

CNS 2/2019

**Legal report in relation to the query made by the Data Protection Officer of a public limited company that manages the metropolitan service of the integral water cycle regarding the sending of communications to customers of the service in under the legal basis of legitimate interest**

**A letter is presented to the Catalan Data Protection Authority from the Data Protection Officer of an anonymous trading company that manages the metropolitan service of the integral water cycle, in which it is requested that the 'Authority issues an opinion to answer the questions raised in relation to the sending of communications to customers of the service under the legal basis of legitimate interest.**

**Specifically, it states that:**

- 1. The company manages the metropolitan service of the integral water cycle for the municipalities of the metropolitan area of Barcelona.**
- 2. The company's strategic plans, its internal policies and its Code of Ethics highlight: "the company's commitment to promoting sustainable development and applying criteria of social, environmental and economic responsibility, as a complement logic of the comprehensive water management activities it carries out".**
- 3. On the occasion of the entry into force of the RGD, the company updated its privacy policy and its contractual data protection clauses. With regard to promotional communications, he chose to base the treatment on the consent of the interested party. However, with respect to certain informative communications, both of the products and services of the company and of other entities of the business group, they understand that they do not have a commercial or promotional nature and that, therefore, they would not be subject to the consent of the person concerned.**
- 4. The company plans to send information related to certain social, cultural and environmental actions, and similar activities organized by companies in its business group, regarding which they consider that they meet the requirements of not having a commercial or promotional nature.**
- 5. The company is considering sending all its customers of the water supply service, without limiting it to those who have previously authorized the receipt of commercial or promotional communications, information and invitations about the exhibition "The Zone of Hope", which is configured as an educational awareness and exposure activity.**

**Based on this presentation, he requests clarification regarding the following issues:**

- "Could the society send by post information about the exhibition "The Zone of Hope", organized by a company in its business group, to all its water supply service customers including invitations to attend the event free of charge, even to those who had not agreed to the sending of commercial communications, on the basis of the existence of a legitimate interest, and taking into account that it is**

is it about an exhibition related to the appropriate management of water, which has generated great anticipation among the public?" • "Could the company carry out the same sending by e-mail (through the e-mails provided by the customers of the service, for example, for sending invoices without paper? The remittance of this information has the nature of commercial communication to the "effect of the application of Law 34/2002, of July 11, on information society services and electronic commerce?"

- "Is the company legitimate to carry out other shipments of similar characteristics in the future, based on the legitimate interest?, can we understand that it would not be necessary to modify its privacy policy/current contractual clauses?" • "Is the company legitimized, based on the legitimate interest, to carry out shipments to its customers of activities organized by third parties in relation to the management of the service provided by the company, for example, participatory processes on the management of the water service?"

Analyzed the query, which is attached, as document no. 1, of the current version of the supply contract which includes the data protection clause that is signed by customers from May 2018, and in accordance with the report of the Legal Counsel I issue the following opinion:

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(...)

II

The company that carries out the consultation is a limited company that, through an indirect management assignment carried out by the Metropolitan Area of Barcelona, carries out the management of the metropolitan service of the integral water cycle for the municipalities of the Metropolitan Area de Barcelona, makes different questions to this Authority in relation to the possibility of basing certain treatments of its customers' data on the legitimate interest. Prior to the specific analysis of each of the issues raised, the legal basis of the legitimate interest in the regulation established in the RGPD is analyzed.

According to the RGPD personal data is any information about an identified or identifiable natural person (article 4.1 RGPD). Any processing of personal data, understood as "operation or set of operations carried out on personal data or sets of personal data, whether by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of enabling access, access or interconnection, limitation, deletion or destruction" (art. 4.2 RGPD), it must be subject to th

In accordance with the principle of lawfulness (article 5.1.a) personal data must be treated lawfully, loyally and transparently in relation to the interested party. The treatment will only be lawful if it meets at least one of the conditions provided for in article 6 of the following RGD:

"1. The treatment is only lawful if at least one of the following conditions is met: a) The interested party has given consent to the treatment of their personal data, for one or more specific purposes. b) The treatment is necessary to execute a contract in which the interested party is a party or to apply pre-contractual measures at their request. c) The treatment is necessary to fulfill a legal obligation applicable to the person responsible for the treatment. d) The treatment is necessary to protect the vital interests of the person concerned or of another natural person. e) The treatment is necessary to fulfill a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment. f) The treatment is necessary to satisfy legitimate interests pursued by the person in charge of the treatment or by a third party, as long as the interests or fundamental rights and freedoms of the interested party that require the protection of personal data do not prevail, especially if the interested is a child.

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What is provided in letter f) of the first paragraph does not apply to the treatment carried out by public authorities in the exercise of their functions."

In the private sector, the legality of the treatment can be based on the existence of legitimate interests pursued by the person responsible for the treatment or a third party, when the cases provided for in article 6.1.f of the RGD occur, that is to say that over the legitimate interests of the controller do not prevail over the interests or fundamental rights and freedoms of the data subject, especially if this is a child. Therefore, the RGD establishes a rule of balance of interests to determine the existence of a prevailing legitimate interest as a sufficient basis for carrying out a certain data processing, which necessarily entails the carrying out of a weighting of conflicting interests.

The recitals of the RGD provide interpretative elements in relation to how to apply this basis. Thus, recital 47 introduces as a criterion, the reasonable expectations that interested parties may have in relation to the treatment that will be carried out, based on the relationship they have with the person in charge. But, in any case, the emphasis is placed on the need to carry out a "meticulous assessment even in those situations in which the interested party can reasonably foresee, at the time and in the context of the collection of the personal data , that a treatment may occur for this purpose".

The same recital 47 of the RGD provides that the legal basis of the legitimate interest must not be applied to the treatments carried out by the public authorities in the exercise of their functions given that it is up to the legislator to establish, by law, the legal basis for the processing of personal data carried out by them.

The GDPR identifies some cases in which legitimate interest can be used as a legal basis for processing. Thus, apart from the cases in which "there is a relevant and appropriate relationship between the interested party and the person in charge, such as in situations where the interested party is a custo

of the controller", recital 47 also provides that "the processing of personal data strictly necessary for the prevention of fraud also constitutes a legitimate interest of the controller in question", as well as that "the processing of personal data for direct marketing purposes can be considered carried out for legitimate interest".

Recital 48 also includes an assumption of legitimate interest in the processing of data of business groups or entities affiliated to a central body, regarding which it is foreseen that they may have "a legitimate interest in transmitting personal data within the business group for internal administrative purposes, including the processing of personal data of customers or employees"

For its part, recital 49 adds another assumption when it states that "it constitutes a legitimate interest of the data controller, the processing of personal data to the extent strictly necessary and proportionate to guarantee the security of the network and information, that is, the ability of a network or an information system to resist, at a certain level of confidence, accidental events or illicit or malicious actions that compromise the availability, authenticity, integrity and confidentiality of personal data held or transmitted, and the security of related services provided or accessible through such systems and networks by public authorities, computer emergency response teams (CERTs), computer security incident response teams (CSIRT), providers of electronic communications networks and services and providers of security technologies and services. It should also include, for example, preventing unauthorized access to electronic communications networks and the malicious distribution of codes, as well as curbing denial-of-service attacks and damage to computer and electronic communications systems."

To these assumptions it is necessary to add the one collected by the Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights, which has provided that it is presumed protected in article 6.1.f) of the 'RGPD, some treatments such as the treatment of the data of natural persons who provide services in a legal entity essential for their professional localization, or the treatment of the data of individual entrepreneurs when they refer to them in this condition and do not treat them to establish a relationship with them as physical persons.

In any case, once the existence of a legitimate interest has been identified, a weighting of interests must be carried out to determine whether the legitimate interest is prevalent and, therefore, a sufficient basis for carrying out the treatment that is intended to be carried out .

In the weighting of interests established in Article 6.1.f) the criteria defined by the Working Group of Article 29, which analyzed the application of legitimate interest in "Opinion 06/ 2014 on the concept of legitimate interest of the data controller under Article 7 of Directive 95/46/ EC". These criteria and recommendations would be transferable to the regulation now contained in article 6.1.f) of the RGPD.

The Opinion analyzes what is to be understood by legitimate interest and concludes that this must be lawful in accordance with the applicable national and EU legislation, must be articulated with sufficient clarity and must be "sufficiently specific to allow the weighing test to be carried out against the fundamental interests and rights of the interested party" and, must represent an "interest real and current, that is to say, not speculative".

Thus, to carry out the weighting of interests and determine whether there is a legitimate interest that can justify the processing of the data, the opinion concludes that four factors must be taken into consideration, which would be the evaluation of the legitimate interest of the person in charge and of third parties; the impact of the treatment on data subjects; the balance between the two previous ones, and finally the additional guarantees that apply to the treatments.

The opinion summarizes these four factors as follows:

"The nature and source of the legitimate interest, including whether:

- data processing is necessary for the exercise of a fundamental right, or
- if it is a matter of public interest or that benefits from recognition legal or normative, social or cultural of the affected community.

The impact on stakeholders, including:

- the nature of the data, for example, if the treatment affects data that can be considered sensitive or contained in sources accessible to the public;
- the way in which the data is processed, for example, whether the data has been disclosed to the public or otherwise made available to a large number of people, or if large amounts of personal data are processed or combined with other data (for example in the case of profiling, for commercial purposes of compliance with the law or otherwise);
- the reasonable expectations of the interested party, especially in relation to the use and disclosure of the data in the relevant context;
- the position of the data controller and the data subject, including the balance of power between the two, or whether the data subject is a child or belongs to a high degree to a vulnerable segment of the population.

Additional safeguards to prevent undue impact on data subjects, including:

- data minimization (for example, strict limitations on the collection of data or its immediate removal after use);
- technical and organizational measures to ensure that the data cannot be used for the purpose of adopting measures or undertaking other actions in relation to the individuals ("functional separation");
- extensive use of anonymization techniques, data aggregation, privacy protection technologies, privacy protection by design, data protection and privacy impact assessments;
- increased transparency, general and unconditional right of voluntary exclusion, portability of data and related measures to empower those interested."

As provided for in the RGPD, in accordance with the principle of proactive responsibility and transparency, this entire analysis process must be properly substantiated and set out in writing, in detail, in order to provide transparency and legal certainty to those interested in the treatment in question, as well as to review and verify compliance and adequacy with what was determined, when necessary.

Likewise, in accordance with the right to information provided for in article 13 of the RGPD and developed in recital 61, it is necessary to provide the interested parties with all the information specified in that article and that, in the case of treatments based on article 6.1.f), will also require identifying the legitimate interests of the controller or a third party, on which the treatment is based.

Regarding the additional guarantees that the person in charge must apply, recital 70 of the RGPD provides, in the processing of data for direct marketing purposes, that the interested party must have the right to oppose this treatment at any time and at no cost and, that this right must be explicitly communicated to the interested party in a clear way and apart from any other information.

### III

To focus on the first of the questions raised, the company states that as a result of the entry into force of the RGPD, it carried out a review of its privacy policy, which, as indicated, was communicated to all its subscribers with contract in force and, attached as documentation is the water supply contract model.

According to the information provided, the water supply contract incorporates the company's privacy policy which includes a table with the purposes, time and legal basis of the treatment, in which it is indicated that the treatment of the personal data for the realization of promotional communications will be based on the client's consent. Specifically, it states:

"Promotional communications. Send him promotional communications, even by electronic means, relating to the activity carried out by the company, the events it organizes, or organized by third parties in relation to the management of the services provided by the company, etc. (...).If you give us your consent, we will send you commercial and advertising information about the company's products and services through any means, including email"

And that, for the purpose of consent, the user is offered the following options:

"YES, I give my consent for the company to send me promotional communications, even by electronic means, relating to the activity it carries out and the events it organizes, or that are carried out by third parties in relation to the management of the service that society lends.

NO, I do not give my consent for the company to send me promotional communications, even by electronic means, relating to the activity it develops and the events it organizes, or that are organized by third parties in relation to the management of the service that society lends."

In this regard, the company maintains that it should make other communications to its customers, related to the activities it carries out, but which do not have a commercial but informative nature. With respect to these communications, it states that, as they are not commercial or promotional in nature, they would not be subject to the consent of the affected party. In particular, he asks about the possibility of sending by post information about an exhibition organized by a company in his business group, including invitations to attend it free of charge to all his customers, including those who had not agreed to receive commercial communications.

Although the company states that these communications do not have a promotional nature, the terms in which the clause of the contract signed by the customers is written "promotional communications, even by electronic means, relating to the activity carried out by the company, to the events it organizes, or that third parties organize in relation to the management of the services provided by the company, etc." it does not seem that it is possible to differentiate, a priori, that both communications are of a different nature.

In this sense, annex f) of Law 34/2002, of July 11, on services of the information society and electronic commerce contains a broad definition of what is to be understood by commercial communications.

On this issue, the National Court in the judgment of the Administrative Court, Section 1, of December 22, 2017, Rec. 689/2016, has highlighted this extensive interpretation of the concept. Thus it is stated that:

"He adds that the event referred to in the communications sent did not pursue any profit-making purpose, but what it aims to promote the development of the ICT sector in Andalucía by promoting contacts and the transmission of information between those interested and related to the sector.

The Chamber cannot share this criterion, because Annex f) of the LSSI defines commercial communication as "any form of communication aimed at promoting, directly or indirectly, the image or the goods or services of a company, organization or person that carries out a commercial, industrial, craft or professional activity".

And regarding the concept of services of the information society, the same Annex f) defines them as "any service normally provided for a fee, at a distance, electronically and at the individual request of the recipient", adding that said concept also includes the Services not remunerated by their recipients, to the extent that they constitute an economic activity for the service provider.

Based on these concepts, the AEPD understood, and the Chamber fully shares this criterion, that the electronic mails received by the complainant directly promoted attendance at a Business and Networking Forum for the ICT market, in the organization of which ETICOM participated, dedicated to to defend the interests of its associates and the companies of the sector in Andalucía, which constitutes a direct form of advertising and promoting the events organized within the framework of its purposes and in the interest of both its associates and other companies of the sector, as well as a indirect way of enhancing the own image of the sending Association.

**Obviously, this involves a breach of the requirements provided for in article 21 of the LSSI and can be classified as a minor infraction as provided for in article 38.4.d) of the LSSI , to which we have also referred."**

**According to the aforementioned sentence, commercial communication must be understood as "any form of communication aimed at promoting, directly or indirectly, the image or the goods or services of a company (...)". It could be understood, following the conclusions of the sentence, that the communications that are intended to be carried out in the case at hand have the purpose of promoting activities carried out, in this case by another company in the group, but which ultimately constitutes a " direct form of publicizing and promoting the acts organized within the framework of their goals", in this case both for the benefit of society and of the company of the group that carries them out, also "indirectly" enhancing the own ima**

**Applying this criterion, the communication subject to the query could be considered a commercial or promotional communication. In this sense, the same legal basis should be applied to this treatment as for the rest of promotional communications.**

**With this approach to answer the first question raised, regarding the possibility of sending the aforementioned information by post, it is necessary to start from the basis that in the clauses of the current supply contract customers have been given the possibility, at the time of the collection of data, of giving or refusing consent to the receipt of this type of communications.**

**Thus, those customers who have expressly accepted the receipt of promotional communications may receive the aforementioned communication, not on the basis of legitimate interest, but on the basis of the consent of the interested party.**

**On the other hand, it will not be possible to send promotional information to customers who refused their consent to receiving promotional communications, since admitting the transmission based on legitimate interest here would go against, not to mention the expectations generated by the company itself, but against the express will of the affected person.**

**Finally, we must take into account the possibility that there are customers who have left blank the boxes relating to consent. In this case, the door would be open to the possibility of making this communication based on the legitimate interest of the company.**

**Although from the literal wording of the clause relating to promotional communications it could be considered that the interested parties could have a reasonable expectation that they will only receive the communications if they give their consent, a joint reading of this clause with the corresponding boxes that allow you to accept or reject the treatment, it does not seem to allow considering that the affected person has been able to generate an expectation that he will not be sent information of this type.**

**It would be a different matter if point 6 of the "purpose" section of the information clause of the supply contract and the boxes to collect consent, referred only to the sending of commercial and advertising information about the products and services of the company or third parties**



**electronic media In this case, the legitimate interest could come into play, if it results from the appropriate weighting, regarding postal promotional communications to all customers.**

**Despite the fact that the company has chosen to base promotional communications on the legal basis of consent, as analyzed below, these data treatments could also be based on a legitimate interest of the company.**

**The company can use the legal basis of legitimate interest in the processing of personal data that it carries out as long as the requirements provided for in article 6.1.f of the RGPD are met.**

**As we have seen, Recital 47 of the RGPD establishes that the processing of data for direct marketing purposes can be considered carried out for legitimate interest.**

**The Article 29 Working Group in Opinion 6/2014 analyzes what is to be understood by "direct marketing" and concludes that it would be "conventional marketing activities aimed indiscriminately at a plurality of customers". In this analysis, direct marketing is differentiated from actions called "behavioural marketing" based on "monitoring techniques such as cookies or profiling".**

**The sending of promotional information, either by post or by e-mail, carried out by the company to its customers, could be considered a direct marketing activity.**

**There would therefore be an interest considered legitimate that could serve as the legal basis for the data processing carried out by the company for this purpose, provided that, after the weighing of interests provided for in the RGPD, this interest prevails over the interests or rights and fundamental freedoms of affected customers. In this weighting, the existence of a relevant and appropriate relationship between the interested party and the person in charge, the nature of the data processed, the existence of a situation in which the interested party can reasonably foresee, at the time of collection that a treatment may occur for this purpose, etc.**

**In the specific case of sending information about an activity to raise awareness about environmental aspects of water management and use, there would also be the circumstance that the purpose of the communication that the company wants to carry out could coincide with a public interest, such as environmental protection. This coincidence could serve as a criterion to weigh the rights at stake in favor of the legitimate interest of the data controller.**

**In this regard, Opinion 6/2014, of the Article 29 Working Group, on legitimate interest, states the following:**

**"It can be the case that the private interest of a company coincides with a public interest to a certain extent. In general, the fact that the data controller acts not only in his legitimate interest but also in the interest of the community in general can give more weight to his interest. The more pressing the public interest or the interest of the community in general, and the more clearly the community and stakeholders recognize and expect that the data controller can act and process the data to pursue those interests, the more weight it will have in the balance said legitimate interest."**

In addition, it must be taken into account that the communication that is to be made includes a free shipment of tickets for an event carried out by a group company with cultural and environmental content and that the receipt of this shipment could be associated by customers to a profit derived from their contract. These considerations would give more weight to the legitimate interest asserted, in the corresponding weighting of interests.

Thus things cannot be ruled out as basing this data processing on a legitimate interest of the company for those cases in which the interested party has not expressed himself in one way or another regarding the granting of his consent. It cannot be forgotten, likewise, that it is necessary, in any case, to inform the interested party that this treatment will be carried out and to offer him the possibility of exercising his rights of opposition.

#### IV

In relation to the second question raised and, in accordance with what has been explained, the sending by email of the information and the tickets to the exhibition that is the subject of the query, would have the character of commercial communication for the purpose of the application of Law 34/2002, of July 11, on information society services and electronic commerce.

Article 21 of the same establishes:

##### "Article 21

**Prohibition of commercial communications made by e-mail or equivalent electronic means of communication**

1. It is prohibited to send advertising or promotional communications by e-mail or another equivalent means of electronic communication that have not previously been requested or expressly authorized by their recipients.
2. What is provided in the previous section is not applicable when there is a previous contractual relationship, as long as the provider has lawfully obtained the addressee's contact details and uses them to send commercial communications regarding products or services of its own company that are similar to those that were initially contracted with the client.

In any case, the provider must offer the recipient the possibility to object to the processing of their data for promotional purposes through a simple and free procedure, both at the time of data collection and in each of the communications commercials addressed to you.

When the communications have been sent by e-mail, the said medium must necessarily consist of the inclusion of an e-mail address or another valid e-mail address where this right can be exercised, and it is prohibited to send communications that do not include the 'mentioned address.'

To the extent that this communication has an advertising or promotional nature, when it is carried out by electronic means, the special regime set up by Law 34/2002, of July 11, will be applied.

of information society services and electronic commerce. In accordance with this regime, commercial communications by electronic means must have the express consent of the interested party, except in those cases in which there is a previous commercial relationship and the communication refers to products or services of their own company that are similar to those that were initially contracted with the client.

Consequently, the promotional communication that is the subject of the consultation when carried out by electronic means, will be subject to the special rule. In these cases, the sending of promotional events from other companies of the group to the clients themselves for purposes that are not similar to those that were initially the object of the contract cannot be based on the legitimate interest but will require the express consent of the users. In short, this information cannot be sent to users who, at the time of signing the contract and formalizing the data protection clause, refused their consent to receive promotional communications, or left none of the two options unchecked.

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The company is also consulting on the possibility of carrying out shipments of similar characteristics in the future based on legitimate interest, on the need to modify the current contractual clauses and, finally, on the possibility of carrying out, based on is in legitimate interest, sending information to its customers about activities organized by third parties in relation to the management of the service it provides.

We understand that the answer to these last two questions can be dealt with jointly and will also coincide with the conclusions made in this report in relation to the first and second questions.

According to what has been stated, when these shipments are made by postal mail, in accordance with the privacy policy contained in the clauses of the supply contract, the treatment could only be based on the existence of a legitimate interest in cases where the customer has left blank the boxes relating to consent to receiving promotional communications.

In these cases, in order to base the transmissions that you want to make on your own or a third party's legitimate interest, the criterion established by article 6.1.f) will have to be applied. Therefore, it will be necessary to carry out, for each communication that you want to carry out, the weighting of the conflicting interests that allows you to determine that the specific interest on which you want to base the treatment prevails over the interests or the fundamental rights and freedoms of the interested parties, in this case of the company's customers.

Likewise, in accordance with the principle of proactive responsibility and transparency, this analysis process must be properly documented, and its customers must be informed of the legitimate interest on which these postal shipments will be based.

Finally, as has already been explained, that for the case of commercial or promotional communications by electronic means, Law 34/2002, of July 11, on information society services and electronic commerce, is a special law and, that in these cases, the treatment cannot be based on

**the legitimate interest but the express consent of the interested party will be required except that the communication refers to products or services of his own company that are similar to those that were initially contracted with the client.**

## **VI**

**In accordance with the considerations made in these legal foundations in relation to the inquiry raised by the Data Protection Officer of an anonymous trading company that carries out the management of the metropolitan service of the integral water cycle in relation to the 'sending communications to customers of the service under the legal basis of legitimate interest, the following are done,**

### **Conclusions**

- 1. The company could send by post the information on the exhibition referred to in the query to all those customers who have accepted the receipt of promotional communications, on the legal basis of the consent of the interested party.**

**This communication cannot be made to customers who refused their consent to receive promotional communications.**

**For those customers who have left blank the boxes relating to consent regarding the receipt of promotional communications, the possibility of making this communication based on the legitimate interest of the company would remain open.**

- 2. When the communication that is the subject of the consultation is made by electronic means, the special regime set up by Law 34/2002, of July 11, on information society services and electronic commerce will apply. Consequently, this information cannot be sent to users who refused their consent to receive commercial communications or who left both options blank.**
- 3. The sending in the future of communications similar to those set out in the consultation based on a legitimate interest of their own or of a third party, will require analyzing and documenting the existence of the prevailing legitimate interest with respect to those customers who have left blank the boxes relating to consent in relation to promotional communications. For communications by e-mail, the express consent of the customer**

**Barcelona, January 29, 2019**