

An abstract geometric pattern in the top-left corner consisting of thin red lines forming various triangles and polygons, with small red dots scattered throughout.

BLACK FRIDAY

How to send commercial
communications that comply with the
GDPR

An abstract geometric pattern in the bottom-right corner, similar to the one in the top-left, featuring thin red lines forming triangles and polygons with small red dots.



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Introduction

In the context of a **globalised society** with the constant expansion of the telecommunication networks, especially the internet, online purchases are becoming increasingly more common.

The official data shows a general increase in Internet retail sales since 2016, with a total of 15747.4 million pounds of expenditure through the network in 2018 alone (Statista, 2019).

With these numbers, it is not surprising that companies are seeking competitive advantages and hope to improve the efficiency of their business through this new vehicle for the transmission and exchange of information, goods, and services.

However, not everything is acceptable. In terms of data protection, it is especially relevant for companies that conduct online marketing actions to take into account the obligations arising from both the GDPR and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR), whose objective is to regulate the legal system of internet-related services and electronic procurement.



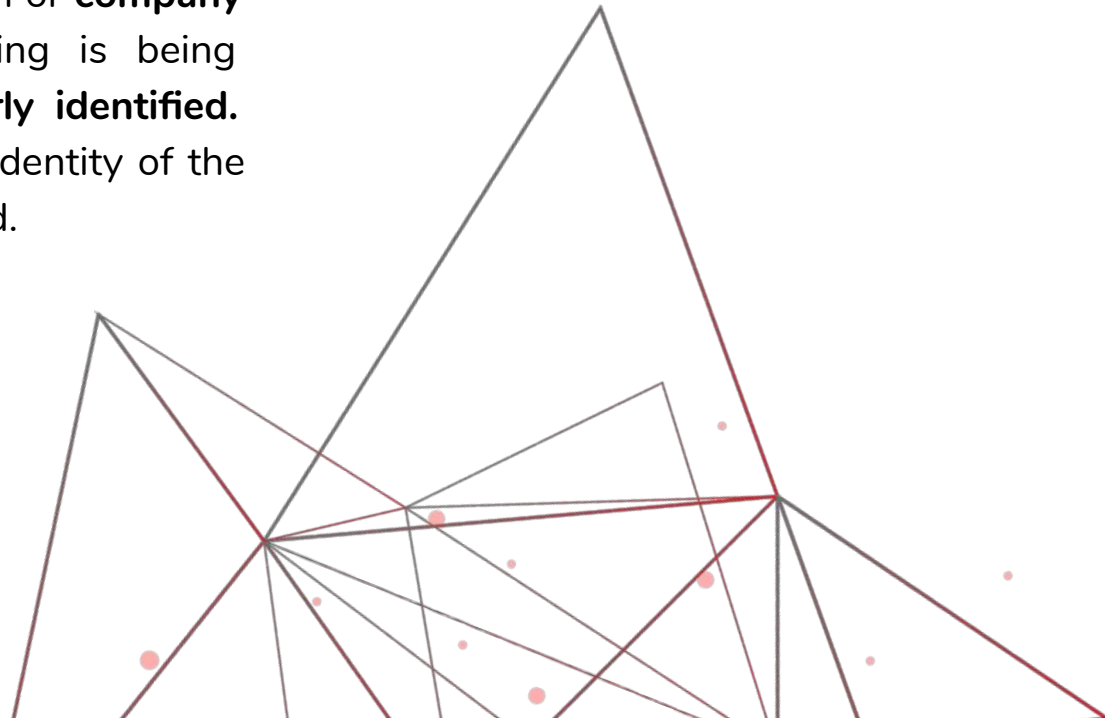


Online advertising

Regarding advertising on the internet, it is important to keep in mind the two conditions under which it is allowed.

- ▶ First, all advertising content must be presented as such and be **easily identifiable**, in a way that cannot be confused with other kinds of content.
- ▶ Along the same lines, the person or **company in whose name** the advertising is being carried out **must also be clearly identified**. Any advertising that hides the identity of the advertiser is expressly prohibited.

In addition, all advertising content that contains or includes offers, gifts, or discounts must make the conditions of access and participation available to users and these must be expressed in a clear and unequivocal manner.





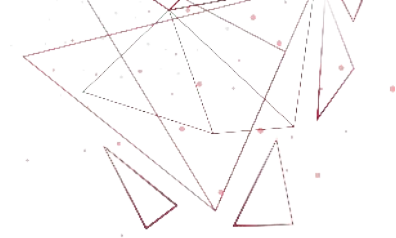
Sending commercial communications by e-mail or other similar means

With regard to commercial communications through electronic mail, the PECR is especially demanding in the requirements under which they are considered lawful. But, let us start at the beginning. What is meant by commercial communication?

A **commercial communication** is "a communication, in any form, designed to promote, directly or indirectly, the goods, services or image of any person pursuing a commercial, industrial or craft activity or exercising a regulated profession."

In this sense, any individual communication that is designed to promote the goods or services of the advertiser is considered commercial communication. However, communications related to the corporate image of businesses, organisations, or professionals – even if they do not include content regarding their business or professional activity, goods or services – are also considered commercial communications.





From here, according to the PECR, when an advertiser wants to direct some type of commercial communication to users, the advertiser must have the users' **express consent** under the terms of the GDPR. That is, the advertiser must have **freely given, specific, informed and unambiguous** consent provided through **clear affirmative action** on the part of the interested parties, and in addition, it must be **verifiable**.

EXPLICIT CONSENT

MUST BE



Freely given

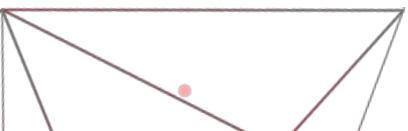
Informed

Specific

Unambiguous

Affirmative action

Verifiable





Additionally, the PECR adds the condition that, at the time of giving consent, the advertiser must **offer users the possibility to refuse using their contact details for the purposes of such direct marketing.**



Consequently, through the interaction of the PECR with the GDPR, the **tacit consent** obtained by pre-marked boxes or by abstract formulas or clauses is **PROHIBITED**, such as, “If the opposite is not said, we understand that we can send you commercial communications,” and so on.



As an exception, the PECR **PERMITS** the **transmission of commercial communication** without prior consent in the following **two cases**:

- ▶ When the user expressly requests it; and
- ▶ When there is a previous sale or negotiation relationship with the user, provided that the new communication is related to goods or services similar or equal to those contracted by the interested party.



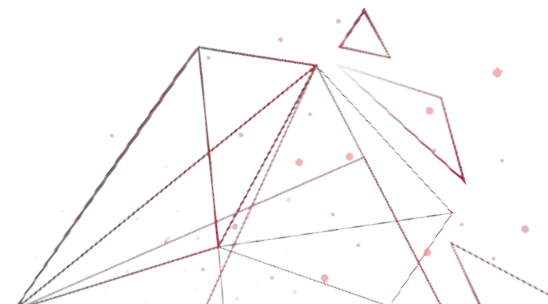
A practical application: Electronic commercial communications for Black Friday

As the famous Black Friday approaches, it is not surprising that companies are beginning to launch marketing campaigns announcing discounts on their products. Companies that want to promote themselves through individual electronic communications to their customers should be very cautious in the following areas:

1. **The advertiser** must be able to guarantee that the communication is made with the consent of the user who receives it in accordance with the conditions set forth in the previous section.

In order to be able to demonstrate that you have this express authorisation and give traceability to the data, it is recommended that you:

- ▶ Offer users, through standard forms on the website itself, the possibility of providing their email address to receive information about the products and/or services offered by the advertiser.
- ▶ Request, by means of an express clause in the contracting conditions, the client's consent to the reception of commercial communications, or ask the addressee a specific question about whether they accept the sending of commercial communications.





2. **Second**, regarding the **content** of the advertising communication:

The conditions required for the interested parties to be able to enjoy the offers, discounts, and/or promotions must be accessible and, in addition, must be expressed clearly and unequivocally.

- ▶ The message must make simple and free procedures available to users to refuse commercial communications and the processing of their data for marketing purposes.

- ▶ Likewise, the advertiser must provide information about these procedures that is accessible electronically.

It is important to respect the rights of the interested parties and comply with these simple requirements in order to avoid sanctions from the ICO.





Pridatect

