

Belgian DPA Publishes Direct Marketing Recommendation

On 10 February 2020, the Belgian Data Protection Authority (DPA) published its first recommendation of 2020 on data processing activities for direct marketing purposes (the **Recommendation**).

Direct marketing is marked as a “priority sector” in the recently presented strategic plan of the DPA. In this context, the Recommendation provides welcome clarifications for the challenging task of aligning direct marketing with the protection of personal data. The Recommendation discusses the roles of the various players in the direct marketing field, defines key concepts and provides an overview of how the GDPR’s data protection principles can be applied to direct marketing. The DPA illustrates its Recommendation with practical examples and recent decisions by supervisory authorities in various EU Member States.

Below, we provide a short overview of the main items discussed in the lengthy (79 pages!) Recommendation.

What is “direct marketing”?

First, the DPA explains that direct marketing covers a wide range of activities affecting a very large group of data subjects. Actors in this area range from data brokers who rent out personal data to the advertiser that carries out specific targeting activities or the company that analyses certain results.

The DPA defines direct marketing as “*any communication, in any form, solicited or unsolicited, originating from an organisation or an individual and aimed at the promotion or sale of services, products (whether in return for payment or free of charge), as well as brands or ideas, addressed by an organisation or an individual acting in a commercial or non-commercial context, which is addressed directly to one or more natural persons in a private or professional context and which involves the processing of personal data*”. This definition promotes a very broad concept of what constitutes direct marketing. The DPA explains that the concept also covers preparatory measures for compiling contact lists and automatic price adjustments based on users’ profiles. Even messages that are not for profit can be regarded as direct marketing.

On the other hand, the GDPR will not apply if an advertisement does not use personal data. For instance, banners with advertisements that are the same for every visitor of a website will not fall under the GDPR.

Roles of the parties involved in direct marketing

In order to define their respective obligations, the role of each party involved in direct marketing must be determined. The data controller, also if acting as joint controller, must provide transparent information on the processing to the data subjects. The DPA points out that when personal data are collected through social media, the terms of use of these social networks do not discharge the controller from informing the data subjects about its direct marketing activities.

The data controller often relies on processors that carry out activities on their behalf, for instance, when it engages a service provider to send marketing messages on behalf of the controller. In such a case, the controller is responsible for selecting a processor that can provide sufficient guarantees for the protection of personal data. In other words, the controller must carry out an assessment of the candidates for the processing task. The DPA indicates that adherence to a code of conduct may indicate an adequate

guarantee for the protection of personal data. When the selection process is complete, the controller should enter into a written data processor agreement setting out the rights and obligations listed in Article 28 of the GDPR.

Defining the purpose and processing activities

An assessment of data protection compliance requires a clear and detailed definition of the purposes of the direct marketing. The direct marketing purpose could be, for instance, to inform customers of new products/services, or the creation of personal customer profiles.

If the data controller intends to re-use personal data collected for direct marketing purposes, the controller must verify whether the intended use is compatible with the initial purpose for which the personal data were collected. The controller will also need to update the information that it provides to the data subject to ensure that it covers the new purpose and processing activities.

The DPA underlines that the purpose of the processing is not the same as the processing activities. The processing activities are each of the operations on the personal data in order to achieve the purposes. For instance, processing activities may include using a customer's e-mail address to inform him/her of various campaigns or to send out a regular newsletter.

Profiling

The GDPR imposes additional requirements for profiling operations that are particularly relevant in the context of direct marketing. Article 4.4 of the GDPR defines "profiling" as "*any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movement*".

The requirements for profiling depend on how the profiling is used. In particular, whether profiling is used to make decisions, and if so, whether the decision is made with or without human intervention. The Recommendation explains that the use of profiling in automated decisions without human intervention is only possible if the data subject has given his or her explicit consent.

Identify the personal data needed for the purpose at hand

The DPA recommends that controllers should assess which personal data are needed for the direct marketing purposes. Anonymous data fall outside the GDPR, but the DPA reiterates that the threshold for anonymisation is high. Accordingly, even if a service provider asserts that data are anonymous, it is recommended to verify whether this is the case.

If personal data are necessary, the GDPR prescribes that only personal data necessary to achieve the processing purposes can be used. The DPA thus advises that the data be regularly assessed to ascertain whether the data are still adequate, relevant and limited to what is necessary for the pursued processing purposes. Also, the DPA encourages the frequent updating of databases, such as the "Do Not Call" lists using automated means.

Lawfulness of direct marketing: do we need consent?

The processing of personal data will only be allowed if it is based on one of the legal bases provided for in the GDPR (Articles 6 and 9 of the GDPR). The Recommendation discusses the application of the GDPR, but reminds organisations that they should verify whether special laws apply that restrict the applicable legal basis. For instance, under the ePrivacy Directive (Directive 2002/58/EC), consent is always required before sending unsolicited electronic direct marketing messages by email, unless a business can rely on the “existing customer” exemption of Article 13.2 of the ePrivacy Directive.

The DPA advocates a very strict interpretation of the legal basis permitting the processing of personal data that is necessary for the performance of a contract (i.e., Article 6.1(b) of the GDPR). Therefore, this legal basis is unlikely to permit the use of personal data for direct marketing purposes. As a result, organisations usually will rely on “legitimate interests” (i.e., Article 6.1(f) of the GDPR) or consent (i.e., Article 6.1(a) of the GDPR).

The Recommendation proposes a three-step test for determining whether the direct marketing purpose can be permitted on the basis of the organisation’s “legitimate interest” under Article 6.1(f) of the GDPR. First, the organisation must clearly set out the legitimate interest pursued. Second, it should determine whether the processing activity is strictly necessary (and the DPA underlines that this criterion is very strict) and third, the legitimate interest must be balanced against the impact on the interests, fundamental rights and freedoms of the data subject.

If no other options are available, or where special laws require this, the controller must obtain consent from the data subject. The DPA explains that consent as a legal basis for direct marketing purposes must be: (i) informed (i.e., based on transparent information); (ii) freely given (i.e., the data subject must have a real choice); (iii) specific (i.e., precise) and (iv) unambiguous (i.e., it must be clear and certain that the data subject agreed). The mere fact that a user did not opt out is not sufficient to have valid consent.

The DPA also reminds organisations to take account of the special rules that apply to minors’ consent. In Belgium, minors can give valid consent from the age of 13. Organisations may need to verify the age of data subjects as part of the consent procedure.

Transparency and objections

Finally, direct marketing must be transparent, which means that data subjects must receive clear and meaningful information as required by Articles 12 to 14 of the GDPR. In this regard, the Recommendation states that the mere reference to a privacy policy in the small print at the bottom of a website does not meet the requirements of Article 12 of the GDPR.

Finally, data subjects have an unconditional right to object to the processing of personal data for direct marketing purposes. If a data subject objects to direct marketing, the DPA requires that the controller ceases all processing of data relating to that data subject for the purposes of direct marketing.

The DPA concludes its Direct Marketing Recommendation by encouraging its implementation as follows: *“acting in accordance with the GDPR is not only an obligation with regard to the personal data you process. It is just as much about ethical behaviour in the market, both towards those involved and partners”*.

As a final remark, the DPA recommends sector associations to draw up codes of conduct, as provided for in Article 41 of the GDPR. Such codes of conduct should ensure a harmonised sector-wide approach and communication to data subjects.

Direct marketing is a priority in the strategic plan of the DPA. Now that it has provided its guidance, it remains to be seen whether this will be followed by an increase in enforcement action. In any case: forewarned is forearmed. Organisations should make sure that they heed the DPA's advice in their current and future marketing projects.

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

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