
CNPD guidelines on direct marketing electronic communications

The Portuguese Data Protection Authority has established several guidelines for data controllers and data processors on direct marketing electronic communications.

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- > The Portuguese Data Protection Authority (CNPD) has approved its first 2022 guidelines on direct marketing electronic communications.
 - > These guidelines are in response to the CNPD receiving a high number of complaints pertaining to unsolicited communications, which, according to the authority, proves that companies must change their procedures.



I. Key points from the guidelines

- As is known, direct marketing electronic communications have been the object of particular attention within CNPD's sanctioning activity. Due to almost 4,000 complaints from data subjects since CNPD provided a specific form for this matter, the supervisory authority has now issued its [Guideline 2022/1](#) on direct marketing electronic communications, in an attempt to clarify a number of important points on personal data processing in this area.
- The supervisory authority highlights that, under the Electronic Communications Privacy Act (Law 41/2004 of August 18), the legal bases for data controllers to send direct marketing electronic communications are limited to (non-general) consent and legitimate interest (in specific cases).
- For an entity to base its communications on legitimate interest, the following criteria must be met:
 - a) A previous legal relation within which the entity obtained the customer's contact data as part of the transaction.
 - b) The direct marketing communication pertains to products or services similar to those that were the object of a previous transaction.
- CNPD regards this previous legal relationship as a "custom" relation, which should be broadly construed to include relations of mutual knowledge and trust that enable data controllers to anticipate the data subject's expectations, without compromising their interests or fundamental rights and freedoms through the data processing. The data subject must also be given the means to opt out or unsubscribe from these communications, either when their data is being collected or when they receive messages.
- If these criteria are not met, CNPD has confirmed that direct marketing electronic communications may only be carried out with the data subject's consent. This consent must follow the rules for consent established in the General Data Protection Regulation (GDPR), and the data subject must be provided with adequate information.
- Regarding data controllers' use of data processors to run marketing campaigns on their behalf, CNPD states that this practice does not exempt the data controller from any liability for personal data breaches. CNPD states that the data controller should carefully monitor the data processor's actions and guarantee the lawful collection and processing of personal data.
- Also, an entity may not use a database previously obtained by the data processor (before their engagement) for direct marketing purposes. Even if the data processor



obtained the data subject's consent for this purpose, according to CNPD, this is not GDPR compliant (i.e., it is not sufficiently specific).

- Similarly, CNPD focuses on the acquisition of databases and the collection of data from data brokers, and strongly restricts this activity. CNPD admits that an entity may collect and transfer data based on consent and legitimate interest, provided there are no "sophisticated approaches, when agreeing to the transfer of their personal data, intended to decrease the data subject's perception of the real purpose of the processing of their data." Once the data broker has transferred these data to the entity that intends to carry out direct marketing actions, that entity will be responsible for processing and will not have specific consent to send direct marketing electronic communications. CNPD states that the data may sometimes be used to send communications by mail, but not electronic communications.
- It also highlights the obligations the data controller must fulfill when obtaining consent, which must not be "ambiguous and unclear in its wording, obtained when participating in online pastimes or competitions, which thus try to obtain authorizations for the transfer of data to third parties or to carry out direct marketing campaigns on behalf of third parties, which would rarely be given if directly requested by the actual data controller expressly stating that purpose." CNPD highlights that when a third-party entity requests consent to data processing, it must specifically identify each of the entities, without using concepts such as "sponsors", "partners", or "group company." The data subject may not be "forced" to give their consent to access a specific product or service.
- Finally, CNPD highlights a number of data controller obligations under the principle of liability, including the preparation of a Data Protection Impact Assessment, given that most direct marketing actions involve large-scale data processing and the frequent use of innovative technologies. Data transfer to third countries is also included within this point.

II. Final provisions

Given the importance of these matters, we highlight the need to:

- a) assess whether there is an established legal relation between the data controller and the recipients, so as to establish the need for consent to the sending of direct marketing communications;
- b) reassess compliance with the requirements for the declaration of consent;



- c) monitor data processors that provide their services when sending direct marketing communications, giving the instructions necessary to ensure that they meet the applicable personal data protection rules;
- d) review the contractual relations in force, if necessary;
- e) assess the use given to the personal data received from data brokers and establish whether their use complies with the GDPR and the Electronic Communications Privacy Act;
- f) map (current and planned) activities involving the sending of direct marketing electronic communications and establish which ones lack the Data Protection Impact Assessment;
- g) map (current and planned) activities involving the sending of direct marketing electronic communications and establish which ones involve data transfers to third countries; and
- h) implement the measures required as standard contract clauses to legitimize them.

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