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## **TELEMARKETING AND RESPONSIBILITY FOR THE TREATMENT OF PERSONAL DATA.**

With provision no. 136 of 5 April 2012 the Italian Data Protection Authority ("the Authority"), following a complaint from a consumer, has resolved to consider (also) responsible for the handling and processing of personal data - pursuant to art. 4 of Legislative Decree no. 196/2003 (so called Privacy Code) - the subject acquiring a list of personal data by a third party company, if such data have been collected without valid informed consent (in this specific case, a leading national operator in the energy sector was using data acquired by third parties - including landline telephone numbers - for telemarketing purposes).

Following the investigation conducted by the Authority, it emerged that, the data had been communicated by the consumer themselves at the time of completion of a questionnaire through which "additional services and customer care" were offered. However, it was found, that: a) the server used was configured in a way that it did not maintain a direct association between the consumer's IP address and the data included in the questionnaire; b) the consumer was led to give permission to the treatment of personal data by a "locking mechanism", by which the non-selection of the acceptance check box resulted in the data not being saved and the consumer redirected to a new web page indicating consent as a pre-requisite for registration; c) the way the questionnaire was structured was also characterized by considerable uncertainty in relation to the specific recipients of the data in question.

Given the above mentioned circumstances, the Authority had, therefore, concluded that the company transferring the personal data collected had actually done so without a valid informed consent from the consumer.

Without prejudice for the unlawful handling and processing of personal data by the company that originally collected them, the Authority has also established the responsibility of the company (the operator in the energy sector that had purchased the database) that had

actually performed the telemarketing activity, noting that the right to handle personal data should be exclusively recognized to the subject who:

- a) is perceived as owner of such a right by the person providing the personal data;
- b) benefits from the promotional relationship established with the client;
- c) is in charge of regulating the conditions, tasks, roles and procedures of the promotional activities.



In addition, the Authority noted, that this argument found its basis - in the first place - in the indemnity clause contained in the contract between the company selling and the company buying the mentioned database. According to this clause, the former was obliged to ensure indemnity to the latter, hence demonstrating an awareness of the responsibilities that might arise from acts related to the handling and processing of the data in question. Secondly, by the fact that the company that bought the data - following a request from the consumer in question to delete the data held in its databases - confirmed that such data had been handled and processed by the company acquiring the database.

In light of these considerations, the Authority has thus recognized the company that acquired the data as the legitimate owner to the right of handling and processing of such data, with the consequent application of the principle by which a party acquiring a database must ensure that every party has validly consented to the disclosure and the subsequent use of their personal data for advertising purposes (see Data Protection Authority, general provision dated 29 May 2003).

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For further information or clarifications on the issues discussed in this article, please contact the authors, **Massimo Colicchia** and **Claudia Sarrocco** at our Milan office.

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**Todarello & Partners provides legal assistance on all issues relating to the topics covered in this article. The Firm's lawyers possess significant experience in the subject field, regularly assisting some of the major market players and representing them in legal proceedings before all competent courts.**

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