

DIRECT MARKETING IN KENYA

Direct Marketing Meaning: This is where a service or product provider sends personalized messages to customers informing them about their products or services. The messages are generally sent via emails, text messages, fax, or direct calls using electronic means.



THE GENERAL LEGAL FRAMEWORK ON DIRECT MARKETING IN KENYA

The Constitution of Kenya, 2010

The constitutional right to privacy affects direct marketing initiatives especially where such marketing comprises unsolicited communications and must therefore be considered before rolling out direct marketing initiatives.

The Data Protection Act, Number 24 of 2019 (DPA)

To the extent that any direct marketing techniques make use of personal data, the requirements that apply to the commercial use of personal data under the DPA would have to be observed.

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

The KICA Regulations also prescribe consent, opt-in and opt-out principle requirements as well as offences relating to direct marketing.



LEGAL REQUIREMENTS FOR DIRECT MARKETING IN KENYA

Constitution

Any direct marketing activity that may reasonably be deemed to infringe on the right to privacy should generally be avoided. The High Court has found that where valid consent to an action is provided by the privacy right holder, the action, once performed on the basis of such consent, would not be deemed to violate the right to privacy.

The DPA

The DPA prohibits the use of a data subject's personal data for commercial purposes (including for direct marketing) save where –

- the data subject expressly consents to the same; or
- any written law permits such commercial use, and the data subject is notified of the intended commercial use when their personal data is collected.

Where possible, persons who use personal data for commercial purposes must anonymize it to ensure the data subject is no longer identifiable.

KICA Regulations

General direct marketing requirement:

Under the KICA Regulations, generally, all automated direct marketing schemes must be based on an opt-in principle. Defaulting on this provision is however not designated as an offence.

Exception regarding further direct marketing in the communications sector:

Licensed entities within the communications sector may lawfully obtain their customers' email addresses in the context of sale of products or services and thereafter use these emails to directly market similar products or services. This is however subject to the provision of an opt-out arrangement at the point of collection and also at the point of subsequent use of the email addresses for direct marketing.

Direct marketing offences: The KICA Regulations however provide that the following acts of direct marketing constitute offences:

- the use of automated calling systems, facsimile or emails for direct marketing purposes without the recipient's prior consent; and
- sending direct marketing emails which conceal the sender or fail to provide for an opt-out mechanism for the recipient.

