

on electronic direct marketing communications

1. The National Data Protection Commission (hereinafter, CNPD) has been receiving an increasing number of citizen participations¹ related to unsolicited electronic communications for marketing purposes

directly, carried out by (or on behalf of) different entities.

2. Most of the participations refer to marketing actions carried out by entities

with whom the holders of personal data do not have any customer relationship, or in relation to which they do not recall having given any kind of consent. The marketing actions in question are

often described by data subjects as intrusive due to the frequency and insistence on their

Realization.

3. Electronic communications can be presented through different channels and in different ways,

namely, by email, by SMS/MMS or by telephone call, regardless of whether this

be carried out through automatic call devices or through human intervention, without this

relevant to the applicable legal regime.

4. The sending of direct marketing electronic communications to individuals is regulated by the Law of

Privacy in Electronic Communications², which constitutes a special law in relation to the general protection regime of data. Thus, everything that is not regulated in that law is subject to the application of the General Regulation.

on Data Protection (RGPD)^{3 4} and Law No. 58/2019, of 8 August.

1 Between May 2019 and January 2022, the CNPD has already received around four thousand participations, relating to electronic communications

unsolicited, with a growth trend: 528 by the end of 2019; 1256 during the year 2020; and 2075

shares in 2021.

2 This guideline does not address the regime regarding the sending of electronic direct marketing communications to legal persons,

provided for in articles 13-A and 13-B of the Electronic Communications Privacy Law – Law No. 41/2004, of 18 August, amended

and republished by Law no. 46/2012, of 29 August.

3 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016.

4 In fact, Directive 2002/58/EC, transposed in 2004 into the Portuguese legal system by the Privacy in Communications Law Electronics, states, in paragraph 2 of article 1, its character of specification and complementarity of the data protection regime then in force: Directive 95/46/EC. Bearing in mind that Directive 95/46/EC was repealed by the GDPR – cf. article 94 of the ORI/2022/1

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5. In fact, sending an electronic communication implies a previous processing of personal data concerning at least the recipient's contact details, which are collected in advance.

6. The legal data protection regime applicable to direct marketing seeks to reconcile the fundamental right the protection of personal data, enshrined in article 35 of the Constitution of the Portuguese Republic and in article 8 of the Charter of Fundamental Rights of the European Union (hereinafter CDFEU), with the rights and interests of organizations, in particular companies, in the promotion and promotion of their activity, as a dimension of free private economic initiative, as provided for in paragraph 1 of article 60 of the Constitution, or freedom of company, contemplated in article 16 of the CDFUE.

7. The special regime for privacy in electronic communications is also the result of this balance and the consideration made by the legislator, in the sense of, on the one hand, maintaining the articulation between both regimes and, on the other hand, to introduce specific safeguards to avoid intrusion on users' privacy, through unsolicited electronic communications for direct marketing purposes, while safeguard the security of communications networks and equipment from spammers⁵.

8. Since 2018, it is primarily the responsibility of the person responsible for processing personal data - therefore, to the entity that wants to promote through direct marketing the object of its activity and, specifically, your products or services – do this consideration and especially ensure respect for the rights and interests of the data subjects (maximum, customers and potential customers), falling on him the duty to verify, before carrying out a treatment (and to demonstrate afterwards), that it complies with all the rules of data protection and whether the specific data processing carried out is in compliance with the

principles listed in Article 5(1) of the GDPR.

9. In the context of a profound evolution of technology and an increasingly digital economy, the realization of this objective depends on controllers adapting their business models and respective technical and organizational means to ensure effective compliance with the law and due protection of personal data and the sphere of interests, rights and freedoms of their holders.

GDPR – this law will apply to everything that is not specifically regulated in the Communications Privacy Act Electronics (cf. Recital 173 of the GDPR). In this sense, see Opinion No. 5/2019 on the interaction between the Privacy Directive

Electronics and the RGPD, particularly in terms of competence, attributions and powers of data protection authorities, the European Data Protection Board (CEPD), points 37 to 49.

5 See Recitals 65 and 67-69 of Directive 2009/136/EC, which amended Directive 2002/58/EC – Privacy Protection Directive in electronic communications (OJ L 337, of 18.12.2009, pages 11-36).

10. This adaptation should not be merely superficial and formal (bureaucratic), and those responsible for treatment to follow the changes of a time that is, in itself, disruptive, through the regularization substantive and in-depth assessment of treatment operations and the impact that technologies have on the functioning of their organizations and, in the case of personal data, the risks to the rights and freedoms of natural persons.

11. In order to promote the (re)evaluation of the processing of personal data in the context of sending electronic communications for direct marketing, the CNPD considers it appropriate to recall the framework of direct marketing activity, outlining the steps any organization must take before determine or carry out direct marketing actions via electronic communications.

12. The guidelines established by the CNPD, in Directive/2019/1, regarding the processing of personal data in the context of electoral campaigns and political marketing, approved on 25 March 2019.

13. Bearing in mind that marketing actions are often not carried out directly by the entity promoter or beneficiary of the marketing, but by other entities contracted by them for the specific delivery

direct marketing electronic communications (subcontractors) or by companies contracted under a
of subcontracting by the latter (subcontractors)⁷, the main addressees of this Guideline are
data controllers and processors.

14. Thus, the CNPD, as a national control authority with the attribution defined in subparagraph d) of no.
of article 57 of the RGPD, in conjunction with the provisions of article 3 of Law no.
the following guidelines:

I.
The “lawfulness, loyalty and transparency” of the processing of personal data

15. Direct marketing operations must be designed, from their inception, to ensure that
personal data are subject to a lawful, fair and transparent treatment in relation to the respective holder of the

6 Accessible at <https://www.cnpd.pt/decisooes/diretrizes/>

7 Cf. Article 28(2) of the GDPR.

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Dice. This triple dimension “lawfulness, loyalty and transparency” corresponds to a foundational principle that
delimits the scope of the processing of personal data, claiming their joint consideration.

16. Indeed, the lawfulness of a processing of personal data derives, above all, from the existence of a
specific basis of legitimacy on which the treatment must be based, but it is not limited to the
fulfillment of this formal condition, being essential to assess compliance with legal obligations in the
field of the right to information, under the terms of articles 12 to 14 of the GDPR, and, in particular, if the requirements
of transparency are in fact implemented rigorously and in good faith or if, under the guise of extensive
provision of information, there is in fact an attempt to manipulate and deceive people. So, so that
the processing can be considered lawful, it must be both fair and transparent in relation to the data subject
of the data. Also because the lawfulness can be called into question if the remaining two conditions are not met.
contained in the principle enshrined in Article 5(1)(a) of the GDPR.

17. First, the controller must, before sending electronic communications to

for marketing purposes, ensure that there is a valid legal basis for such a transaction.

treatment.

18. It is not ignored that, often, those responsible for the treatment are limited to contracting the action or direct marketing campaign, defining its purpose and object, with the subcontractor in charge to define the other aspects of the treatment. Now, the (body or proem of) paragraph 3 of article 28 of the GDPR is clear by providing for the elements of the processing of personal data that have to be fixed in the contract of subcontracting, of which the types of data and the categories of holders stand out; why can't the responsible intends to disclaim responsibility in relation to the treatment, on the grounds that it was not who determined the means to be used by the subcontractor, when at least such means were proposed by the subcontractor and accepted by the person in charge.

19. In the strict scope of the RGPD, among the various grounds of legitimacy for the processing of data personal data, for the purpose of direct marketing, the legitimate interest of the person responsible for the treatment⁸. In fact, the GDPR expressly admits, and mentions, the power "(...) to be considered of interest the processing of personal data carried out for the purposes of direct marketing (...)". Such will be so much

⁸ This is without prejudice to the need to assess, in the specific case, even for direct marketing purposes, the nature of the treatment

of personal data in question, in particular when profiles are defined, as the rights of the holders may prevail over the legitimate interest of the person responsible and, to that extent, the condition of lawfulness would have to be based on the consent of the holder.

the more valid the stronger the customer relationship⁹ established between the data subject and the person in charge for the processing (cf. the provisions of subparagraph f) of paragraph 1 of article 6, together with recital 47 of the GDPR).

20. However, it is important here to take into account the special regime of the Law on Privacy in Electronic Communications, which delimits the admissible legal conditions for the operation of sending electronic communications from direct marketing.

i.

The grounds for sending electronic communications: legitimate interest and consent

21. To simplify the analysis, it is anticipated that the Electronic Communications Privacy Law only admits two grounds for sending direct marketing electronic communications: legitimate interest of the responsible for the processing and consent of the holder of the personal data being processed. emphasizes that the two grounds are not alternative or dependent on the arbitrary “choice” of the person responsible for the treatment, the law specifying the assumptions of each of them.

22. Thus, the Law on Privacy in Electronic Communications, in its article 13.º–A, distinguishes the fundamental of legality depending on the relationship with the recipient of the electronic direct marketing communication:

The. If a customer relationship already exists, the basis is different depending on the promotional content; so,

(i) If the marketing concerns products or services similar to those previously purchased by the customer, your consent is not required;

(ii) If the marketing concerns products or services other than those previously purchased by the customer, depends on the customer's prior and express consent;

B. If there is no prior legal relationship between the person responsible and the recipient, only with the prior and express consent of the data subject.

23. Thus, in the context of the customer relationship, entities are allowed to use the contact details of the your customers (obtained in the context of a product or service transaction) for direct marketing purposes when 9 “Customership” should here be seen in its broad sense, to encompass the relationships of mutual knowledge and trust that allow controllers to anticipate the expectations of the data subject, without jeopardizing, in the processing operations, their interests or fundamental rights and freedoms.

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relates to products or services similar to those transacted. In this case, the basis of processing of personal data is the legitimate interest of the controller.

24. As the European Union legislator abstractly weighed the different interests at stake, it seems have assumed that, with regard to products and services that are the same or similar to those already purchased by the customer, it is also

in the interest of the customer to know about promotions or new similar products or services or, at least, that he will have a reasonable expectation of receiving promotions on such goods or services.

25. However, the customer must be provided with the possibility of refusing, easily and free of charge, the use of your data for this purpose, either at the time of the respective collection, or on the occasion of each message sent, with the supplier's identity and means of contact being explicit in each message. At issue is the right of opposition, provided for in paragraph 3 of article 13-A of the Privacy Law in Electronic Communications and also regulated in article 21 of the RGPD.

26. In the absence of a legal relationship between the controller and the recipient of the communication, or if this exists, when the promotional action focuses on products or services other than those transacted with the customer, electronic direct marketing communications can only take place with consent prior notice of the data subject.

ii.

The characteristics of consent for sending electronic communications from marketing

27. Consent to send electronic communications for direct marketing purposes, provided for in the Law of Privacy in Electronic Communications, assumes all the characteristics of the consent provided for in GDPR, since the special law refers the concept to the definition contained in the general regime, all legal requirements arising therefrom shall apply.

28. To be valid, this consent must fulfill the attributes defined in paragraph 11) of article 4 of the GDPR, respect the limits defined in article 7 of the GDPR and also be obtained within a framework of loyalty and transparency, pursuant to Article 5(1)(a) of the GDPR.

29. Indeed, consent must “be given through a clear positive act that indicates a manifestation of free will, specific, informed and unequivocal that the data subject consents to the processing of the data concerning you, for example by means of a written declaration, including in electronically, or an oral statement” – cf. Article 4(11) and Recital 32, both GDPR.

30. In addition, the manifestation of will must be translated into a positive and express act, not just the mere inaction or silence, and therefore forms or other forms of data collection are not admissible.

consent in which the field to confirm consent is already filled in.

31. The expression of unequivocal will is reinforced in the Law on Privacy in Electronic Communications by the requirement that the consent be “express”, as follows from the wording of paragraph 1 of article 13-A. Such will always imply active behavior by the person concerned, and implicit acceptance of the data processing¹⁰. Furthermore, it must be obtained prior to sending the communication.

32. Another element that characterizes consent is that it must be “informed”. This presupposes that, before obtaining consent, the controller provides all the information required by the Article 13 of the GDPR, namely the identity and contact details of the controller, the sending of electronic marketing communications as the purpose of the treatment and consent as the respective grounds of legitimacy, the right to withdraw consent at any time, the retention period of personal data.

33. It is extremely important that the information must be provided under the conditions required by paragraph 1 of article 12 of the GDPR, that is, in a concise and intelligible way, in clear and simple language, taking into account the public intended, and in an accessible way, also taking into account the particularities of the medium through which the information¹¹.

34. A consent cannot be considered valid if, from the information provided by the person responsible when of obtaining consent, the holder is unable to reasonably anticipate the consequences mediate that result from the processing of your personal data¹².

¹⁰ See Judgment Planet49 of the Court of Justice of the European Union, of 1 October 2019, C-673/17, EU:C:2019:801, points 61 and 62.

11 See Guidelines on transparency within the meaning of Regulation 2016/679 of the Article 29 Working Group, revised and last adopted on April 11, 2018, (WP260 rev01) and assumed by the CEPD on May 25, 2018.

12 This occurs when consent is collected with the main purpose, albeit disguised, of being able to include data personal data in direct marketing contact bases, made available by data brokers, under the mistaken belief that, in alienation, these databases carry with them “valid consents”.

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35. For the legal conditions of a “specific” consent to be met, it is essential that the scope of what you are consenting to is duly specified, either with regard to the purposes or to third parties (in the case of data transmission).

36. Whenever there are different processing operations with different purposes, the manifestation of will must be specific, i.e. it must relate to the processing of data in question and cannot be deducted from a manifestation of will with a distinct object, so the holder must be given the possibility of autonomously consenting to each of the operations. Even if there is a link between the purposes of data processing, it will not be possible to use consent for a particular purpose when that consent was given for another purpose.

37. As for consent constituting a “free” expression of will, it is understood that consent is not free if it is obtained as consideration for the provision of a service that claims the processing of data personnel not necessary for the performance of the contract, as provided for in paragraph 4 of article 7 of the GDPR.

38. On the other hand, in this context, if consent is not properly informed or specific consent is also considered not free and, consequently, not valid.

39. In short, all the characteristics of consent described above must be verified in order for the consent constitutes a valid basis of legitimacy for sending electronic communications to direct marketing purposes. The lack of any of these components of consent immediately results in the illegality of the data processing, in its aspect of 'sending communication'.

40. Furthermore, consent should not be used to create a false sense of comfort in the

of the controller, which would exempt him from weighing the balance and proportionality of the processing data, and how it affects the interests, rights and freedoms of the data subject¹³. On the contrary, it should be noted that consent is the most demanding legal basis, especially when it comes to support an operation in which the legislator has recognized that the legitimate interest of the person responsible does not prevail by the treatment.

41. Specifically, in direct marketing operations, it is essential to assess what the owner's expectations are data in relation to the established contact, it is therefore essential that only the

¹³ In fact, the existence of consent, although apparently valid at the formal level, does not relieve the person responsible for the processing of personal data that, substantively, grossly violates loyalty and transparency.

communications that are relevant and valued by the holder, in the context of the existing relationship with the responsible for the treatment. And this is due to the fact that the compliance of a data processing depends, not only of a valid legal basis, but also of showing loyalty and transparency in the relationship with the data subject.

42. However, at this level too, one of the criteria for assessing whether, in particular, a given treatment hurts or not loyalty and transparency, it is the holder's expectation as to the way in which his personal data will be processed, according to a reasonable judgment, so that you are not surprised by the treatment¹⁴.

43. This forces us to go back to the moment before the electronic communication was sent, in order to highlight the operation to collect your recipient's contact details.

iii.

The context of the collection of personal data and its subsequent use

44. Personal data used in the context of sending electronic marketing communications

direct concern, above all, the telephone number, which allows the making of a telephone call and the sending SMS or MMS, and to the e-mail address, for sending an e-mail. Each of these data

in itself, already has the nature of 'personal data', within the meaning of point 1) of article 4 of the GDPR, even if it does not

name is associated. However, more personal data may have been collected.

45. We will only address, in this part, the collection of personal data in a context in which the consent to the sending of electronic marketing communications and not within the framework of a relationship of existing clientele between the controller and the recipient of the electronic communication, since that such forwarding is based, as explained above, on the pursuit of the legitimate interest of the person responsible for the treatment¹⁵.

46. It is verified, in this domain, that the personal data (contact) that are used to send electronic marketing communications are collected in different ways: either by the person responsible for the treatment that intends to promote its products or services and for the benefit of whom the action is carried out

14 In this regard, it must be considered whether, in the design of the processing operations, the controller did not use formal artifices to, in substance, obtain a result different from the one presented to the data subject.

15 As long as the marketing action concerns products or services similar to those purchased.

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marketing by sending electronic communication, or by a third party, within the scope of a relationship commercial or other nature (e.g., social network, contests, competitions), to whom the promoter and beneficiary of the marketing action will acquire the personal contact data.

The. The role of subcontractors

47. In the first case, it is often the case that the controller who wants to promote his products or services by sending electronic communications, use subcontracting companies to organize marketing campaigns on your behalf, which may include the collection of personal data, the management of and channels used, the contents, the effective sending of electronic communications and their frequency.

48. However, the fact that subcontracting is used does not remove any responsibility from the company that intends to enhance and promote its products or services through direct marketing actions, that is, addressed to specific natural persons. Subcontractors act only on behalf of the person in charge, through their instructions and the processing operations they carry out (e.g., collection of personal data and

respective obtaining consent for its processing or sending of electronic communications).

49. Despite the fact that subcontractors are recognized as having a certain autonomy due to the knowledge specific skills and experience they have in a given area, as far as data processing is concerned personal data, the GDPR imposes that their actions strictly result from what is prescribed to them by the person responsible for the treatment. This is without prejudice to the fact that, if the controller gives instructions that violate the GDPR or other provisions of Union or Member State law, the subcontractor must inform the controller immediately (cf. Article 28(3)(h), second subparagraph, of the GDPR).

50. Indeed, irrespective of the offers made by the subcontractors, the ultimate decision on the data processing operations is the responsibility of the controller, who cannot exempt himself from perform its role and comply with its legal obligations, possibly deferring to subcontractors responsibilities that are yours alone.

51. In this sense, the controller must ensure that, being the processor collecting data personal data with a view to carrying out its marketing actions through electronic communications, it does so in the strict respect for the law, and for this purpose it must monitor its performance.

52. In addition, subcontracting a company because it already holds personal data that could be used in direct marketing campaigns is not possible in the current legal framework, since, even if it were alleged that that processor had obtained prior consent for the processing of personal data for marketing purposes, including through electronic communications, such consent would not have been sufficiently specific to include the identity of the controller who intends to do the sending the electronic communication, as this was still unknown at the time of data collection, which would render the consent invalid.

53. Furthermore, that data collection would have been carried out in a context prior to the subcontracting by the company that you want to promote your products or services, so the now subcontractor was nothing more than the responsible for processing these collected data, obviously not being able to use them for sending electronic marketing communications from the company that now subcontracts it.

54. The GDPR clearly distinguishes between the role of the controller and the role of the processor and the respective obligations. These are therefore not transmutable.

B. The role of third parties

55. Let us now focus on the very common circumstances in which the collection of personal data takes place through a third party¹⁶, which communicates this data to the entity that intends to promote its products or services, which thus becomes the new person responsible for processing at least the contact data that will be used to send electronic marketing communications. With regard to the collection of personal data by an entity other than the person responsible for direct marketing through communications electronic data, the legal basis for this initial collection may be a contractual relationship (because the data are or were necessary for the performance of the contract), or the legitimate interest of the person responsible for the processing, or even the consent of the data subject, pursuant to Article 6(1) of the GDPR. But this basis does not serve, per se, to legitimize the transfer or transmission of personal data to entities third parties for the purpose of direct marketing, let alone for the actual subsequent sending of electronic communications.

¹⁶ Whether through the most frequent means of acquiring, for payment, “databases” for marketing, with emphasis on the activity of brokers, either through commercial partnerships in which there is transversal sharing of personal data.

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56. The transmission of personal data to third parties must always obey a basis of legitimacy autonomous. In the case of data transmission for the purpose of direct marketing in general, the condition of lawfulness may be the consent of the holder, respecting the respective legal requirements, or the pursuit of the legitimate interest of the person responsible or of a third party (to whom the data are transmitted), provided that the interests, rights and guarantees of the data subjects prevail, which has to be assessed and duly justified before such data transmission.

57. In the latter case, if the personal data were collected for a purpose other than that of direct marketing, the controller must always carry out a compatibility test between the

initial purpose and the purpose for which it is intended to (re)use the data, in particular applying the criteria of article 6(4) of the GDPR, in particular the context in which the data were collected and the relationship between the data subjects and the (new) controller, the nature of the data and possible consequences for the holders of the intended further processing.

58. When reusing these data for a purpose or purposes other than those for which they were collected initial, it is essential to resume the relevance of the principle of loyalty, enshrined in subparagraph a) of paragraph 1 of article 5.

of the RGPD regarding the processing of personal data, because here the expectations that the data subject had at the time of providing their personal data.

59. It is insisted that the processing of personal data for direct marketing must be based on a relationship transparent, where the data subject is the subject of interests, rights and freedoms in the context of treatments of data that are governed by loyalty and good faith. This treatment, as mentioned above, can be done, sometimes within the framework of the legitimate interests of the controllers, sometimes supported by consent of the recipients, but not under a formal web that, in apparent compliance with the law, defrauds the expectations of data subjects, to lead them to results that they could hardly foresee or that they would authorize, if they had been presented to them with due transparency.

60. Therefore, in terms of loyalty and transparency, sophisticated approaches aimed at reduce the owner's perception, at the time of agreeing with the transfer of his personal data, of the real purposes that motivate the operations of processing your data¹⁷.

¹⁷ These approaches include treatment operations that, under the guise of contests or hobbies, are no longer aimed at than to speed up the construction of databases, ready to be commercialized to give rise to massive operations of

61. Consider then a scenario in which the contact details of natural persons are transmitted to a company that intends to carry out marketing actions for its products or services, thus becoming responsible for processing this data.

62. Even if the transmission of this data was carried out in compliance with the GDPR, the truth is that this data can only be used in direct marketing through postal mail, but no longer through

electronic communications.

63. Indeed, the data processing operation that represents the 'sending of electronic communication' for direct marketing requires the prior and express consent of the recipient, which does not happen with a collection of data made by third parties, eventually mediated by brokers.

ç. joint responsibility

64. A separate issue is the situation in which two or more partner entities jointly determine the purposes and means of data processing for the purpose of sending direct marketing electronic communications, being, in that case, joint controllers, pursuant to Article 26 of the GDPR. In this way, the agreement among those co-responsible must establish the scope of each one's tasks and responsibilities, so it will be regardless of which one (or both) collects the personal data and obtains the respective consent of the data subject.

65. In this framework, the holder will always be informed from the outset of the identification of each of those responsible for the treatment and the specific purpose for which the data are collected, among the other information that you must be provided.

d. Transparency and loyalty

66. As noted above, consent, to be valid, must correspond to an expression of free, specific, informed, unequivocal and express will, provided that this will is only informed and specific if the data subject can reasonably anticipate the immediate consequences and mediate that result from the provision of your personal data.

direct marketing. Or registering on a social network that subsequently transfers personal data to third parties to carry out direct marketing operations.

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67. In view of the above, ambiguous and not very transparent "consents" should not be seen as valid in its writing, collected in the wake of participation in online competitions or competitions, which look for this way to obtain authorizations for the transmission of data to third parties or to develop campaigns of

direct marketing on behalf of third parties, which would hardly be granted if requested directly by the real controller with express indication of such purpose. The shape disguised way in which these consents are obtained lead to it being difficult for the holders to anticipate who are, in practice, granting permissions to be contacted for direct marketing purposes by entities other than those promoting the contest or competition online, in a context where it is not reasonable to require them to be able to project the consequences of such a disclosure.

68. Nor will consents collected by a given entity, asking for authorization to the holder of the data for the treatment of the same by a third party, who do not expressly identify, in a clear and transparent, the identity of the third party and the specific context in which the subsequent transaction of data processing will take place.

69. Although the data subject has provided his personal data through any form, the collection was carried out by an entity that enters into contracts for the dissemination of data with various entities and that the data subject marks a consent option for the purposes defined therein (namely sharing data with “sponsors” or “partners”, or even “Group companies”), such consent cannot be considered valid. Consent must be able to be given specifically, entity to entity, as the data subject may not be interested in making their data known and be contacted by all entities that make up the universe of recipient entities, namely if only the vague concepts of “sponsors”, “business partners” or “third-party entities to whom the data are communicated”¹⁸.

70. It is still common practice that the data subject is not allowed to consult the websites or participate in activities (e.g., hobbies, viewing content) without, at the same time, consenting to the use of your data for the purpose of direct marketing communications. The data subject is forced to accept

¹⁸ Consent must clearly identify who is the entity that will process the personal data, something that does not occur when the companies are presented, in a generic and diluted form, in the category of “sponsors” or others mentioned above. Even because,

In order for consent to be given with full knowledge of the facts, the information must be clear and complete, and allow

the user to easily determine its consequences (cf. Planet 49 judgment of the Court of Justice of the European Union, already cited).

all treatment operations and only after consultation or participation can you demonstrate that you do not want to be target of such communications, canceling your subscription. The same is to say that access to the website, to the hobby or content, is always dependent on the subscription and acceptance of all processing of personal data en bloc, something that will not be admitted due to the conditioning of the will and because the transfer of personal data (and consent to its treatment) to receive direct marketing cannot be the “bargaining currency” and condition of access to content¹⁹.

II.

From the principle of responsibility

71. Also in the context of processing personal data for sending direct marketing, it is important to highlight which specific obligations fall on the controller, in accordance with the principle of liability (cf. Article 5(2) of the GDPR).

72. Essentially, it stems from the obligation of entities to adopt technical and organizational measures adequate for the protection of personal data (cf. Articles 24 and 32 of the GDPR), and to think, design and carry out the processing operations ensuring the protection of personal data from conception and by defect (cf. article 25 of the GDPR).

73. The CNPD recognizes that a good part of the life cycle of the data processed in terms of direct marketing takes place outside the sphere of beneficiary entities or promoters of the respective campaigns, using subcontractors. However, in such cases, the controller must be well present that the fulfillment of its obligations in terms of data protection becomes, in this context, by the careful choice of subcontractors that provide sufficient guarantees for the execution of technical measures and organizational structures suitable for compliance with the RGPD, in particular that ensure the defense of the rights of the data subject (cf. Article 28(1) of the GDPR).

74. Second, it is the responsibility of the controller to give precise and documented instructions to the processors with regard to all aspects of the processing of personal data concerned, not

therefore the former may be exempted from liability for inertia or omission of decision.

19 Considering that data protection is a fundamental right guaranteed by article 8 of the CDFEU, and taking into account that a

One of the main purposes of the RGPD is to provide data subjects with control over the information concerning them.

CEPD that personal data cannot be considered tradable goods (cf. point 53 of Guidelines 2/2019 on the

processing of personal data pursuant to Article 6(1)(b) of the GDPR in the context of providing online services to

data subjects, of October 8, 2019.

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75. It is also of particular importance that the controller exercises effective control over

subsequent subcontracts, having to know them or authorize them in advance, in order to guarantee that the

subcontractor's choices comply with legal requirements. Indeed, the controller

cannot claim ignorance about the personal data processing operations that are carried out in

your name and on your behalf.

76. It is also recalled that the relationship between controller and processor and between the latter and others

subcontractors must be regulated by a written contract (cf. Article 28(3) and (4) of the GDPR). Even so,

the verification of the requirements contained in article 28 of the GDPR must be substantive, and not just formal, not

limited to the choice of any standard clause. For this reason, when selecting the

subcontractor and the means it makes available for data processing (e.g. services, products,

tools and technologies), the controller should carry out a risk assessment

associated with the processing, and apply or require the application of measures to mitigate them (cf. recital 83 of the

GDPR).

77. Bearing in mind that most direct marketing actions involve data processing in

large scale, and the frequent use of innovative technologies, this risk assessment may need to be

express in a Data Protection Impact Assessment ("AIPD"), to determine, in particular,

the origin, nature, particularity and seriousness of that risk (see paragraph 1 and paragraphs a) and b) of paragraph 3 of article

35 and

of recital 84, all GDPR). When carrying out an IAPD, the controller requests the opinion of the data protection officer, when he has been appointed (cf. Article 35(2) of the GDPR).

78. Furthermore, it is also recalled that data processing operations associated with marketing actions must be included in the record of processing activities (cf. article 30 of the GDPR²⁰).

79. The person in charge must also keep an updated list of people who have expressly expressed and consent to receive this type of communications free of charge, as well as from customers who do not objected to its reception (cf. paragraph 1 of article 13-B of the Law on Privacy in Electronic Communications).

It should be noted that, according to the GDPR, it is up to the controller to demonstrate that he has the right of opposition of a customer, as well as that the data subject has given consent. Obviously,

²⁰ See also the CNPD recommendations in this regard, here.

the existence of these records does not allow the person in charge to discriminate against customers who did not consent or who

objected to the receipt of electronic direct marketing communications.

80. The controller must therefore prove the consent given to him by the data subject data for sending electronic direct marketing communications, as well as the specific context in which that it was obtained, so that it is possible to determine the validity of that consent (e.g., what was the information provided to the data subject at the time of obtaining consent).

81. In order to verify compliance with Article 7(3) of the GDPR, the controller also must be able to prove what conditions the data subjects have to revoke their consent.

82. Bearing in mind that direct marketing electronic communications are sent with frequency to services provided by third parties located outside the territory of the European Union, is called in particular, attention to the need to comply with the GDPR regarding data transfers personal data (cf. chapter V of the GDPR).

III.

conclusions

83. In short, sending electronic communications for direct marketing can be done in the following conditions:

The. If a customer relationship already exists and:

(i) If the marketing concerns products or services similar to those previously purchased by the customer, your consent is not required; but the right of opposition must be guaranteed,

at the time of data collection and in each message sent;

(ii) If the marketing concerns products or services other than those previously purchased by the customer, only with the prior and express consent of the customer.

B. If there is no prior legal relationship between the person responsible and the recipient, only with the prior and express consent of the data subject.

84. The person in charge must also keep an updated list of people who have expressly expressed and consent to receive this type of communications free of charge, as well as from customers who do not oppose its reception.

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85. The burden of proof that consent was given and under what conditions, as well as that the right to object lies with the data controller.

86. The holder's consent must always be informed, specific, free, unambiguous and express, which means that the holder must consent that a certain entity, duly identified, sends him electronic communications for direct marketing of your products and services.

87. Thus, "consents" for the use of personal data for the purpose sending electronic direct marketing communications:

The. ambiguous and not very transparent in the way the treatment is explained and how the declaration of consent, collected in connection with participation in competitions or competitions online, who seek in this way to obtain authorizations for the transfer of data to third parties or to develop direct marketing campaigns on behalf of third parties;

B.

collected by a given entity, asking the data subject for authorization to process the
by a third party, without being expressly identified, in a clear and transparent way, the
identity of the third party and the specific context in which the subsequent data processing operation
will have place;

ç. required as a condition of accessing websites or participating in certain activities (e.g.,
hobbies, viewing of content), which is thus dependent on the subscription and acceptance of
all operations of processing of personal data en bloc, both those effectively necessary
for the realization of this access or participation as others, including marketing
direct.

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