

Obtaining consent when enrolling in the customer club was in accordance with the GDPR

Date: 26-04-2022

Decision

Private companies

No criticism

Basis of treatment

In a complaint, the Danish Data Protection Authority has assessed whether the consent Magasin obtained in connection with registration in the Goodie customer club was voluntary.

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Summary

The Danish Data Protection Authority assessed that the benefits of membership of Magasin's customer club Goodie, in return for giving consent to marketing, were within the scope of an incentive that a data controller can give in order to obtain consent, without such consent being considered to be contrary to the condition of voluntariness.

In this connection, the Data Protection Authority emphasized that as a member of the customer club you can obtain certain advantages, but that regardless of these advantages, you must be considered to have a real and free choice in relation to the purchase of Magasin's products on general terms.

On this basis, the Danish Data Protection Authority found that Magasin's processing of personal data had taken place in accordance with the rules in the data protection regulation.

Decision

The Danish Data Protection Authority hereby returns to the case where you complained to the Danish Data Protection Authority on 18 May 2021 that Aktieselskab Th. Wessel & Vett. Magasin Du Nord (hereafter 'Magasin') has required you to give your consent to receive marketing by registering in Magasin's customer club, Goodie.

1. Decision

After a review of the case, the Danish Data Protection Authority finds that Magasin's processing of personal data has taken place within the framework of the rules in the data protection regulation^[1] article 6, subsection 1, cf. Article 4, No. 11.

Below follows a closer review of the case and a rationale for the Data Protection Authority's decision.

2. Case presentation

It appears from the case that on 9 May 2021 you contacted Magasin and pointed out that you wanted to become a member of Magasin's customer club, Goodie Card, without simultaneously receiving newsletters from Magasin. In this connection, you stated that the consent Magasin collected was not voluntary and is therefore not in accordance with the data protection legal regulations.

Magasin responded to the inquiry and stated that membership of the customer club was conditional on Magasin being able to send marketing. It was therefore not possible to unsubscribe from receiving marketing without also unsubscribing from the customer club. Magasin also noted in response to your comments about the voluntariness of the consent that the criterion of voluntariness was assessed as part of the ongoing administration of the membership program and that Magasin, on the basis of legal text, guidelines and previous decisions, had assessed that the consent complied with the condition of voluntariness. In this connection, Magasin emphasized that without membership you still had the opportunity to buy the same goods and receive services at market prices.

By e-mail of 18 May 2021, you contacted the Data Protection Authority regarding Magasin's processing of information about you for marketing, including that the consent that Magasin collected for the processing was in breach of the data protection legal regulations.

Gorrissen Federspiel Advokatpartnerselskab (hereafter 'Gorrissen') appeared on 12 July 2021 on behalf of Magasin with a statement to the Data Protection Authority, to which you were subsequently given the opportunity to make comments. The Danish Data Protection Authority received your comments by e-mail of 17 August 2021.

By e-mail of 15 December 2021, Gorrissen forwarded a copy of the consent text that Magasin used in connection with your registration for Magasin Goodie. The consent text states, among other things, following:

"[] Yes, I accept the terms and conditions for Magasin Goodie and permission to receive marketing from Magasin du Nord about current and future products and services that are sold and offered in Magasin's department stores and on Magasin.dk (see product range and examples of services here). Included in my consent is that Magasin must send me, for example, e-mails where they ask me to update my consent. Magasin must also send me offers for products and services from business partners, which I can see here. Magasin must contact me via e.g. e-mails, push messages in the app, SMS and social media (e.g. Facebook).

”
...

The consent text contained one check box that you had the option to tick off.

Gorrissen also stated that at the time of the Danish Data Protection Authority's inquiry, Magasin had initiated a process aimed at updating the consent text, and that the update would be expected to be implemented in Magasin's systems as soon as possible. The updated consent text is worded as follows:

”[☐] I accept terms of Goodie.

[☐] I agree to receive targeted inquiries via e-mail, push messages in associated apps, and text messages from Magasin du Nord (“Magasin”) with news, offers, campaigns and competitions relating to the products and services that Magasin provider. In order to be able to target the inquiries to me, Magasin will use information (name, contact details, gender, date of birth, interests, purchase history, use of benefits and search behavior) associated with my Goodie membership or collected via cookies on magasin.dk via a separate cookie consent.

In Magasin's personal data policy, I can read more about how Magasin, as data controller, processes my personal data in connection with my Goodie membership.

I can always withdraw my consent via e.g. magasin.dk or the Goodie app. If I withdraw my consent, my membership of Goodie will cease.

[SIGN UP]

2.1. Magazine's comments

Gorrissen has generally stated on behalf of Magasin that Magasin processes information about you for marketing purposes, as you, as a member of the Magasin Goodie customer club, receive marketing regarding membership offers and benefits.

As far as the extent of the marketing is concerned, Gorrissen has stated that the consent that is obtained upon registration in the Magasin Goodie customer club only includes targeted marketing about current and future products and services that are sold and offered in Magasin's department stores and at www.magasin.dk as well as from Magasin's partners. The collected personal data is not shared with the mentioned business partners, and the relevant marketing is targeted solely by using information about the behavior on/in Magasin's website/app.

It is Magasin's assessment that the consent to marketing that is required in connection with registration to the Magasin Goodie customer club is in accordance with the requirements of the data protection regulation, and is thus to be regarded as a

voluntary, specific, informed and unequivocal expression of will from you. The consent is also documented and can be withdrawn.

In response to your statement that the consent is not voluntary, as the membership ends if you do not at the same time agree to receive marketing, Magasin has argued that as a member of the Magasin Goodie customer club you obtain a number of benefits, and in return conditions Magazine gives a separate consent to receive marketing when signing up. This ensures that the customer club concept can be mutually beneficial. In other words, the access to be able to approach members of the customer club with special offers and the benefits associated with Magasin Goodie is of significant importance to Magasin. In this connection, Gorrissen has stated that a parallel can be drawn to the cases where traders offer discounts in return for marketing consent, which is also one benefit among several that a member of the customer club gets. If a consumer does not wish to give consent, that person cannot become a member of Magasin Goodie and thus obtain the benefits associated with it. However, the consumer will not be prevented from buying certain products/services simply because consent is not given – they will simply have to rely on regular prices and the general discounts that apply at Magasin. In other words, it is voluntary whether a customer will give marketing consent in exchange for the mentioned benefits or buy products/services on normal market terms.

Members can revoke their consent to marketing at any time, with the consequence that membership of the Magasin Goodie customer club ends. There are no costs associated with revoking consent, and in connection with registration for the customer club, it is clearly stated that revoking consent results in the termination of membership.

Against this background, it is Magasin's opinion that the consent fulfills the requirement of voluntariness, as consumers who do not wish to give consent have a real alternative, which consists in the possibility of buying the products on ordinary terms. It is basically an offer to obtain benefits that can be accepted by giving consent.

Gorrissen has also referred to a decision from the Austrian data supervision[2], which in November 2018 assessed that a "consent or pay" model is in accordance with the data protection rules.

Gorrissen has also referred to the EDPB's guidance[3] on consent, where the following appears:

"The controller could argue that his organization offers data subjects genuine choice if they were able to choose between a service that includes consenting to the use of personal data for additional purposes on the one hand, and an equivalent service offered by the same controller that does not involve consenting to data use for additional purposes on the other hand. As long

as there is a possibility to have the contract performed or the contracted service delivered by this controller without consenting to the other or additional data use in question, this means there is no longer a conditional service. However, both services need to be genuinely equivalent.”

Gorrissen has stated that the Consumer Ombudsman's practice is in line with the above, as the Consumer Ombudsman considers consent to be voluntary if it is possible to choose between either paying for a service or giving consent in return for access to the service.

Furthermore, Gorrissen has referred to the Data Protection Authority guidance on consent, which states the following:

"A data controller can to a certain extent motivate the registered to give consent by the fact that there is an advantage associated with consenting. Enrollment in a business benefit program can, for example, involve discounts which motivate the customer to consent to receiving advertising material from the business. The discount or the benefits that a consent to a benefits program entails do not exclude that the consent can be considered voluntary. However, it is important to be aware of whether a lack of consent entails negative consequences for the data subject who does not want to give consent – e.g. in the form of additional costs.”

In this connection, Gorrissen has stated that the section in the Danish Data Protection Authority's guidance on consent also applies to the membership benefit, which consists of digital receipts that are saved in the Goodie app, and which you have referred to in your inquiry. In this connection, it should be noted that for purchases in Magasin's department stores, it is always possible to get a physical receipt for your purchase, just as the receipt for purchases on www.magasin.dk is sent by e-mail. These receipts contain the same information and fulfill the same purpose as the digital receipts stored in the Goodie app and therefore constitute an equivalent service. It is therefore only the format that is different for Goodie members.

2.2. Your comments

You have generally stated that Magasin requires a consent to receive marketing in connection with registration in the Magasin Goodie customer club in violation of the data protection legal rules, as the consent is not voluntary and therefore does not meet the conditions for consent that follow from the data protection rules.

You have also stated that it is not possible to withdraw your consent to marketing without also opting out as a Goodie card member, and that you are therefore in a worse position in Magasin than if you were a member. In this connection, you have listed a number of the benefits associated with the Goodie customer club, which include including discounts, the opportunity to

participate in competitions, free shipping for orders over DKK 499, etc.

You have also emphasized that the complaint only relates to the fact that it is not possible to opt out of marketing in connection with registration in the customer club, and that Magasin, on the other hand, may use information about you for digital receipts and earning points.

Regarding what Magasin stated about digital receipts, you have argued that it is extremely problematic that Magasin binds digital receipts to a consent to marketing, as customers lose access to valid proof of purchase. This helps to harm the consumer, as he can no longer document a purchase in connection with a complaint or the like.

3. Reason for the Data Protection Authority's decision

3.1. Basis of treatment

Of the data protection regulation, article 6, subsection 1, letter a, it follows that the processing of personal data is lawful if the data subject has given consent to the processing of his personal data for one or more specific purposes.

Consent from the data subject is defined in Article 4, No. 11 of the Data Protection Regulation as:

"Any voluntary, specific, informed and unequivocal declaration of intent whereby the data subject, by declaration or clear confirmation, consents to personal data relating to the person concerned being made the subject of processing."

Magasin has stated that the processing of information about you for marketing purposes, which takes place in connection with registration for the customer club, takes place on the basis of consent, cf. the data protection regulation article 6, paragraph 1, letter a.

It must then be assessed whether the consent can be considered valid.

By basing the processing of personal data on consent, the data controller must give the data subject a free choice and control over personal data about themselves, which is why consent must be voluntary. Consent will not be given voluntarily if the data subject does not have a real or free choice. Any form of inappropriate pressure on or influence on the data subject's free will means that the consent is invalid.

A data controller can to a certain extent motivate a data subject to give consent by the fact that there is an advantage associated with the consent, as long as it will not have negative consequences if the consent is withdrawn^[4]. The fact that the data subject may possibly obtain an advantage by signing up for the customer club at Magasin does not, in the opinion of the Danish Data Protection Authority, imply in itself that the consent cannot be considered voluntary.

3.2. Magasin's consent solution

Based on the information provided in the case, it is the Danish Data Protection Authority's assessment that the benefits linked to membership of the customer club in exchange for consent to marketing are within the framework of an incentive that a data controller can provide in order to obtain consent, without that such an incentive can be considered to be in breach of the condition of voluntariness, cf. article 4, no. 11. The Danish Data Protection Authority has here particularly emphasized that you, as a member of the customer club, can obtain certain advantages, but that regardless of these advantages, you must be considered to have a real and free choice in relation to the purchase of Magasin's products on general terms.

As far as your comments about Magasin's storage of digital receipts are concerned, the Danish Data Protection Authority finds that your inability to obtain a digital receipt is not such a disadvantage for you that the consent becomes invalid, as you have the option of obtaining a receipt for purchases either physically or digitally when purchasing online.

On this basis, the Danish Data Protection Authority finds that Magasin's processing of personal data has taken place in accordance with the rules in the data protection regulation, cf. article 6, subsection 1, letter a, cf. article 4, no. 11.

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in connection with the processing of personal data and on the free exchange of such data and on the repeal of Directive 95/46/EC (general regulation on data protection).

[2] DSB-D122.931/003-DSB/2018

[3] Guidelines 05/2020 on consent under Regulation 2016/679, Version 1.1., Adopted on 4 May 2020

[4] See the European Data Protection Board's guidelines 5/2020 regarding consent according to regulation 2016/679 (version 1.1., adopted on 4 May 2020), point 48.