best for 2019! 🍀

<sup>1</sup> You cannot email or text an individual to ask for consent to future marketing messages. That email or text is in itself is considered to be sent for direct marketing purposes and therefore is subject to the same direct marketing rules, meaning you must already have a legitimate ground to send such an email or message. If you want to send any kind of direct marketing, it is thus crucial to obtain the consent immediately upon collection of the personal data.