B2B DIRECT MARKETING
AND POPIA – WHAT'S THE DEAL?

1. OVERVIEW

There's been a lot of hoo-hah about POPIA's impact on direct marketing in the business-to-consumer (B2C) space. But what about POPIA's impact on direct marketing in the business-to-business (B2B) space? Many businesses in South Africa have other businesses as their leads or customers, so how does POPIA impact their lead generation and direct marketing models? It's a valid question to ask and not a question we have seen dealt with in much detail.

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2. BUT IN EUROPE…

It is very tempting to say, 'but in Europe under the GDPR, things in the B2B space have not changed'. This is true because technically, they haven't much in relation to B2B direct marketing rules.

Fun fact, the GDPR is not the primary text regulating electronic direct marketing in the EU. It is a law called the 'ePrivacy Directive'. Each EU state has a domestic version of this law. The ePrivacy Directive's rules on sending unsolicited electronic communications (on which section 69 of POPIA is based) only apply to communications sent to natural persons and not juristic persons. To bridge this gap, many EU states have specific rules about direct marketing to 'corporate subscribers', which then regulate B2B direct marketing activities. Some EU states do require prior consent before responsible parties can send electronic direct marketing to B2B leads or customers. In contrast, larger jurisdictions such as the UK and France do not require prior consent for sending electronic direct marketing to B2B leads or customers. In the UK and France, responsible parties can legally justify any natural person's personal information processed in relation to doing B2B direct marketing under the GDPR in terms of legitimate interest

So, under POPIA, can a responsible party follow the same approach as the UK and France in using legitimate interest as a legal justification to send electronic direct marketing to B2B leads or customers?

3. POPIA IS A 'SPECIAL' TYPE OF DATA PRIVACY LAW

The answer to the above question is sadly a 'no'. This is because as data privacy laws worldwide go, POPIA is a slightly different kettle of fish. Under POPIA, 'data subject' is defined as 'the person to whom personal information relates'. Additionally, 'person' under POPIA is defined as 'a natural person or a juristic person'. Section 69(1) of POPIA (which deals with unsolicited electronic direct marketing) states explicitly that:

The processing of personal information of a data subject for the purpose of direct marketing by means of any form of electronic communication, including automatic calling machines, facsimile machines, SMSes or e-mail is prohibited unless the data subject—(a) has given his, her or its consent to the processing; or (b) is, subject to subsection (3), a customer of the responsible party.

There's not much getting around it! It is there in plain black and white – section 69 of POPIA clearly applies to electronic direct marketing sent to B2B leads and customers.

The GDPR clearly defines a data subject as an 'identified or identifiable natural person'. Therefore any mentions of a 'data subject' in the GDPR do not extend to juristic persons like in POPIA. Additionally, article 13 of the ePrivacy Directive (on which section 69 of POPIA is based) only applies to subscribers or customers who are natural persons. Overall, in this regard, the provisions of POPIA relating to electronic direct marketing have a unique application to B2B leads and customers.

This interpretation of section 69 of POPIA concerning B2B leads or customers is supported by the fact that having the same rules apply to

B2B direct marketing as to B2C direct marketing is not such a novel concept in South African law. For example, the direct marketing provisions in the Consumer Protection Act (CPA) and the amended General Code of Conduct for Authorised Financial Service Providers and Representatives apply to natural and juristic persons. The CPA provisions for direct marketing apply to all 'consumers'. The definition of 'consumer' here includes 'all juristic persons whose asset value or annual turnover, at the time of the transaction, equals or exceeds R2 million'. The direct marketing provisions in section 14(9) of the amended General Code of Conduct for Authorised Financial Service Providers and Representatives apply to all 'clients'. The definition of 'clients' here includes juristic persons.

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4. WHAT **DO YOU DO** NOW?

If your lead generation and electronic direct marketing activities involve B2B leads or customers, these are our recommendations for you:

- Ensure all your lead generation and database compilation activities comply with sections 11 (legal justification) and 12 (collection from third party sources) of POPIA.

- If possible, within your business model, contact B2B leads telephonically (this can still be justified by legitimate interest) in terms of being the first contact you make with them. You can either ask for consent to send them electronic direct marketing or establish a business relationship with them first.

- We think there is some leeway in terms of the 'once' rule set out in section 69(2)(iii) of POPIA in a B2B direct marketing context. Under this section, we think you are allowed to contact more than one person at the same business to see if they are interested in receiving electronic direct marketing from you. From a best and safest practice perspective, we recommend (as a precautionary measure) that once you have contacted two or three people at the same organisation and still have not received a positive answer, you should stop.

- What if you have one or more contact persons at a B2B lead or customer who subscribe to your direct marketing database, and one of these contact persons unsubscribes? Must you unsubscribe them all? Unless they specify as such, we don't think this is necessary. In this scenario, you only need to unsubscribe the specific contact person at the B2B lead or customer who requested to be unsubscribed.