

PERSONAL DATA PROTECTION REDRAWS THE BOUNDARIES OF DIRECT MARKETING

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*This article was first published online on IQads on 19.07.2017.

Less than a year remains until May 25, 2018 when the new General Data Protection Regulation (GDPR) will enter into force. On the same date, the new ePrivacy regulation, now in its project phase, was also expected to enter into force. Although at this moment 25 May 2018 no longer seems like a feasible date for the application of the new ePrivacy regulation, which may still be modified until adoption, most of the measures proposed by the two regulations are imminent and will significantly impact the practicability of using personal data for marketing purposes.

The GDPR will influence the data processed for direct marketing using traditional channels (eg by post), whereas the ePrivacy regulation will impact direct marketing achieved through the use of electronic communications services (eg e-mail, direct marketing via Bluetooth, in-app advertising, phone, etc.).

In which cases will the processing of personal data for direct marketing be allowed?

As a general rule, data collected by companies will be processed for direct marketing purposes in 2 situations:

- when the companies have obtained the consent of the concerned person; or
- when the companies are able to demonstrate that they have a legitimate interest in the processing (for example, when sending product catalogues to existing customers by post).

In both situations, the companies will be required to clearly and transparently inform the data subject about the purpose for which the data will be used, the duration for which it will be retained, and his/her right to oppose the processing of the data at any time. The companies will need to carefully elaborate this communication to ensure that it complies with GDPR requirements, employing simple and clear language that is easily understood.

This aspect is important in practice considering that a recent study by [SAS](#), one of the largest software companies in the world, has shown that 56% of UK adults approve the introduction of the right of opposition in the form proposed by GDPR. This means that once someone has been transparently informed that he/she may refuse the processing of the data, the person may rather choose to protect their personal data rather than to allow its processing.

Direct marketing only with the consent of the targeted audience

According to the ePrivacy regulation, in the case of direct marketing via electronic communications, data processing can only be performed based on the consent of the data subject. The only exception to this rule relates to the situation in which the email address is obtained from the customer in the context of the sale of a product or service. In this situation, that email address may be used by the company for direct marketing related to its own similar products or services, provided that the customer is clearly and distinctly able to oppose such use at any time, free of charge.

Data collected through various promotional campaigns should not be used for direct marketing via electronic channels, unless the data subject agrees for it to be used with this purpose. If the data was collected for another purpose during the promotional campaign and the company subsequently decides to use it for direct marketing and requests the person's consent via email, this will be considered a violation of the GDPR and the ePrivacy regulation, as the request for consent is also a form of direct marketing, for which the company did not have approval. Thus, in this case, data processing is unlawful and can bring huge fines for companies.

Also, the use of databases for different campaigns conducted by agencies for different clients, in which unsolicited emails are sent to the people included in that database, is in principle prohibited. The only exception in which these databases can be used is when the data subjects have been informed and have given their consent for this purpose.

How to obtain the consent?

Obtaining the consent will be subject to much stricter rules: the agreement must be given in a clear and explicit manner (opt-in), without doubt, and without being implicit. If, for example, the consent is given in a written statement which also covers other matters, it may be considered unclear about the data processing part and therefore might not be suitable for use by the company.

However, we do not have to imagine that in all cases the consent will mean a specific phrase by which the person agrees with the processing of personal data for a specific purpose. For example, in the case of companies intending to use Bluetooth technology for direct marketing, consent could be obtained by placing a device in a relatively small but clearly defined area where the user should pass his own device to connect via Bluetooth. Of course, the user will have to be informed beforehand that by passing the device through that area he/ she will trigger a processing of his/ her personal data.

The timeframe in which the collected data can be used

Particular attention should be given to the period during which the data is retained. The rule imposed by GDPR is that personal data must be kept for a period that does not exceed the time required to meet the objectives for which the data was being processed. In other words, personal data will have to be deleted when it is no longer required to achieve the purpose for which it was collected. For example, if the data was collected in a promotional campaign and there is no clear and explicit consent for further data processing, the company will have to cease processing any data and erase it.

What are the next steps?

A first step in this journey would be for everyone to understand that the obligations imposed by the new regulations will be serious and that the fines for non-compliance will be huge. Most of the time, the transfer of data collection operations to a third party or the argument that the data is collected in the name and on behalf of a client will not be sufficient to mitigate the risk of a fine for non-compliance.

Under these circumstances, all companies, including those in the marketing and communication industry, will have to adapt to the new requirements and, in most cases, will have to obtain the consent of data subjects.

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