The Protection of privacy has become a worldwide concern. Companies can compile multiple types of information about their customers, and thereby build up sophisticated databases of information which may, for example, contain a compilation of customer lists that allow customer profiling. Such a list not only has strategic value, but is a valuable asset that may be sold to third parties.

If any information on a database is unlawfully used, processed or sold, it poses real risks to the data subjects (i.e. the persons to whom personal information relates), such as fraud and identity theft, and creates opportunities for unsolicited communications.

The Protection of Personal Information Bill (POPI)\(^1\) takes into account international developments regarding data protection and should be welcomed by consumers. POPI not only provides for the rights of data subjects to protect their personal information, but also sets the minimum conditions that must be met when personal information is processed.

In addition, POPI establishes an Information Protection Regulator to enforce the requirements of POPI.

This Legal Brief considers the provisions of POPI dealing with unsolicited electronic communications or spam in the context of direct marketing. We will also consider whether current applicable legislation and POPI require both opt-in and opt-out provisions or whether only opt-out provisions would be sufficient to protect data subjects.

Opt-in provisions usually require the data subject to give express consent before a communication is sent to him / her and before his / her personal information is processed by the so-called responsible party.

A “responsible party” is defined in POPI to mean a public or private body or any other person who, alone or in conjunction with others, determines the purpose of and means for processing personal information.

Opt-out provisions allow the data subject to object to data processing and to object to the receipt of any communication both before and after a communication is sent to him / her and his / her personal information is processed. Should the data subject opt out from receiving any communication, no further communications can be sent to such data subject.

The reason for the consideration of other legislation lies in the provisions of section 3(3)(b) of POPI, which currently states that if any other legislation provides for conditions for the lawful processing of personal information that are more extensive...
than those set out in Chapter 3 of POPI, then such extensive conditions will prevail. Chapter 3 contains the conditions for lawful processing of data.

A company wishing to make use of direct marketing will obviously have to process certain personal data (see the definition of “data processing” below). Sending unsolicited electronic communications as a result of the use of such personal data may constitute an invasion of privacy.

Unsolicited electronic communication is not only addressed in POPI, but also in the Consumer Protection Act. 68 of 2008 (CPA), the National Credit Act. 34 of 2005 (NCA), and the Electronic Communications and Transactions Act. 25 of 2002 (ECTA).

The Protection of Personal Information Bill

“Processing” is very widely defined in clause 1 of POPI as “any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including -

- the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
- dissemination by means of transmission, distribution or making available in any other form; or
- merging, linking, as well as blocking, degradation, erasure or destruction of information”.

Clause 71(1) of POPI currently provides that the processing of personal information of a data subject for the purpose of direct marketing by means of any form of electronic communication (including automatic calling machines, facsimile machines, SMSs or e-mail) is prohibited, unless the data subject

- has given his or her consent to the processing; or
- is, subject to certain conditions as set out in POPI, a customer of the responsible party.

Therefore, if the data subject is not a customer of the responsible party, the data subject must consent to data processing.

Clause 71(2) currently permits a responsible party to approach a data subject once in order to obtain the consent of the data subject for such processing.

“Consent” is defined in clause 1 currently to mean any voluntary, specific and informed expression of will in terms of which a data subject agrees to the processing of personal information relating to him or her.

There are thus three elements to be established for the consent to be valid under POPI

- the consent must be given freely or voluntarily. There should therefore be no duress from the responsible party to obtain the consent. This also assumes that the data subject is capable of volition (free will);
- the consent should be specific, i.e. not vague or over-generalised but rather specifically directed to the purpose for which the consent has been given;
- the consent must be an informed expression of will, i.e. the data subject must know and understand to what he or she is consenting. Any consent given must therefore also comply with the purpose specification principle as referred to in the proposed clauses 12 and 13 of POPI. Accordingly, the consent must be in connection with personal information which is collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party, and steps must be taken to ensure that the data subject is aware of the purpose of the collection of the information.

Although express consent is not required, it would be relatively simple to show consent if the responsible party makes use of an opt-in provision which complies with all of the above (i.e. the wording in the opt-in provision used shows consent that is given voluntary, is specific and constitutes an informed expression of will).

It is possible to imply consent when using an opt-out provision, but the wording of such an opt-out provision should be precise and clear so as to indicate implied consent which is given voluntarily, is specific and which constitutes an informed expression of will.

In terms of proposed clause 71(3), if the data subject is a customer of the responsible party, the responsible party may only process the personal information of a data subject

- if the responsible party has obtained the contact details of the data subject in the context of the sale of a product or service;
- for the purpose of direct marketing of the responsible party's own similar products or services; and
- if the data subject has been given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to such use of his, her or its electronic details at the time when the information was collected, and on the occasion of each communication with the data subject for the purpose of marketing if the data subject has not initially refused such use.

Furthermore, any direct marketing communication must contain

- details of the identity of the sender or the person on whose behalf the communication has been sent; and
- an address or other contact details to which the recipient may send a request that such communications cease.

From this, it is clear that if the data subject is a customer of the responsible party, an opt-out provision at the time when the information is collected and on the occasion of each marketing communication, if the data subject has not initially refused such use, would be sufficient.

If there is strict compliance with the "consent" requirement of POPI for data subjects who are not customers of the responsible party, the problem of spam may to some extent be addressed.


Briefly, Article 13(1) of the Privacy and Electronic Communications Directive requires Member States to prohibit the sending of unsolicited commercial communications by fax or e-mail or other electronic messaging systems, unless the prior consent of the addressee / data subject has been obtained (opt-in).

The only exception is in cases where contact details for sending e-mail or SMS messages (but not faxes) have been obtained in the context of a sale. Within an existing customer relationship the company who obtained the data may use them for the marketing of similar products or services as those it has already sold to the customer, and is similar to the requirements set by POPI.

Article 13 further requires that the company must make it clear, from the first time of collecting the data, that the data may be used for direct marketing and should make provision for the right to object. Moreover, each subsequent marketing message should include an easy way for the customer to stop further messages (opt-out), which is also similar to the requirements set by POPI.

The National Credit Act. 34 of 2005

Section 74(6) of the NCA provides that when entering into a credit agreement, the credit provider must present to the consumer a statement of the following options and afford the consumer an opportunity to select any of the options, namely to be excluded from any telemarketing campaign that may be conducted by or on behalf of the credit provider;

marketing or customers list that may be sold or distributed by the credit provider, other than as required by the NCA; or

any mass distribution or email or sms messages.
The abovementioned requirements are in line with proposed clause 71(3), and require only opt-out provisions. Although not more extensive, section 74(6) of the NCA requires specific compliance.

It is also submitted that credit providers should, once POPI becomes effective and for purposes of direct marketing, also comply with the other requirements set by proposed clause 71(3).

The Consumer Protection Act. 68 of 2008

Section 11 of the CPA confirms the consumer’s right to restrict unwanted direct marketing, by providing that the right of every person to privacy includes the right to:
- refuse to accept;
- require another person to discontinue; or
- in the case of an approach other than in person, to pre-emptively block, any approach or communication to that person, if the approach or communication is primarily for the purpose of direct marketing.

Section 11(2) then provides that to facilitate the realisation of each consumer’s right to privacy, and to enable consumers to protect themselves efficiently against the activities contemplated in section 11(1), a person who sends “unsolicited commercial communications to a person who has advised the sender that such communications to a person who has advised the sender that such communications are not wanted or are not necessary for the fulfilment of a legitimate interest of the person sending such communications” (from section 11(2)) is committing an offence.

Section 11(2) then provides that to facilitate the realisation of each consumer’s right to privacy, and to enable consumers to protect themselves efficiently against the activities contemplated in section 11(1), a person who has received a direct marketing approach may demand (during or within a reasonable time after that communication has been received) that the person responsible for initiating the communication desist from initiating any further communication.

A person authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of demands contemplated in section 11(2).

Although these provisions demand only the facilitation of appropriate opt-out provisions, they are more extensive in protecting the consumer in the sense that a pre-emptive block may be registered against any direct marketing at a registry to be established (see section 11(3) of the CPA).

Regulation 4(3)(g) of the Consumer Protection Act Regulations (published under Government Notice R293 in Government Gazette 34180 of 1 April 2011) establishes as one of the principles that is required for the operation of a registry, contemplated in section 11(3), that: “… except in respect of those existing clients where the direct marketer has proof that the existing client has after the commencement of these regulations expressly consented to receiving direct marketing from the direct marketer, a direct marketer must assume that a comprehensive pre-emptive block has been registered by a consumer, unless the administrator of the registry has in writing confirmed that a pre-emptive block has not been registered in respect of a particular name, identity number, fixed line telephone number, cellular telephone number, facsimile number, pager number, physical address, postal address, e-mail address, website uniform resource locator (URL) global positioning system co-ordinates or other identifier which the operator of the registry makes provision for….”.

In the case of existing clients, the direct marketer must assume that there is a comprehensive block already registered by the existing client, except where the direct marketer has proof that an existing client has “expressly consented” to receive direct marketing.

If the direct marketer has made use of an opt-in provision, it would be simple to show such proof. If the direct marketer cannot show express consent, the administrator must confirm in writing that no pre-emptive block has been registered.

The Electronic Communications and Transactions Act of 2002

In terms of section 45(1) of ECTA, any person who sends “unsolicited commercial communications to consumers, must provide the consumer with the option to cancel his or her subscription to the mailing list of that person, and with the identifying particulars of the source from which that person obtained the consumer’s personal information, on request of the consumer.

Any person who fails to comply with or contravenes section 45(1), is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1) (i.e. a fine or imprisonment for a period not exceeding 12 months).

Similarly, any person who sends unsolicited commercial communications to a person who has advised the sender that such communications are unwelcome, is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).

Although section 45 only requires opt-out provisions, the requirements are more extensive than other applicable legislation in the sense that the consumer is entitled to request the identifying particulars of the source from which the responsible party obtained the consumer’s personal information.

Conclusion

POPI, the NCA, the CPA and ECTA place obligations on responsible parties, credit providers and direct marketers to give data subjects opportunities to object to the processing of information and to unsolicited electronic communications (i.e. to opt-out).

It is submitted that the requirement of “consent” in cases where the data subject is not the customer of the responsible party, would be better served by an opt-in provision.

Opt-in provisions are arguably more protective of a data subject’s rights than opt-out provisions. Responsible parties should make use of both options to make sure that the data subject understands and knows what he or she is consenting and objecting to.

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*In 1993, Werksmans co-founded the Lex Africa legal network, which now has member firms in 30 African countries.