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**Comments on amendments to the Privacy Code by law  
decree no.201 (the so-called saving Italy decree) December  
6, 2011**



## **Comments on amendments to the Privacy Code by law decree no.201 (the so-called saving Italy decree) December 6, 2011**

G. Marcoccio, January 2012

The second paragraph<sup>1</sup> of Article 40 "Reducing administrative burdens for companies" of [law decree](#) "Urgent provisions for growth, equity and consolidation of public finances " no. 201 of December 6 2011, amends the Italian Privacy Code (Legislative Decree 196/03), for what exclusively concerns the processing of data relating to "legal persons, bodies or associations", hereinafter referred to as 'not natural persons'<sup>2</sup>.

Amendments mainly concern the definition of "data subject" and "personal data" from which it has been deleted the reference to 'not natural persons': consequently all the protections and measures provided by the Privacy Code for the processing of personal data of data subjects are no longer applicable for 'not natural persons', in positive alignment and not excessive considering the privacy European directive [95/46/EC](#).

Note that with the changes to the Privacy Code previously made in July 2011 by [law decree no. 70/2011](#), enacted into law by [L.106/2011](#), it has been already removed from the application of the Code the processing of data relating to 'not natural persons' in the context of the relationship between them, limited to the processing for administrative and accounting purposes: the law decree no.201/2011 now definitely enlarges the above not applicability, independently from any specific purpose or context.

No doubt that the new regulatory framework simplifies the administrative burdens of companies in their role of data controllers: all the requirements regarding the figure of "data subjects" and the processing of their "personal data" must be observed only in relation to natural persons.

Conversely the definition of "subscriber" is not subject to amendment by law decree no. 201/11 and it continues to include the 'not natural persons': it does not surely represent a mere oversight of the lawmaker because the current Italian Privacy Code operates as implementation of the already mentioned privacy European directive 95/46/EC and also of the European directive [2002/58/EC](#) concerning the processing of personal data and the protection of privacy in the electronic communications sector. Note that the current definition of "subscriber" includes legal persons, in line with the definition provided by the European Directive [2002/21/EC](#).

Directive 2002/58/EC has been transposed with Articles 121-134 of the Privacy Code (Title X "electronic communications") as well as with the definitions in paragraph 2 of Art. 4.

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<sup>1</sup> "To reduce the burden arising from privacy provisions, the following changes have been made to the Legislative Decree no. 196 of June 30, 2003:

- a) In Article 4, paragraph 1, letter b), the words "legal person, body or association" shall be deleted.
- b) In Article 4, paragraph 1, letter i), the words "legal person, body or association" shall be deleted.
- c) Paragraph 3-bis of Article 5 shall be repealed.
- d) In paragraph 4, Article 9, the last period shall be deleted.
- e) Letter h) of paragraph 1 of Article 43 shall be deleted. "

<sup>2</sup> The subsequent conversion into law of 22 December 2011 ([law no.214](#)) has not made any changes to the text of paragraph 2 of Art. 40 in question.



From this justified asymmetry between the definitions of "subscriber" and "data subject" it derives however a framework of requirements (and consequent applicability of related sanctions) in the Privacy Code not immediately clear for some types of processing and purposes, especially for what related to marketing and commercial communications: valuable activities in this phase when the relaunch of Italian economic development must be the primary target for most of the current regulatory initiatives.

Regarding the use of information contained in the lists of telephone subscribers, for the purposes of sending advertising material or direct selling or carrying out market research or commercial communications (Art 129 and letter b of paragraph 4 of Art . 7), the 'not natural person' as "subscriber" retains the right to express his/her consent in order to be contacted for such purposes, in particular whether or not subscribing in the register of objections under paragraph 3-bis of Article 130 when the means of contact is the phone or paper mail.

Instead, if the means of contact is the use of automated calling systems without human intervention for sending advertising materials or direct selling or carrying out market research or commercial communications (always the case in letter b paragraph 4 of Art. 7), when the recipient is a 'not natural person', it is no longer required his/her consent because it is no longer a "data subject" (paragraphs 1 and 2 of Art. 130).

Additionally when it is used the email address, supplied by the purchaser in the context of purchasing a product / service (paragraph 4 of Article 130) for subsequent direct sale of products / services similar to those already acquired, the 'not natural person' has no right to object for such treatment, because it is no longer "data subject".

Then in general since no longer "data subject", the 'not natural person' loses the rights under Art. 7 (to request and receive specific information, to rectify, to make opposition for the processing of his/her data, particularly for marketing and commercial communications).

Therefore for some practical conditions it is not easy to understand the rationale of such different rules, that is also reflected on the relevant Orders issued by Italian Data Protection Authority.

It appears correct to highlight the difficulties at the operational level (not certainly any mere wording inconsistency in the text of the provisions), for the companies who want and are required to implement their marketing actions respecting a clear framework (and possibly simple) of rules, for the 'not natural persons' who will experience a substantial increase in marketing efforts/unsolicited commercial, and who also need a clear set of rules to be able to accept or to object (in any case the consequent procedural costs for the 'not natural person' are not at all trivial).

Unfortunately the lack of clarity in the regulations creates difficulties for the business that should be instead supported by clear rules especially in these times, rules which facilitate business development and do not involve further obstacles, born and fed by unproductive distinctions.

It would therefore be desirable a clarification, timely and effective, by the competent authorities.