



### DIRECT MARKETING: NEW CNPD GUIDELINES

It is widely known that **electronic direct marketing communications** can be carried out through various channels, including email, SMS, MMS and telephone calls, using automatic instruments or with human intervention. Without prejudice to this multiplicity of practices, electronic communications are subject to their own legal regime.

Due to recurring breaches of legal obligations, between May 2019 and January 2022, the **Portuguese data protection authority (CNPD)** received around four thousand reports regarding unsolicited electronic communications, with an increasing trend.

The CNPD has thus recently issued **Guideline No. 2022/1** on electronic direct marketing communications aimed at individuals, the implications of which we explore below, with the main recipients of the Guideline being those responsible for **data controllers** and **processors**.

#### > Direct marketing electronic communications

Direct marketing implies the **processing of personal data** prior to the sending of said electronic communications, namely with regard to the **contact details** of the recipients.

Involving the processing of personal data, the sending of electronic communications of direct marketing to individuals is specifically framed by Law no. 41/2004, of 18 August (**Privacy Law in the electronic communications**) and, subsidiary, the General Data Protection Regulation (GDPR) and Law No. 58/2019, of 8 August.

It is important to emphasize that it does not matter whether the marketing actions are carried out by **processors** or by companies contracted by the processors. In any case, remains the responsibility of the company that, as personal data controller, has contracted these processors. In this way, all stakeholders must comply with applicable legal and regulatory standards.

### > Lawfulness of processing personal data

From its conception to its implementation, direct marketing operations must ensure that the personal data collected are subject to lawful, fair and transparent treatment in relation to the respective data subjects.

The data controller must therefore ensure that there is a **valid legal basis** for the processing in question, based on:

- a) **Legitimate interest**; and/or,
- b) **Consent**.

### > Legitimate interest

Data controllers may invoke legitimate interest, waiving the consent of the holders of personal data, when:

- a) There is **previous customer relationship** with the recipient of the marketing communication regarding **products or services the same or similar to those transacted between the parties**;
- b) The data has been **collected** in the context of the transaction of products or services; and,
- c) The **right of opposition** has been given to the data subject at the time of data collection.

Each direct marketing communication must also contain the **possibility for the data subject to refuse the use of his/her data for the purposes**, and the identity and means of contact of the data controller must be informed.

It should be noted that, according to the CNPD, the legitimate interest of the data controller will be all the more valid the stronger the customer relationship established between the data controller and the data subject. If it is not possible to invoke legitimate interest, only consent will remain, as a legal basis for the processing of personal data.

### > Consent

The consent of the data subject must be exposed through, for example, a written statement, including in electronic format, or an oral statement, and, in accordance with the requirements derived from the GDPR and other applicable legislation, must be, namely:

- i) **Prior and informed**, based on clear, simple and concise information;
- ii) **Express and unambiguous**, and pre-filled or implied consent is invalid;
- iii) **Specific**, whereby the holder must autonomously consent to each of the purposes and each of the recipients;
- iv) **Free**, whereby consent should not be obtained, for example, in exchange for the provision of a certain service in which the processing of personal data is not necessary for the performance of the corresponding contract;

- v) **Loyal and transparent**, and consent should not be used to create a “false feeling of comfort” for the data controller, always considering the proportionality of the treatment and considering the legitimate expectations of the data subjects.

According to the CNPD, if these requirements are met, the lawfulness of the processing of the personal data in question is materialized, in the field of “sending communication”.

#### > Collection of personal data

Personal data, such as email address, telephone number, among others, are collected for direct marketing purposes in the following ways:

- a) By the **company itself** that intends to promote its products or services;
- b) By **third parties**, within the scope of a commercial relationship or otherwise, using data stored on social networks, contests, competitions (which are acquired by the company promoting or benefiting from the marketing activity).

We warn that, both in the direct collection and in the acquisition of data from third parties, the data controller must comply with the applicable legal rules, avoiding the practice of offenses punishable by high fines.

#### > Processors

The **data controller** has the duty to issue **instructions** to the processor and **monitor** the performance of marketing activities through electronic means, in order to ensure that the processor acts lawfully.

In turn, **processors** (and subprocessors) must act, individually, in compliance with those instructions and other legislation, within specific legal parameters correspondingly applicable.

#### > Third parties

It is common to collect personal data through the acquisition, against payment, of databases for marketing, namely derived from the activity of brokers, based, for example, on commercial partnerships in which there is transversal sharing of personal data for such purposes.

Without prejudice, the CNPD considers inadmissible processing data that, under the guise of contests or competitions, are mainly aimed at speeding up the configuration of databases, to be marketed, with a view to enabling massive direct marketing operations. Or the registration in social networks that, later, transact the personal data to third parties.

Also it is not deemed to be valid the consent obtained for direct marketing as a condition to be able to consult websites or participate in activities such as sweepstakes or contests valid, nor the generic consent usually given to share data with partners, sponsors or group companies.

#### > Responsible for treatment

The CNPD clarifies that **personal data controller companies** within the scope of direct marketing electronic communications **must** provide for:

- a) Adopt appropriate **technical and organizational measures** to protect personal data;
- b) Design, configure and carry out processing operations and **ensure the protection of personal data** from design and by default;

- c) **Carefully choose processors** that demonstrate sufficient guarantees of carrying out appropriate technical and organizational measures to comply with the GDPR;
- d) Enter into a **written contract** with subcontracted service providers whenever they process data on behalf of the data controller;
- e) Assess the **risks associated with the treatment** and apply or require the application of measures to mitigate them;
- f) Issue **precise and documented instructions** to processors regarding the processing of the personal data in question;
- g) Control **subsequent subcontracting**, having to know or authorize them in advance;
- h) Carry out an **impact assessment on data protection**, when mandatory, given that most direct marketing activities involve large-scale data processing, with frequent use of innovative technologies;
- i) Include the personal data processing operations associated with marketing activities in the **registration of processing activities**;
- j) Maintain an up-to-date list of people who have expressed their consent to receive electronic direct marketing communications, as well as customers who have not objected;
- k) Keep documentary evidence of the consents expressed by the data subjects and information on the possibility and conditions under which consent can be revoked and the right of opposition can be exercised.

Considering the implications of the recent CNPD Guideline, changes in the scope of data protection in companies may be necessary to adapt the compliance of documents and procedures related to direct marketing ●

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