

G-Regs™Italy – Direct Marketing – DPA Decision Doc No:
2543820

Full title: Resolution on consent in the use of personal data for “direct marketing” purposes, by conventional and automated means - May 15, 2013 (DPA Doc. No: 2543820)

Introduction

WHEREAS

This resolution aims to highlight developments outlined by the Authority with respect to art. 130, paragraphs 1 and 2 of the Code, and the requirements of art. 23, with respect to the use of personal data for the purposes of direct marketing, or for sending out advertising material, or direct sales, or for carrying out market research, or commercial communications, by way of automated systems such as electronic mail, facsimile, MMS (multimedia messaging service), or SMS (short message service) messaging, as well as by automated non-operator-assisted phone calls.

This resolution does not relate to the regulation of telemarketing, where contact is initiated by telephone operator-assisted calls, utilizing personal data extracted from subscribers directories (defined as "contracting parties"), and limited by the Public Opt-Out Register.

The resolution stems from an initiative by the Authority pursuant to section art. 154 paragraph 1a of the Code, to verify the legality and correctness of data management policies adopted by leading national telecom operators with regard to the personal data acquired and client consent expressed on acceptance of a subscription or line activation contract.

As part of this initiative, the Authority reviewed submissions highlighting a number of concerns including; a general lack of document conformity; the different specific consents required in accordance with legislation on the protection of personal data; and the varying interpretations of the data protection code practiced by those holding personal data, including its use for automated direct marketing purposes.

With respect to these issues, particular relevance was given to the manifestation of one inclusive consent for the purposes of “direct marketing” under the provisions of art. 130 paragraphs 1 and 2 of the Code. In particular, the Authority highlighted some critical concerns with regard to the aforementioned consent from the subscriber and the interpretation by operators of the cited art. 130, and also in respect to art. 23 of the Code. A new perspective was needed, linked to the clear need for simplification of procedures relating to the processing of personal data.

1. The Regulatory Framework

The manifestation of consent on the part of the person concerned [data subject] constitutes one of the key principles in the processing of personal data in the private sector within the meaning of the cited art. 23 of the Code. On the basis of that provision, the Authority has always emphasized the requirement that consent should be understood in selective terms, calling for specific consent for each objective pursued by

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the data controller. For example, distinguishing between profiling and marketing. This is also in accordance with the principles embedded in art. 11 of the Code.

With regard to the use of personal data for "direct marketing" purposes, art. 130, paragraph 1 of the Code states that the use of automated non-operator-assisted calling systems, is allowed only with the consent of the contracted party or subscriber and, even in this case, is considered to be valid only if expressed freely and specifically, and is documented in writing, as set out in art. 23 of the code. This provision also applies, as cited in art. 130, paragraph 2, to automated communications made for the same purposes; by e-mail; fax; mms; sms or other such means. Moreover, the cited art. 130, paragraph X of the Code ("electronic communications") chapter 1, concerning "electronic communication services", constitutes a special provision of direct derivation, relating to art. 13, paragraph 1 of Directive 2002/58/EC (e-privacy directive) which expressly provides that: "the use of automated non-operator-assisted calls (automated calling systems), or by fax, or e-mail, for direct marketing purposes is allowed only in relation to subscribers who have expressly given their prior consent."

The purpose of that provision is apparent from examining n. 40 of the directive, where the need to protect the rights of an individual from disruption to their private life by way of commercial communications, especially those considered invasive and in some cases burdensome, justifies the requirement of prior written consent. It is precisely on the basis of these assessments that the national legislature includes the provisions referred to in art. 130, paragraph 1 and 2, and also art. 13, in relation to automated messages such as sms and mms.

2. Telecom Operators' Perspective

Interpretation by telecom operators of the aforementioned articles of the Code and the relationships between them, has led to an accepted practice of non-acquisition of specific consent from their clients, as they believe such consent was previously granted for the purposes of "direct marketing" under art. 23, in reference to permissions required for automated calling systems under art. 130, paragraphs 1 and 2 of the Code.

The arguments put forward in this area were examined by the Authority, taking into account on the one hand, the orientation of the Authority with regard to the requirements of specific consent and. on the other, the premise of an unambiguous manifestation of one inclusive consent for the purposes of "direct marketing" for both traditional and automated methods of contact under the provisions of art. 130, paragraphs 1 and 2 of the Code, not only in reference to the telecom industry, but also in many private sectors, such as in banking or insurance, assuming, then, a far broader connotation than that originally initiated by the Authority.

The telecom operators' interpretation of art. 130, paragraph 1 of the Code, reiterated by subsequent paragraph 2, relegates the importance of the automated system used for the purposes indicated in the regulations, to behind that of the requirement for consent from the subscriber to receive direct marketing, and that such consent should not need to be expressed in a separate form for each method of communication. This is because the objective of direct marketing does not change whether using a traditional means of contact, such as printed paper, or by operator-assisted calls, or by an automated calling systems. Consequently, consent should be expressed only in relation to the specific purposes of the contact, as provided for by art. 23 of the Code, and not by the communication channel selected by the data controller.

In this context, the Authority was faced with legal and organizational challenges in addition to the technical controls, with particular regard for the need to simplify

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procedures relating to the processing of personal data, as requested by the data controllers.

The attainment of a unilateral consent for "direct marketing" purposes, achieved by way of an automated contact form, was also proposed as a means to combine administrative duties and reduce bureaucracy with respect to other regulations, in particular art. 58 of the Consumer Code.

Therefore, given what has already been established under art. 23 of the Code, and in accepting the need to improve regulations with regard to consent within the context of processing personal data, the request for one inclusive consent for purposes of "direct marketing", will suffice, as documented above, to be obtained by the data controller by way of an automated contact form pursuant to art. 130, paragraph 1 and 2, of the Code.

3. The Authority's perspective

Reading the cited art. 130, paragraphs 1 and 2, the outline above does not take into consideration the specific significance of the legislation, which forms part of the legal code system as a special provision in relation to more general provisions mentioned art. 23 of the Code, ensuring that an individual, particularly in the face of invasive or onerous forms of commercial communications, has the right to control the use of their personal data through the conscious and specific expression of consent.

However, within the spirit of the Code, the Authority has searched for a solution, taking into account existing legislation and the scope of specific provisions of cited art. 130, to consider the interests of all those represented. With particular regard to the principles of simplification, harmonisation and effectiveness, art. 2, paragraph 2 of the Code expressly refers to the level of protection of the fundamental rights and freedoms of the holder [data controller] with respect to procedures for the fulfilment of the obligations, as well as the rights of the individual person [data subject] concerned.

Moreover, with respect to simplification, clarification in the context of the correct treatment of personal data with a view to a substantial cohesion between the different interests of all those involved is needed, also considering emerging European directives.

The European Commission communication dated January 25, 2012 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on "Safeguarding Privacy in a Connected World - A European Data Protection Framework for the 21st Century", addressed this need to balance an individual's right to maintain effective control over their personal information, against the trend of simplification within the regulatory environment by significantly reducing bureaucracy by eliminating a series of formalities.

The need to eliminate unnecessary red tape and to update measures, through policy simplification, had already been raised in the European Commission's communication of June 25, 2008, within the context of the analysis of European policies towards small and medium-sized enterprises "Think Small First" - A "Small Business Act" for Europe.

A need for simplification of the procedures in correlation to the need to safeguard the data subject's rights, is also highlighted in the provisions of paragraph 4 of art. 130 of the Code, with respect to the hypothesis of so-called soft-spam. Similar simplification criteria were adopted with regard to postal marketing for the purposes of direct sales to customers of similar products and services, under the Authority's general measures dated June 19, 2008.

Recent regulatory changes (article 20bis of Decree-Law No. 135, dated September 25, 2009, converted into law No 166 on November 20, 2009, - giving rise to article 130 of the

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Code) provided, by applying a system to 'opt-out' in relation to "direct marketing" via operator-assisted calls. The implementation of such a system allowed the processing of personal data published in the 'subscriber directories', without the prior consent of the person concerned, excepting the right of opposition by the data subscriber via enrolment the appropriate 'Public Opt-out Register'.

Furthermore, the switch from an opt-in to an opt-out system was adopted for postal marketing (as cited in art. 6 of Decree-Law n. 70 dated May 13, 2011, converted into law n. 106 on July 12, 2011, further modifying art. 130 of the Code), against which, however, has not yet been established a specific Public Opt-out Register.

In a framework thus outlined, it is also considered that the need for clarification extends beyond telecom operators to the private sector and, in the context of reconciling various interests in the event of dispute, may demand restructure of the means by which consent is given by an individual for the purposes of "direct marketing" by automated non-operator-assisted systems.

Therefore, while respecting the legislative principles of art. 130, paragraphs 1 and 2 of the Code, the Authority intends to structure a wider scope of application, taking into consideration that the "explicitness" of consent – which constitutes a general rule for all processes based on this requirement – must be assessed in the interests all parties, but above all, facilitating clear and simple obligations on the part of the data controller, while also preserving the data subject's rights.

In reiterating that art. 130, paragraphs 1 and 2 of the Code provides, in the presence of massive and uncontrolled commercial communications, including those generated automatically, protection of the data subject through the manifestation of specific acceptance of any processes to be carried out by such means, the Authority considered that the request for consent on the basis of this special provision, is prerequisite to the consent cited in art. 23 in relation to the aims that art. 130 specifically invokes.

The latter provision, aimed at regulating hypothetical processes, is characterized not only by the requirements referred to in paragraph 1, but also by the specific processes set out in paragraph 2, since an implied intrusion into the private life of an individual may, in fact, by reason of this further attribute, be logically covered by art. 23 of the Code, thus simply defining in general terms, the characteristics of consent based on their application in the private domain.

Based on that interpretation, and bearing in mind the need to balance the interests of those involved, and to simplify the principles cited in art. 2 paragraph 2, of the Code, the data subject will give express consent on the basis of art. 130, paragraphs 1 and 2 of the Code, with respect to the treatment of their personal data for the specific purposes stated, at the same time agreeing to receive promotional communications sent through traditional, less invasive means of contact, such as by post or by operator-assisted calls.

Whereas on the one hand, this interpretation allows an individual to simultaneously deny consent to the processing of their personal data for both automated and traditional modes of contact, within the meaning of the cited art. 130, paragraphs 1 and 2 of the Code, on the other hand, it confers the data controller the prospect of obtaining a positive response across a greater diversity of commercial communication consents under art. 130, paragraphs 1 and 2, and art. 23 of the Code.

In the light of these considerations, an individual's right of opposition to the processing of personal data for purposes of "direct marketing" by automated means, should be extended to receiving promotional communications via traditional means, even if the

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data is present in the "subscriber lists" and is not listed in the public opt-out Register.

It must also be noted that the interpretation here given by the Authority must in no way lead to a reduction to the individual's right to privacy and self-determination.

It remains, therefore, to protect the individual's right to easily and freely communicate to the data controller, their willingness to receive communications for purposes of "direct marketing" exclusively through traditional means, such as postal or operator-assisted calls.

This possibility must be included in the data subject's rights as an expression of informed self-determination and, in particular, as a manifestation of the right to oppose in part to the use of personal information as expressly provided under art. 7, paragraph 4 of the Code.

Under the projected framework, the Authority therefore considers it desirable to prescribe, within the meaning of arts. 143, paragraph 1b, and 154, paragraph 1c of the Code, suitable measures to ensure a fair balance between the rights of the interested parties, and to simplify procedures related to the processing of personal data that have emerged in the application of discipline.

Consequently, the information issued concerning the consent sought by the data controller pursuant to art. 13 of the Code, must be clear that, with respect to data use for the purposes of "direct marketing", the consent given by the data subject pursuant to art. 130, paragraphs 1 and 2 of the Code, encompasses both automated and traditional means of contact.

Conversely, the information must also illustrate the data subject's right to object to the processing of personal data for such purposes through automated means, also extends to promotional communications by traditional means, notwithstanding the data subject's right to oppose in part to the usage, as provided by art. 7, paragraph 4 of the code.

In addition, with regard to the recognized possibility for an individual to express willingness to receive commercial and promotional communications exclusively through traditional modes of contact, it will be the data controller's responsibility to record such a request within the privacy statement and to ensure it is easily and freely enacted.

The right to an exclusive consent, as highlighted above, shall be contained in a policy statement to be issued at the earliest opportunity to all data subjects who have granted a single consent for "direct marketing" purposes (using traditional and electronic communication services), possibly at the time of next contract renewal.

Specific information obligations with respect to commercial communications that constitute a service of the organizations holding the data, or are an integral part of that service, as foreseen by art. 8 of Legislative Decree n.70 del 2003, expressly cited, as a result of the latest regulatory changes, in the first paragraph of art. 130 of the Code.

ALL THIS BEING SAID, THE AUTHORITY

1) Highlights, pursuant to art. 154, paragraph 1h of the Code that, on the basis of the implied reasoning outlined in respect to art. 130, paragraphs 1 and 2 of the Code, data controllers in the private sector who, in pursuit of "direct marketing" via automated modes of contact, acquire the consent of the data subject within the meaning of the cited art. 130, can make use of the same data for contact by traditional methods, such as postal or telephone operator-assisted calls, without having to obtain a separate consent,

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provided that the data subject concerned has not exercised a specific right to 'opt-out' of the treatment;

2) Prescribing, for the purposes of articles. 143, paragraph 1b, and 154, paragraph 1c the above Code, data controllers that:

a) By the information given and consent requested and, the resulting consent for the sending of commercial and promotional communications, on the basis of art. 130, paragraphs 1 and 2 of the Code, implies the data subject's receipt of these communications, not only through automated modes of contact, but also through traditional methods, such as postal or operator-assisted calls.

b) By information resulting from the data subject's request to opt-out of the processing of their personal data for purposes of "direct marketing" via automated modes of contact, extends also to traditional means, notwithstanding the data subject's right to oppose only in part, as provided by art. 7, paragraph 4 of the Code;

c) By the information resulting, there is also the possibility for an individual who chooses not to consent to the terms indicated above, to express a willingness to receive communications for such purposes exclusively through traditional modes of contact, whereby envisaged;

d) That request be exercised easily and free of charge, within the meaning of the cited art. 7, paragraph 4 of the Code;

3) Prescribing, for the purposes of articles. 143, paragraph 1b, and 154, paragraph 1c of the Code, to data controllers that have garnered a single consent for purposes of "direct marketing" through the use of both traditional and automated communications, to make reference to the aforementioned 'willingness' option to the data subject at the earliest opportunity, possibly at the time of next contact renewal;

4) Has transmitted copy of this resolution to the Ministry of Justice, office for the publication laws and decrees, for publication in the Official Journal of the Italian Republic.

Within the meaning of articles 152 of the Code and 10 of Legislative Decree No. 150/2011, any motion against this resolution may be brought before the Italian Law Patents Court, by appeal filed at the Court of the data controller's residence, within thirty days from the communication date of the decision, or sixty days should the applicant reside abroad.
