

Data protection

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Belgian Data Protection Authority Publishes Draft Recommendation on Direct Marketing

On 10 March 2025, the Belgian Data Protection Authority (the DPA) published its draft recommendation 01/2025 on data processing activities for direct marketing purposes (the Recommendation). This Recommendation updates the DPA's recommendation 01/2020 which was published on 17 January 2020 to bring it in line with new case law, decisions of the dispute resolution board and guidelines of the European Data Protection Board (EDPB) in relation to direct marketing and the protection of personal data.

In this article, we will provide a high-level overview of the most significant changes and recommendations.

1. PROPOSAL OF A NEW DEFINITION OF "DIRECT MARKETING"

The DPA proposes the following definition of "direct marketing":

"All activities resulting in the direct communication of messages with promotional content to one or more identified or identifiable natural persons".¹

Further, the DPA notes that the following elements help to clarify the scope of the proposed definition:

- Direct marketing does not only concern communication of the direct marketing messages as such but also covers all activities performed in the context of such direct marketing communication;
- It covers both desired and undesired direct marketing communication;
- It requires the processing of personal data. In other words, if no personal data is processed, there is no direct marketing (e.g., advertisements which are randomly shown on TV or the Internet, or advertisements which are put into all letter boxes and not addressed to any specified individual);
- The identity of the natural person or legal entity whose goods or services are being promoted is not relevant;
- The concept "promotional content" must be interpreted broadly to refer to any "promotion", irrespective of whether the message has a commercial nature or not. Moreover, communication of a mixed nature, which contains promotional messages in addition to other information, is also considered to constitute "direct marketing";
- The means of the communication is irrelevant.

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In Dutch: "Alle activiteiten die resulteren in de rechtstreekse communicatie van boodschappen met een promotionele inhoud aan een of meer geïdentificeerde of identificeerbare natuurlijke personen".
In French: "L'ensemble des activités résultant en une communication directe à une ou plusieurs personne(s) physique(s) identifiée(s) ou identifiable(s), de messages au contenu promotionnel"

2. SPECIFICATION OF THE RETENTION PERIOD OF PERSONAL DATA FOR DIRECT MARKETING PURPOSES

Under GDPR, personal data cannot be kept for longer than is necessary for the purpose of its processing (data retention principle – Art. 5(1)(e) GDPR). According to the DPA, determining the retention period for direct marketing information is a complex process which depends on the specific factual circumstances of the envisaged processing.

For example, the nature of the relationship between the data controller and the data subject could be important when determining the retention period. If the relationship is strong, a longer retention period may be justified than in the case of a weak relationship (e.g., prospective customers). The degree of product/service ageing can also play an important role in determining the retention period. For example, a longer retention period may be justified in case the product or service has a longer life cycle.

3. CONSENT OR PAY

The Recommendation also discusses the “consent or pay” model and the judgment of the Court of Justice of the European Union (CJEU) of 4 July 2023 in the *Bundeskartellamt* case (See, [this VBB Client Alert](#), 2023). The “consent or pay” mechanism requires users to either consent to data processing for marketing purposes or pay for an alternative service. The Recommendation suggests that users might feel compelled to consent to all ads to continue using the service. The DPA refers to the guidelines of the EDPB which indicate that, as a general rule, a “consent or pay” option is not a form of valid consent if the user is confronted with a single binary choice. To be valid, the controllers should also offer a free alternative that does not require consent to behavioural advertising. The DPA adds that the amount of the compensation (in the “pay” option) may also be relevant to determine whether consent can be considered to be valid.

4. CLARIFICATION OF LEGITIMATE INTERESTS AS LEGAL BASIS FOR THE PROCESSING OF PERSONAL DATA

Article 6.1 (f) of the GDPR allows personal data to be processed for direct marketing purposes on the basis of the legitimate interest of the data controller, provided that this interest is not overridden by the fundamental rights and freedoms of the data subjects. Relying on this basis, it is necessary to conduct a balancing test. Generally, the test is framed as a three-step process. First, identify the controller’s legitimate interest and define it clearly. Second, evaluate the interests of the other parties involved, especially the data subjects. Finally, determine if the controller’s legitimate interest outweighs the interest and rights of the data subjects. In the case of *Koninklijke Nederlandse Lawn Tennisbond v Autoriteit Persoonsgegevens* (C-621/22), the CJEU ruled that a purely commercial interest could qualify as a legitimate interest. However, this does not mean that this interest will automatically outweigh the interest of individuals. The respective interests still need to be weighed.

If legitimate interest as a legal basis is not possible following the three-step test, the controller must obtain consent from the data subject. The DPA explains that consent as a legal basis for direct marketing purposes must be freely given (i.e., individuals must have a real choice to say yes or no) unambiguous (i.e., it must be explicitly expressed) specific (i.e., precise) and informed (i.e., the controller must provide a minimum amount of information). Consent must involve active behaviour. A pre-ticked box is clearly not active behaviour, and, therefore, not sufficient to indicate valid consent.

It should be noted that the processing of personal data for direct marketing purposes may fall within the scope of both the GDPR and the e-Privacy Directive (Directive 2002/58/EC; the **e-Privacy Directive**). The latter sets out specific consent requirements for processing activities falling within its scope of application. For more information on these consent requirements and the interaction between the GDPR and the e-Privacy Directive, we refer to Section 6 below.

6. THE INTERACTION BETWEEN THE GDPR AND ARTICLES 13.1 AND 13.2 OF THE E-PRIVACY DIRECTIVE

Direct marketing often involves the processing of personal data, making it subject to the requirements of the GDPR. Additionally, Article 13 of the e-Privacy Directive regulates the use of automated calling systems or e-mail (and the once commonly used fax message) for direct marketing purposes. The e-Privacy Directive was transposed in Belgium in Book XII of the Code of Economic Law, the Royal Decree of 4 April 2003 regulating the sending of advertising by electronic mail

and by amending the Electronic Communications Act of 13 June 2005.

The e-Privacy Directive requires consent for unsolicited electronic direct marketing communications via automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail (Article 13.1 e-Privacy Directive).

Article 13.2 e-Privacy Directive provides for an exception to this consent requirement for direct marketing communications that are sent to existing customers under specific conditions, notably:

- the customer's contact details have been obtained by the data controller directly from the data subject in the context of the sale of a product or service;
- the direct marketing communication relates to the data controller's own identical or similar products or services;
- the customers must be clearly and distinctly given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message in case the customer has not initially refused such use.

In other words, if a data controller uses unsolicited electronic direct marketing messages, both the GDPR and the e-Privacy Directive will need to be taken into account when processing personal data. The DPA further clarifies that for the specific actions set out in Article 13.1 of the e-Privacy Directive the data controller will have to rely on consent as a legal basis for the processing of personal data. As regards the exception to the consent requirement described in Article 13.2 of the e-Privacy Directive, the DPA confirms that this provision requires that the processing must be based on legitimate interests of the data controller within the meaning of Article 6.1.f) GDPR.

7. TRANSPARENCY & OBJECTIONS

It is essential for controllers who process personal data to be transparent about their activities, as required by Articles 12 to 14 of the GDPR. This means that they must inform individuals about how their personal data will be processed, and this information must be provided ex ante, or before processing begins. In this regard, the DPA states that the structure of the information must not complicate access to information or the exercise of rights. Additionally, the information provided must not be misleading or confusing.

The DPA also emphasises the importance of additional safeguards to ensure that minors understand and genuinely choose to provide consent. In Belgium, minors aged 13 and above can provide valid consent, but organizations must verify their age and ensure that the consent process is transparent and appropriate.

The Recommendation is available in both [Dutch](#) and [French](#).

[Gert-Jan Freyman](#)

[Ayda Tavsi](#)