

Commercial prospecting and the need to respect the consent of data subjects



Commercial prospecting is a **method** of **approaching a target prospect** with the aim of firstly presenting the company and its products, and then closing a sale. This **prospecting** can be **direct** (by contacting the prospect without an intermediary) or, much more rarely, **indirect** (by creating a good reputation and seeking to make oneself known to attract interested prospects without the need to approach them)

The legal framework in the Principality

"*Direct prospecting*" is defined in Article 1 of Law No. 1.383 of August 2, 2011 for a digital Principality as "*the sending of any message intended to promote, directly or indirectly, goods, services or the image of a person providing goods or services*".

Furthermore, under Article 11 of that law:

*"Is prohibited Direct prospecting by means of an automated calling machine, a fax machine, or e-mail using, in any form whatsoever, the contact details of a consumer who has **not expressed his or her prior consent** to receive direct prospecting by such means.*

*However, direct prospecting **by e-mail is authorized if the consumer's contact details have been collected directly from him or her**, in compliance with the provisions of Law No. 1.565 of December 3, 2024, on the occasion of a sale or provision of services, **if the direct prospecting concerns similar products or services supplied by the same supplier, and if the consumer is offered, in an express and unambiguous manner, the possibility of opposing**, free of charge, except those related to the transmission of the refusal, and **in a simple way**, the use of his or her contact details when they are collected and each time a prospecting email is sent to him.*

*In any case, it is forbidden to send messages for direct marketing purposes by means of **automated calling machines, fax machines and e-mails**, without indicating **valid contact details to which the consumer can usefully transmit a request for such communications to cease** without costs other than those related to the transmission of the*

request. It is also forbidden to conceal the identity of the person on whose behalf the communication is made and to mention a purpose unrelated to the service offered."

All data controllers must thus now apply the principles set out in Law No. 1.565 of December 3, 2024.

To this extent, Article 17 of Law No. 1.565 of December 3, 2024 provides that "*The data subject has the **right to object at any time** to the processing of his or her personal data for direct marketing purposes, including profiling to the extent that it is related to such direct marketing*".

The principle of prior consent before any direct prospecting

Article 2 of Law No. 1.565 of December 3, 2024 defines consent as:

"any freely given, specific, informed, and unambiguous indication of the data subject's wishes by which he or she agrees, by a statement or by a clear affirmative action, to the processing of personal data relating to him or her".

To be valid, the agreement expressed by the data subject must therefore **meet 4 conditions**, namely to be:

- freely-given
- specific
- informed, and
- unambiguous

The freely-given consent

This first condition implies that data subjects must be able to **make a real choice** regarding the processing of his/her data. As such, the data subjects **must not be coerced or influenced** in their choice. Data subjects should not suffer from any negative consequences if they do not give their consent.

The specific consent

Consent must be **specific to the purpose** of the processing. Therefore, when the processing has several purposes, the consent should be **obtained independently for each purpose**. This is referred to as **separate consent** for each purpose.

The purpose must be **clearly** described and in **unambiguous terms**.

The informed consent

Before the data subject makes a choice, the data controller must provide **him or her with certain information** listed in Article 11 of the Law No. 1.565 of December 3, 2024.

These include:

- **the identity and contact details** of the **data controller**, and, if applicable, of his or her **representative** in Monaco;
- the categories of the **personal data** processed.
- the purposes of the processing and its legal basis;
- the **data retention period**, or, when this is not possible, the criteria used to determine this period;
- the **recipients** of possible data transfers.

[For more information, refer to the factsheet **Data subject information**]

The unambiguous consent

The consent must be given by an **oral** or **written** declaration by the data subject, or be the result of a **clear affirmative act**. There must be no reasonable doubt as to the person's wish to give consent to the processing of his or her data.



Silence or inaction on the part of the data subject does not therefore constitute valid consent within the meaning of the legislation relating to the protection of personal data as consent is not unambiguous.

[For more information, refer to the factsheet **Consent**]

A right to object to commercial prospecting at any time

In accordance with Article 17 of Law No. 1.565 of December 3, 2024, the data subject has the right to object at any time to the processing of his/her data. He or she does not have to justify the exercise of his/her right to object to the data controller, who is required to grant it. Their personal data will then no longer be processed for this purpose.

And so, in order to allow each person to oppose commercial prospecting, each commercial prospecting message **must** include the following:

- the identity of the advertiser;
- a simple and free means of objecting to the receipt of any new messages

It is prohibited to conceal the identity of the sender or the subject of the communication.

Examples of good wording using check boxes

- ☐ I object to my phone number being used to receive text messages about events organized by the company
- ☐ Yes, I would like to receive information about offers and promotions by e-mail
- ☐ Check the box if you wish to be contacted by e-mail

Special case of commercial prospecting by e-mail

Article 11 of Law No. 1.383 of August 2, 2011 for a digital Principality authorizes commercial prospecting by e-mail if all 3 conditions are met:

- the consumer's contact details have been collected directly from him or her **in relation to a sale or provision of services**



Simply creating an online account on a commercial site is insufficient when no order for products or services has been placed

- the direct marketing must concern similar products or services provided by the **same supplier**
- the consumer must be able to object, free of charge and in a **simple manner**, to the use of his or her contact details **when they are collected and each time a prospecting e-mail is sent to him/her**.

In a nutshell:



Prior consent
+ object at any time



Prior consent
+ object at any time



Prior consent unnecessary if all 3
conditions are met
+ object at any time