

G-Regs™

Italy – Direct Marketing – Doc No. 2542348



Full title: **Garante Guidelines relating to promotional activity and the fight against spam, July 4 2013**

<http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/2542348>

Section **Guidelines on Marketing and Against Spam**

2. Changes to the regulatory framework in relation to spam

Clause 2.1 **Objectives of spam**

To begin, it is necessary to define the characteristics of spam which, for the purposes of the Code, consists of the distribution of advertising material, direct sales activities and market research or commercial communication activities (see articles 7, paragraph 4b, and 130, paragraph 1, and 140 of the Code), carried out in violation of the rules of the Code, by automated non-operator assisted calls (i.e. pre-recorded phone calls) or by e-mail, fax, sms, or mms (art. 130 Para 1).

Under the Code, sending indiscriminate and/or multiple promotional messages simultaneously to a large number of addresses or phone numbers should be avoided, and detection will lead to the inevitable consequence of sanctions.

Clause 2.2 **Constraints and actionable safeguards against spam**

Given the significant regulatory changes detailed below, it is also necessary to clarify constraints within the provisions of the Code relating to spam, and the rights of those in receipt of automated promotional communications. While individuals may exercise the rights referred to within the abovementioned articles of the Code in order to protect themselves from unlawful contact, "legal persons" are no longer entitled to apply directly to the Italian authorities for protection against any infringements.

In that regard, article 40, second paragraph of Decree Law no. 201 dated December 6, 2011, ("Save Italy Decree"), converted into Law no. 214 on December 22, 2011, amended some provisions contained in part one of the Code (art. 4) revoking the "General provisions", concerning, inter alia, the concept of "stakeholder" and of "personal data", notably removing any reference to legal persons or similar, i.e., organizations and associations, and has retained the reference to individual/s only.

Subsequently, Decree Law no. 69 dated May 28, 2012, entered into force following the incorporation of Directive 2009/136/EC, partially amending some provisions of Chapter 1 ("electronic communications services") of title X ("electronic communications") of the Code, as applied to the implementation of the Community Directive 2002/58/EC, covering automated promotional communications, and which introduced the qualification "contracting party"- with respect to legal persons - in place of the "Subscriber".

As a result of these regulatory changes and their subsequently ambiguous

URL of Source: <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/2542348>

interpretation, the Authority intervened with a general provision dated September 20, 2012 (DPA web doc. no. 2094932), on the application of the Code with respect to legal persons, organizations and associations.

Based on the aforementioned interpretation, it should be noted that from December 6, 2011, legal persons and entities targeted by spamming - unlike individuals - may no longer submit reports, complaints or appeals to the Authority, nor may they exercise rights as referenced in articles 7 etc. of the Code, because they cannot claim "Stakeholder" status.

However, "Contracting Parties" can avail themselves of ordinary judicial authority statutory remedies such as an injunction or an action for damages, or possibly, an appeal under article 167 of the Code of Practice, by instigating a criminal action with the relevant penalties. In addition, they can benefit from the eventual exercise of local body by-laws - as for injunctions, or by sanctions - if prerequisites for the possible unlawful processing of data apply.

With particular reference to e-mail communications, it prove difficult to distinguish if a recipient is an individual or a legal entity. For example, an employee who provides their corporate email address containing their general information: (name.surname@companyname.com).

This occurrence is clarified by Group Article 29 (judgement no. 4/1997 and No. 5/2004), and based on of the criteria of "content", "purpose" and "outcome" set out therein, in order to define specific data in relation to legal persons as "concerned" individuals, - such email addresses should be considered "personal address" e-mails and their respective assignees as "stakeholders", with the consequent applicability of Code and its embedded rights and safeguards. That being without prejudice to the already established use of corporate e-mail by way of existing Authority requirements in respect to the processing of employee data (ref. "The supervisor's guidelines for e-mail and the Internet" dated March 1, 2007, web document no. 1287522).

Clause 2.3

Data processing principles of fairness, purpose, proportionality and responsibility. Technological neutrality

Personal data processed by automated communication systems, in particular fixed and mobile telephones numbers and e-mail addresses, must, among other provisions of articles 3 and 11 of the Code, be used and stored in accordance with the principles of fairness, purpose, proportionality and responsibility and, in any instance of contravention of the Code, further use of the data is null and void.

In respect to promotional communications made through e-mail in particular, the Authority emphasizes the need for email providers to ensure, while respecting the principle of technological neutrality, reciprocal authentication of the respective servers to provide users with the highest possible level of spam protection. This is all the more important when taking into consideration the harmful phenomenon known as phishing, i.e. counterfeit e-mails that use the graphics and official logos of private entities (banks in particular) and institutions, which motivate the recipient [data subject] to provide personal data by giving reasons of a technical or economic nature, in order to pursue illegal objectives. For example, to gain access by password to the data subject's account or credit card to perform transactions that are damaging to the data subject's legal or economic circumstances, and without the data owner's knowledge.

In particular, the provider [data controller] should install special filters to recognise spam with a reasonable degree of certainty, providing, however, that such a device will not pose any risk to the confidentiality of the parties concerned.

Clause 2.4**The obligation to provide clear and comprehensive information in accordance with article 13 of the Code**

An essential responsibility of the data controller is that, prior to the release of promotional communications governed by article 13 of the Code, recipients have a clear and comprehensive awareness of the processing of their personal data, including their authorised consent thereto.

Therefore, the data subject or individual from whom the personal data was collected must have previously been informed, orally or in writing, of a set of mandatory and consistent prerequisites. Among these, are the means by which the data will eventually be used, in particular those referred to in article 130, paragraphs 1 and 2, i.e. automated phone calls and similar methods (such as fax, e-mail, sms, mms), as well as the traditional methods of post and operator-assisted phone calls, and also, the reason for the contact (for example, statistical research, marketing or profiling).

On the basis of this provision, with respect to contact for promotional purposes using automated systems or the equivalent, it should be noted that, if the personal data submitted for recipients of these communications was not collected directly from the data subject, clear and comprehensive information, including the categories of the data to be used, shall have been given at the time the data was first registered, or at the earliest opportunity thereafter (see article 13, paragraph 4, of the Code).

Clause 2.5**The requirement of prior consent ("opt-in")**

Data processes carried out for promotional purposes using automated systems or the equivalent are governed by article 130, paragraphs 1 and 2, of the Code, where the use of such means for marketing purposes is only allowed with the prior consent of the data subject or subscriber (i.e. opt-in).

For a promotional communication to be legal when it is effected, it is not permitted to advise at that time, how to object to future communications, nor is it permissible to request consent, with this first promotional message, for the processing of data for promotional purposes.

Therefore, without prior consent - as consistently upheld by the Authority since the general provisions on spamming were introduced on May 29, 2003 (web document no. 29840) - it is not possible to send automated promotional communications using personal data extracted from public directories, lists, records or website documents, all readily available in the public domain.

Similarly, without the prior consent of the interested parties, it is not permissible to use for promotional purposes PEC [posta elettronica certificata] email addresses contained in the "National index of business and professional PEC addresses" - reference Decree Law no. 179 of October 18, 2012, converted with modifications into Law no. 221 on December 17, 2012, which introduced the special article 6bis of Legislative Decree no. 82 dated March 7, 2005 (Digital Administration Code) - established to encourage the submission of applications, statements and data, as well as the exchange of information and documents between the government and businesses and/or professionals using IT systems.

However, operator assisted calls (requesting a subscriber's consent to receive promotional communications in accordance with procedures set out in article 130, paragraphs 1 and 2) may be made to those telephone directory numbers not included in the Public 'Opt-out' Register (established by Decree Law No. 135 dated September 25, 2009, and converted with amendments into Law No. 166 on November 20, 2009), as well as to those numbers in public lists "with the limitations and conditions that laws, regulations or by-laws provide for the dissemination and publication of data", among

which "there is a link based on the specific and legitimate purposes for which the data was collected and recorded, and any further use compatible with those purposes (article 11, paragraph 1b, of the Code)": see resolution dated January 19, 2011 (web document No. 1784528).

In addition, with a view to consistency, it should be pointed out that the principle of consent for the processing of personal data also exists within the framework of consumer protection in distance selling, according to which, professional telephone operator calls, electronic mail, automated non-operator-assisted calls and fax messages, require the prior consent of the consumer (see article 58, Legislative Decree n. 206/2005, of the consumer code).

Clause 2.6

Requirements of a valid consent for the purposes of sending promotional communications

Consent given for the purpose of sending promotional communications must be free, informed and specific, with data use clearly identified and documented in writing (article 23, paragraph 3 of the Code) and therefore requires the presence of all the aforementioned requirements to uphold the consent in accordance with the Code.

On the basis of what has already been stated in paragraph 2.4, an individual should be able to knowingly and freely express their own choices with regard to the processing of their personal data (see No.7 of resolution dated February 24, 2005 web document no. 1103045) and to this end they must be given clear and comprehensive information, as specified above.

The data subject's consent for promotional activities is considered to be free when it is not pre-set, is not by implication or required in order to benefit from the product or service provided by data controller.

To exemplify, free consent for the use of personal data for promotional purposes is not given when an individual registers with a company website for the free use of its services. With this In mind, the Authority has expressly stated that a web service cannot be called "free" if consent is implied to further processing of the personal data; i.e., the data subject must "pay" as a condition of using the service (see: resolution dated February 22, 2007, web document no. 1388590; resolution dated October 12, 2005, web document No. 1179604; resolution dated November 3, 2005, web document No. 1195215; resolution dated May 10, 2006, web document no. 1298709; resolution dated July 15, 2010, web document No. 1741998 and more recently; resolution dated October 11, 2012, web document No. 2089777).

Similarly, preparation of modules where the "check-box" acquisition of consent is pre-compiled with a specific symbol (i.e. flags) is not acceptable (see resolution "Consent to the Internet processing and use of data for promotional purposes", dated May 10, 2006, web document No. 1298709).

An individual's consent must be specific for each possible objective pursued and for each process type carried out, particularly, data communication to third parties for promotional purposes, according to the following guidelines and clarifications.

Clause 2.6.1

Purpose

With regard to the purpose of the processing of personal data, confirmation that the data controller must acquire a specific consent for each distinct objective, such as marketing, profiling, data communication to third parties (see resolution dated February 24, 2005, section 7, web document No. 1103045).

However, an unusual aspect of 'promotional purposes' requires further clarification. With the cited articles: 7, paragraph 4b; 130, paragraph 1; and 140, the Code provides for

more than one marketing purpose, i.e., sending advertising material, direct sales, market research or commercial communications, with the subsequent consideration as to whether or not a specific consent is required for each. (For the online marketing sector, see judgement 4/2010 Group Article 29 on the Fedma European code of conduct for the use of personal data in direct marketing). The Authority considers that the aforementioned activities are functional and that they pursue a single marketing purpose (*lato sensu*), and that consequently, an associated treatment is justified with the acquisition of a single consent (see, among others, resolution dated March 9, 2006, web document No. 1252220; resolution dated May 24, 2006, web document No. 1298784; and resolution dated November 15, 2007, web document No. 1455985).

This approach, already expressed by the Authority in a number of resolutions (see, for example, resolution dated January 31, 2008, web document No. 1490553; <http://www.microsofttranslator.com/bv.aspx?from=it&to=en&a=http%3A%2F%2Fwww.garanteprivacy.it%2Fgarante%2Fdoc.jsp%3FID%3D1490553> see also judgement 15/2011 Group Article 29 on the definition of "consent", according to which, the need for consent must be assessed in line with the objectives pursued or the destination of the data) aims to avoid multiple consents and is compatible with article 2, paragraph 2, of the Code, requiring compliance with the principle of simplification of procedures for the fulfilment of the obligations on behalf of all stakeholders.

This approach appears consistent with the principle of purpose (according to which the data can be used in other processing operations termed "compatible" with the original purpose of the data collection: article 11, paragraph 1b, of the Code).

Clause 2.6.2

Consent for the marketing method (both traditional and those referred to in article 130, paragraphs 1 and 2 of the Code)

In order to implement the need for simplification of procedures in relation to the processing of personal data, this Authority considered it equally legitimate to interpret the requirement for specific consents with respect to the methods used for marketing purposes, by envisaging two appropriate and distinct consents, covering traditional means and those referred to in article 130, paragraphs 1 and 2 of the Code respectively, or, alternatively, a single consent covering both methods.

In the latter case, as mentioned in paragraph 2.4 in relation to information obligations to be met, simplification of the methods used for marketing was called for (traditional methods and those referred to in article 130, paragraphs 1 and 2, of the Code), and, at the same time, the need to safeguard the data subject's rights was fundamental. In particular:

- Information given with respect to the consent sought, must explain that consent given for the automated sending of commercial and promotional communications, as per article 130, paragraphs 1 and 2, of the Code, will also extend to such traditional means of contact as specified in the notice, for example, postal and operator-assisted calls.
- Information must also illustrate the data subject's right to object to the processing of personal data for such purposes through automated means, and such 'opt-out' 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 4b of the Code. For example, consent may be given to receive promotional communications via automated systems only.

Clause 2.6.3

Specific consent for the communication and/or transfer of data to third parties for marketing purposes

In practice, the Authority sometimes found that data controllers, via paper or online

contract forms, collect a generic consent to data processing for their own promotional purposes and for third parties to which they communicate (and/or sometimes give up) personal data, without identifying the data subject, nor recording information on how the consent was obtained, and without any reference to the trade or economic categories for which the consent was intended.

Firstly, the Authority provides clarification regarding the communication of data to associated third parties for marketing purposes, where the third party – in respect of data collected for marketing purposes - is a subsidiary of the parent company or, for various reasons, is connected to the entity that collected the personal data.

With regard to the communication of data to third parties for marketing purposes in general, it should be noted immediately that the communication or transfer of personal data to third parties for marketing purposes cannot be based on a singular or generic consent from the data subject. (See, among many; resolution dated October 11, 2012, web document No. 2089777; resolution dated May 19, 2011, web document No. 1823148; resolution May 12, 2011, web document No. 1813953; resolution dated October 7, 2010, web document No. 1763037; resolution dated July 15, 2010, web document No. 1741998; see also Tribunal, Rome, dated October 5, 2011, No. 19281).

Therefore, those data controllers who collect the personal data of individuals to communicate (or distribute) such information to third parties for their promotional purposes, shall prior to release of data to the third party, make an adequate disclosure to the data subject, pursuant to article 13, paragraph 1, of the Code, that, in addition to other prerequisites, clear information is included in relation to third parties or, alternatively, that the categories of eventual data use are specified (economic or trade) and/or the affiliated categories (for example: "finance", publishing "apparel ": see subparagraph (d) of that provision).

In addition, the data controller must acquire specific consent for the communication (and/or transfer) of personal data to third parties for promotional purposes, separate from the consent required by the data controller to carry out promotional activities in-house.

If an individual gives a specific consent for the disclosure of their personal data to third parties, such parties will be able to contact them for promotional activities using automated communication systems, as cited in article 130, paragraphs 1 and 2, and without having to acquire a new consent for promotional purposes.

This clarifies that, for the purposes of the Code, a third party can belong to trade or economic category dissimilar from that of the data controller who provided the collection of personal data from an individual.

Moreover, where a third party is identified as contacting an individual to promote goods or services outside of those provided in article 13 of the Code relative to the intended data use, it is not necessary for the third party to issue a separate disclosure to the data subject where it was documented, as specified in article 13, paragraph 2 of the Code, in the original privacy policy, that future promotions "may include goods or services not already known to the data subject providing their information".

Where the request for consent is not accompanied by a policy statement with these requirements, the third party - pursuant to article 13, paragraph 4, of the Code - will only be able to send promotional communications to an individual, after the release of its own privacy policy, which must contain, in addition to the items provided for in article 13, paragraph 1, information about the source of the personal data, thus giving the data subject the right to object to the use of their information by the third party, and also by the data controller who collected and then transferred their data, in accordance with article 7, paragraph 4b of the Code.

In both cases, the third party must provide the data subject with suitable access to the data controller - as referred to in article 130, paragraph 5 - thus enabling them to exercise their right to privacy effectively under article 7 (see resolution dated April 7, 2011, web document No. 1810207), and to assure the effective achievement of this objective, the same, or similar, communication channel as that used to send promotional communications, should be made available (see judgment n. 5/2004 of Group Article 29).

For example, if third parties intend to send an e-mail promotion, recipients should be able to oppose the process by sending an e-mail to an address indicated in the promotional information provided which, as such, is perhaps reserved for the management of data processing issues submitted by users and customers.

These rules also apply when a third party - to whom a data controller intends to communicate (or assign) personal data collected for marketing purposes - is the subsidiary, parent company, or, is connected in any other capacity with the entity that collected the personal data.

A separate consent for profiling must be upheld, as already stated by the Authority, albeit in other contexts (see: resolution dated November 23, 2006, "review of guidelines on the processing of employee personal data for the purpose of managing employee liaison by private employers," web document no. 1364099; resolution dated May 12, 2011, "review of provisions relating to the circulation of banking information and the tracking of financial transactions," web document no. 1813953; see also resolution dated June 15, 2011 "ownership of personal data processed by those who rely on agents for promotional activity," web document no. 1821257; see also resolution dated February 22, 2007, cited above). In particular, individuals employed within a corporate group, in order to meet the requirements of consent, must still be considered, as a rule, as autonomous and as the individual owners of their respective personal information.

Clause 2.6.4

Consent documented in writing

Consent for promotional purposes must be documented in writing.

It should be noted that Directive 2002/58/EC does not specifically establish the method for obtaining such consent. (Consider also 17 of the same directive: "... Consent may be given by any appropriate method that allows the user to knowingly and freely express their informed specific wishes, including by ticking a box when visiting an Internet site".)

It follows that operators [data controllers] are free to choose the method they deem appropriate within the constraints of their organisation. In addition, there is no requirement for consent to be acquired in writing, on risk of invalidity of the same, but it is necessary for the data controller to adopt appropriate measures to evidence a valid consent by providing substantiating documentation. In particular, a record of the date consent was given and the identification of those who received it. At the same time, procedures to ensure the data subject is aware of the option to revoke consent must be observed. (see resolution dated May 30, 2007, web document no. 1412598.)

It seems useful to adopt a system to verify the identity of an individual who visits a web site because they may be interested in receiving promotional offers. For example, an automated system that sends an introductory email where the recipient is asked to confirm their identity by clicking on a special link.

Clause 2.7

The exception of "soft spam" for sending promotional e-mails

The Authority points out that such communications under article 130, paragraphs 1 and 2, are valid grounds for exemption from the consent referred to in article 24 of the Code.

E-mail alone, is the exception under the so-called "soft spam" referred to in article 130,

paragraph 4, under which, e-mail information provided by an individual in the context of a purchase of a product or service, and subsequently used by the data controller for the purpose of selling additional products or services, may not require consent from the data subject. Providing, however, that promotions offered must be for services similar to those covered by the initial transaction and, the data subject, adequately informed, has the right to revoke the use of their personal data.

Section 6

New forms of spam

The Authority, in keeping within the regulatory framework, intends here below, to provide guidance of a general nature in relation to new regulations and methods for spam, where specific regulatory disciplines are presently lacking, and also, to ward off the real potential that the Internet, and technology as a whole, has paved the way for the indiscriminate and fraudulent use of personal data.

Clause 6.1

Social spam

So-called "social spam" consists of a set of activities through which the spammer conveys messages and links through online social networks. This forms part of the indiscriminate and often unconscious use of personal information by social networks users, especially those using "open" profiles. Such use lends itself to unsolicited marketing and the use of personal data for profiling and marketing by the business partners of companies who manage such sites, or who take advantage of the availability of such data on the Internet. Furthermore, the 'real people' using social networks are open to spammers that seek to capture users contact lists, aiming to increase the viral reach of their messages.

In this regard, the Authority points out that the easy traceability of personal data on the Internet (such as phone numbers and/or e-mail addresses) does not grant use of this information for automated promotional activities, without the consent of recipients.

With respect to this type of spam, it should be noted that promotional messages sent to private users of social networks (such as Facebook), as in their virtual notice board, are in violation of the Code and thus are subject to sanctions under articles. 3, 11, 13, 23 and 130, in particular.

The same rules apply to messages sent using increasingly popular systems and services such as Skype, WhatsApp, Lapwings, Messenger, etc. These services raise the risk of proliferation of spam since, as stated in their terms of service, on occasion, they involve the undifferentiated sharing of any personal data present in the smart-phone and/or tablet (such as contacts, calendar, notes, sms, and Internet navigation data) and give the company who provides the service, open access to any contact lists and/or address books present on the user's mobile devices to obtain and/or retain such personal data.

The risk of receiving spam, and in particular so-called "targeted spam" based on user profiling, is aggravated by the tendency technology platform managers to increasingly simplify their privacy policy, thus unifying different profiles on services rendered from the same platform. In doing so, they achieve a more thorough knowledge of their users, which allows the targeting of promotional messages from multiple applications, based on the users' personal tastes.

On the one hand, these new practices facilitate the commercial relationship between producer and consumer, reducing the costs of marketing and also secondary product research costs. On the other hand they allow the individual to be profiled against their will, and, in addition to receiving spam, the data subject's freedom to benefit from information society services, is restricted.

On that premise, and without prejudice to the legality of messages for purely personal purposes, it is possible to identify some assumptions about what personal information

should be provided and also seek clarification of regulatory aspects.

The first assumption is that the user receives, in private, on bulletin boards or via an e-mail address connected to his social profile, a given promotional message for a specific product or service from a company that has taken the recipient's personal data from a social network profile to whom they are subscribed

A second assumption is that the user has become a "fan" of a particular company or organization, or they are a member of a "group" of followers of a particular brand, character, product, or service (having elected to "follow" their news or comments), and then receive promotional messages concerning the above items.

In the first instance, the use of personal data is considered unlawful, unless the sender can prove the acquisition of specific consent from the recipient, informed and free, and documented in accordance with article 130, paragraphs 1 and 2, of the Code.

In the second instance, the sending of promotional communications in relation to a particular brand name, product or service, carried out by the company referenced by its page, can be considered lawful within the context or mode of operation of the social network. Also, the information submitted can clearly attest that the individual concerned has expressed a desire to provide their consent to receive promotional messages from that particular company. If the individual resigns from a group, un-clicks the "follow", or otherwise opposes any further promotional communications, any future promotional messages will be unlawful, with disciplinary consequences. Therefore, without prejudice, a social network may give their users recourse to block messages from a specific contact, or to report the latter as spammers.

With respect to a user's "contacts" or "friends", phone numbers and/or e-mail details are often visible on social networks and subscriber communities. Any corporation or organization that intends to send promotional messages legitimately using such data, must have previously acquired, from each "contact" or "friend", a special consent for promotional activity.

Clause 6.2

"Viral" marketing

"Viral" marketing is a form of promotional activity by which, a promoter uses the communication capacity (friends or contacts) of a limited number of individuals who are direct users, to convey their message to a large number of end users. This form of activity has evolved from the "word of mouth" phenomenon, but is distinguished by the fact that, from the outset, the promoter reveals their intention to launch a promotional campaign. Like a "virus", a communication promoting an idea, product or service, which may prove useful or of interest to the recipient, is then conveyed to their contacts, and from them to others, and so on.

In general, the term "viral marketing" refers to Internet users that suggest or recommend to others the use of a particular product or service. At the present time, this promotional technique is rapidly expanding to include products not strictly connected to the Internet, However, the message vehicle remains the web community, with its proven ability to communicate in a clear, fast and free manner.

To facilitate distribution of their message, a promoter may provide an incentive, bonus, or some other commodity to a recipient who, in turn, offers or otherwise makes known to others (by email or sms) the promotional communication they have received.

Such activity, when performed by automated communication systems for marketing purposes, may fall into the category of spam if the principles and rules already mentioned within the regulatory framework currently in force are not observed, with particular reference to articles 3, 11, 13, 23 and 130 of the Code.

However, the Code on data processing carried out by an individual who has received a

promotional offer, allows individuals to relay an offer using automated means, recommending the product or service to friends on a personal basis. The Code applies to personal data employed to relay or otherwise communicate a promotional message received, to multiple recipients whose personal data (telephone numbers and/or e-mail addresses) are freely visible in public directories or on the web.
