

## Document 1.1.2 -1

# DATA PROTECTION IN DIRECT MARKETING – analysis of the legislation in direct marketing

## Component 1 Activity 1.1.2

Final version



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## Contents

I. INTRODUCTION .....	3
II. ANALYSIS ON THE LEGISLATION ON DIRECT MARKETING .....	4
1. Law on Personal Data Protection.....	4
1.1 General overview .....	4
1.2 Analysis of Specific Provisions for direct marketing from LPDP .....	4
2. Law on Electronic Communication .....	7
2.1 General overview .....	7
1.2 Analysis of Specific Provisions for direct marketing from Law on Electronic Communication .....	8
III. RECOMMENDATIONS .....	11



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## I. INTRODUCTION

In simple words direct marketing is selling via direct contact with the prospective customer. Direct marketing differs from general marketing in that the result of a promotion is measurable in terms of response; also, direct marketing is largely dependent upon the use of customer databases and lists. Direct marketing is a more personal type of promotion than advertising. The direct marketer often selects the individuals who will receive the promotion, and is the direct recipient of the response, if any. The response may be a purchase, an inquiry, or a referral that can be traced directly back to the individual. Direct marketing is utilized by virtually every type of business and organization. Direct marketing is any marketing or advertising material that is directed at particular individuals. It includes messages trying to sell goods or services and those promoting an organisation or its values or beliefs, such as material from charities or political parties asking for support. Direct marketing could be an email advertising car insurance or a phone call from a charity asking for a donation. It does not include calls that are purely for market research.

The growth of technology in general and of computer-based technologies in particular, has played an important role in many areas of direct marketing. New computer technologies have allowed direct marketers to be more precise in the analysis of results, in the targeting of messages based on more complex psychographics and demographics, in developing more sophisticated customer and prospect databases, and even in the creative execution of direct mail packages which allows businesses to target individuals with known purchase histories that match the marketer's customer profile. Direct marketing databases do not contain only names, addresses, telephone numbers, e-mail etc. They are the repository of a wide range of customer information and may also contain psychographic, demographic, and census data compiled from external sources. They form the basis of direct marketing programs whereby companies establish closer ties with their customers.

Database marketing, and especially the prospect of using confidential information (sensitive data) for marketing purposes, has made privacy an important issue in the direct marketing industry. In order to avoid excessive personal data collection and save the right of privacy of citizens, the processing of personal data for the purpose of direct marketing is regulated with legal acts.

### *Purpose*

The purpose/aim of this document is to make analysis of the legal framework for data protection in the area of direct marketing in the country. The document will detect the existing regulations on direct marketing and data protection, extract and elaborate the provisions regarding protection of citizens privacy in the area of direct marketing. A comparative analysis with the EU aquie in this area will be made and on the basis of the conclusions, recommendations for improving the regulation will be made.



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## Analyzed laws

For the purposes of this Analysis, the following Laws regulating data protection in direct marketing were detected and were taken into consideration:

1. **Law on Personal Data Protection** (Official Gazette no. 7/05, 103/08 and 124/10)
2. **Law on Electronic Communication** (Official Gazette no. 13/05, 14/07, 55/07, 98/08, 83/2010)

## II. ANALYSIS ON THE LEGISLATION ON DIRECT MARKETING

### 1. Law on Personal Data Protection

#### 1.1 General overview

Law on Personal Data Protection (LPDP) is *lex generalis* in the area of personal data protection and protection of privacy of citizens. LPDP was enacted in 2005 and due to the dynamics of this matter, as well as harmonization of Beneficiary legislation with the EU legislation, this Law was subject to amendments and modifications which were made in 2008 and 2010. The LPDP determines the general principles for protection of the data subject rights. The first article of the law stipulates *“The law regulates the protection of personal data as one of the fundamental rights and freedoms of natural persons, particularly the right of privacy regarding personal data protection”*. Although the provision explicitly states the right to privacy regarding personal data processing, the scope of the act is not limited to information i.e. data that concerns the private sphere of an individual. In contrast, the law governs all areas of life related to the processing of personal data, be it in the professional area, the area of public administration, health sector or as in the interest of this document the processing of personal data for the purposes of performing direct marketing. Since direct marketing is an activity which includes different sorts of processing personal data it is obvious that the LPDP determines the rules of such processing.

#### 1.2 Analysis of Specific Provisions for direct marketing from LPDP

This analysis will include specific provisions of the LPDP that are directly or indirectly related to the processing of personal data for purposes of direct marketing.



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## Article 13-a

***“The personal data processing for the purpose of direct marketing shall be allowed only if the personal data are being processed in accordance with Article 6 paragraph 1 of this Law, unless otherwise determined by other law.***

***The personal data subject shall have the right, at any period, for free and by using simple means to withdraw the consent for processing his/her personal data for direct marketing.”***

The first paragraph of this article determines the legal basis/ground for processing personal data for the purpose of direct marketing. The wording of the article refers to Article 6 paragraph 1 of the law which stipulates:

### “Article 6

***Personal data processing may also be performed:***

- ***upon previously obtained consent of the personal data subject;***  
***.....”***

Basically this means that processing personal data for the purposes of direct marketing may only be based on the data subject’s consent. But there are few other constellations that can be found in the scope of this paragraph.

First, it stipulates that personal data can be processed for the purpose of direct marketing only if the data subject specifically gave his consent that certain categories of his personal data, like name, surname or home address, can be used specifically for the purpose of performing direct marketing. Indirectly this provides an obligation for the data controllers to specifically obtain consent from data subjects that certain categories of their personal data (name, surname, home address etc.) can be used specifically for performing direct marketing, which means that controllers can’t use personal data of the data subject (that they obtained by any means) for direct marketing purposes if they haven’t obtained consent from the data subject for using that data for purposes of direct marketing.

Second constellation is that the **consent** must be **previously** obtained from the data subject. Seeing that the consent is **freely** and **explicitly** given statement of will of the data subject<sup>1</sup> and that the consent must be obtained before the start of the processing it could be concluded that the legislator has chosen the so called “opt-in” principle for obtaining consent from the data subject. This principle means that the controllers must give a choice (freely) to the data subject to choose (explicitly) if he/she agrees or he/she doesn’t agree for his data to be processed for purposes of direct marketing. It is obvious that consent must be given before the start of the processing of the data. Therefore it’s obvious that the legislator has chosen a more strict approach on personal data protection for the means of direct marketing - “opt-in” principle, instead of the softer “opt-out” principle for obtaining consent from the data subjects.

<sup>1</sup> Article 2 paragraph 9 from the Law on Personal Data Protection



The third constellation from this paragraph would be that the personal data processing for the purpose of direct marketing shall be allowed only upon previously obtained consent of the personal data subject, **unless otherwise determined by other law**. This means that legislator provides an exemption that processing personal data for direct marketing can be made with out the consent of the data subject but it conditions the same with obligation to be determined by other law. The opinion of the author is that the words “*unless otherwise determined by other law*” may also mean the possibility for the consent to be obtained by other means example by “*opt-out*” principle, of course if the same is determined by law.

Therefore, a conclusion would be that the “*opt-in*” principle is a general rule for obtaining consent from the data subject, but in some cases if its determine otherwise by law the consent can be obtained by using the “*opt-out*” principle, as its given further in this document.

The second paragraph of this article provides that the consent can be withdrawn at any time without the need to indicate specific grounds. Moreover, the law stipulates that the controller must provide simple means for the data subject to withdraw his/her consent which means that the controller must provide the simplest procedure for the data subject to be able to withdraw his/her consent.

The LPDP also prescribes fines for cases where the provisions of article 13-a of the law are breached.

**Article 49 states:**

***“Fine in amount of 1.000 Euros in Denar counter-value shall be imposed for misdemeanor on the legal entity controller:***

.....

***12) Acts in manner contrary to the provisions referred to in Article 13-a of this Law;***

.....

***Fine in amount of 350 Euros in Denar counter-value shall be imposed to the responsible person at the legal entity or official person in a state administration bodies for a committed misdemeanour, referred to in paragraph 1 of this article.***

***Fine in amount of 250 Euros in Denar counter-value shall be imposed to the natural person – controller entity for committed misdemeanour, as referred to in paragraph 1 of this Article.”***



**Conclusion:** The EU legislation on personal data protection, the Directive 95/46/EC<sup>2</sup> stipulate in article 14 (b) *“the data subject's right to object on request and free of charge, to the processing of personal data relating to him which the controller anticipates being processed for the purposes of direct marketing.....”*. Paragraph 2 of the same article determines an obligation for *“Member States to take the necessary measures to ensure that data subjects are aware of the existence of the right referred to in the first subparagraph of (b)”*. As for the harmonization with the EU legislation as shown so far the LPDP is fully harmonized with the requirements of the Directive 95/46/EC. In fact the LPDP goes further than the minimum requirements set up in the Directive. The Directive as minimum is stipulating the *“opt-out”* principle for obtaining consent from the data subject for processing his data for purposes for direct marketing, which is *“softer”* principle as to the *“opt-in”* principle which foresees more strict demands for obtaining the consent. As shown previously the LPDP determines the more strict way – *“opt-in”*.

## 2. Law on Electronic Communication

### 2.1 General overview

The Law on Electronic Communication was enacted in 2005 and due to the dynamics of this matter, as well as harmonization of Beneficiary legislation with the EU legislation, this Law was subject to amendments and modifications which were made twice in 2007, 2008 and 2010. The Law regulates the conditions and the manner of performing the activity in the field of electronic communications, the establishment of the Agency for Electronic Communications, construction, maintenance, safety, supervision and use of electronic communications networks and services, interconnection and access to electronic communications, ensuring universal service, ensuring competition, use and control over the radio frequency spectrum, numbering, the relations between the providers and users of services, management, **protection of secrecy and confidentiality of electronic communications**, and other issues referring to the electronic communications.

New advanced digital technologies which have been introduced in public communications networks, gave rise to specific requirements concerning the protection of personal data and privacy of the user. The development of the information society is characterised by the introduction of new electronic communications services. Access to digital mobile networks has become available and affordable for a large public. These digital networks have large capacities and possibilities for processing personal data. The successful cross-border development of these services is partly dependent on the confidence of users that their privacy will not be at risk. The internet is also overturning traditional market structures by providing a common, global infrastructure for the delivery of a wide range of electronic communications services. Publicly available electronic communications services over the Internet open new possibilities for users but also new risks for their personal data and privacy. Therefore, Chapter twelve of the Law

<sup>2</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (*Official Journal L 281 , 23/11/1995 P. 0031 – 0050*)



regulates the secrecy and confidentiality of communications, with intention to set up appropriate safe guards for the processing of personal data of the data subjects in this sector. This chapter, among the rest, regulates the unsolicited communications, or the processing of personal data for the purpose of direct marketing using the benefits of the electronic communications.

## 1.2 Analysis of Specific Provisions for direct marketing from Law on Electronic Communication

This part of the analysis will include specific provisions of the Law on Electronic Communication that are directly or indirectly related to the processing of personal data for purposes of direct marketing.

### Chapter XII

#### Article 117 – Unsolicited communications

**“The use of automated calling systems for making calls to the subscribers’ telephone numbers without human intervention, such as fax machines or electronic mail, for the purposes of direct marketing, can only be allowed if subscribers have given their prior consent.**

**Natural persons or legal entities having electronic mail addresses from the customers of their products or services can use such addresses for direct marketing of their similar products or services, but they shall be obliged to give their customers the option at any time, free of charge and by using simple means, to prevent such use of their email address.**

**Sending of electronic mail for the purposes of direct marketing disguising or concealing the identity of the sender on whose behalf the message is sent, or without a valid address to which the recipient may send a request that such communications is to be terminated shall be prohibited.”**

Article 117 sets up Safeguards for subscribers (personal data subjects) against intrusion of their privacy by unsolicited communications for direct marketing purposes in particular by means of automated calling machines, telefaxes, and e-mails, including SMS messages.

Clearly in paragraph 1 the legislator has chosen an opt-in approach to unsolicited commercial e-mail. As already stated previously this principle provides that the use of electronic mail, automatic calling machines or facsimile machines for the purposes of direct marketing may be allowed only with subscribers who have given their prior consent and that prior explicit consent of the recipients is obtained before such communications are addressed to them.

Paragraph 2 on the other hand provides exception to the opt-in rule which applies to existing costumers, subject to certain conditions. This paragraph allows the use of opt-out rule in certain specific cases. For the best explanation of



this exception it is best to refer to the **Opinion 5/2004 on unsolicited communications for the marketing purpose under Article 13 of the Directive 2002/58/EC**<sup>3</sup> of the Article 29 Working party<sup>4</sup> which states the following:

***“Recital 41 provides useful elements to help understand Article 13 (2):***

***(41) Within the context of an existing customer relationship, it is reasonable to allow the use of electronic contact details for the offering of similar products or services, but only by the same company that has obtained the electronic contact details in accordance with Directive 95/46/EC. When electronic contact details are obtained, the customer should be informed about their further use for direct marketing in a clear and distinct manner, and be given the opportunity to refuse such usage. This opportunity should continue to be offered with each subsequent direct marketing message, free of charge, except for any costs for the transmission of this refusal.***

***While the description leaves some room for interpretation, the Working Party would emphasise that this exception is limited in several ways and must be interpreted restrictively.”***

Firstly, this exception is limited to customers (subscribers) in accordance with the first paragraph of Article 117. In addition, emails may only be sent to customers from whom electronic contact details for electronic mail have been obtained, in the context of the sale of a product or a service. Secondly, only the same natural or legal person that collected the data may send marketing e-mails. For instance, subsidiaries or mother companies are not the same company. Thirdly, there is an obligation, including under the exception, to continue to offer an opt-out in each marketing message.

In paragraph 3 the Law prohibits sending direct marketing e-mails that disguise or conceal the identity of the sender, or that do not include a valid address to which the recipient may send a request that such communications cease.

The Law also prescribes fines for breaching the provisions for unsolicited communications.

***“Article 139***

***(1) A fine in the amount of 7 to 10% of the total annual revenue of the legal entity (in absolute amount) during the business year preceding the year when the misdemeanor was perpetrated or of the total revenue acquired for a shorter period of the year preceding the misdemeanor, provided that the legal entity commenced its operations during that year shall be imposed on the legal entity if it:***

<sup>3</sup> [http://ec.europa.eu/justice/policies/privacy/workinggroup/wpdocs/2004\\_en.htm](http://ec.europa.eu/justice/policies/privacy/workinggroup/wpdocs/2004_en.htm)

<sup>4</sup> The Working Party has been established by Article 29 of Directive 95/46/EC. It is the independent EU Advisory Body on Data Protection and Privacy. Its tasks are laid down in Article 30 of Directive 95/46/EC and in Article 15 of Directive 2002/58/EC.



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.....

**50) uses electronic communications for direct marketing without the consent of the subscriber (Article 117, paragraph (1));**

**51) uses the electronic address of customers for direct marketing without allowing the customers to prevent such use of their addresses (Article 117, paragraph (2));**

**52) uses a false identity or false address for direct marketing with the use of electronic communications (Article 117, paragraph (3));**

.....”

**Conclusion:** Regarding the above said it is obvious that Article 117 of the Law on electronic communications is harmonized with the provisions of the Directive on privacy and electronic communications<sup>5</sup> regarding the processing of personal data for unsolicited communications. Therefore it is natural to say that this provision gives an appropriate degree of protection of citizens' privacy when their personal data is being processed for direct marketing by unsolicited communications.

However, it must be noted that Article 13 of the Directive on privacy and electronic communications is not fully transported in Article 117 of the Law. Paragraph 2 of Article 13 states: *“Notwithstanding paragraph 1, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, **in accordance with Directive 95/46/EC**, the same natural or legal person may use these electronic contact details for direct marketing.....”* while paragraph 2 of Article 117 states: *“Natural persons or legal entities **having** electronic mail addresses from the customers of their products or services can use such addresses for direct marketing.....”*. Paragraph 2 of Article 13 of the Directive stipulates that controllers besides having the right to obtain electronic contact details for electronic mail from their customers also have the obligation to that according to Directive 95/46/EC. Seeing that paragraph 2 of Article 117 of the Law is missing this it is not clear how exactly can controllers obtain the needed information. Therefore, for the purpose of more clear legal interpretation it's recommended to amend paragraph 2 on the following way:

*“Natural persons or legal entities having **obtained, according to law/or according to the provisions of the Law on Personal Data Protection**, electronic mail addresses from the customers of their products or services can use such addresses for direct marketing.....”*

The purpose of the amendment of this paragraph is to ensure that controllers will respect the provisions of the Law on Personal Data Protection and data protection principles when obtaining e-mail address of their costumers.

<sup>5</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector



### III. RECOMMENDATIONS

As given in the previous text the laws and regulations in the country regarding data protection in direct marketing are on a great scale transposed from the EU Directives and are in effect for several years. However, the practice from the EU Member States shows that the provisions on direct marketing from the EU legislation by themselves are not enough to secure appropriate level of data protections in regard to the fast development of the technology for processing personal data and the various technology methods for using that data for the purposes of direct marketing. In order to address this downside it's recommended that the DPDP takes more active role in developing and implementing relevant safeguards for protection of citizens' privacy regarding the use of their data for purposes of direct marketing. The DPDP should follow the development of the new technologies and offer to the public according to its jurisdictions relevant opinions or recommendations of safe implementation of this technology regarding the processing of personal data and the use of such data for direct marketing. Also it's recommended for the DPDP to follow the opinions issued by the relevant EU bodies in order to be harmonized with the practical implementations of the EU aquie.

Another recommendation that could be extracted from the EU practice is that the DPDP should issue guidelines for code of conduct in line with the national legislation, to encourage companies to introduce privacy policy and deliver info material to the current and potential clients regarding personal data treatment and increase the awareness of personal data protection matter on direct marketing.



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