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# Data Privacy: Unsolicited Messaging and The Limits of Opt-Out Provisions

## Introduction

In an increasingly digital age, where digital marketing is the favoured method for business promotion, Nigerian businesses, like their global peers, often use unsolicited emails and SMS as cost-effective means to reach potential customers. A notable aspect of these marketing campaigns is the inclusion of "opt-out" mechanisms, which give recipients the option to unsubscribe from future messages. Although the opt-out provision seems like a reasonable measure to comply with privacy laws and prevent potential legal issues, businesses must understand that these mechanisms do not completely absolve them of legal responsibility. Recent judicial decisions show that relying solely on opt-out provisions is inadequate as a defence against legal liability under Nigeria's data protection and consumer protection laws.

This article examines the legal landscape in Nigeria, highlighting the limitations of opt-out provisions in unsolicited emails and SMS as a defence, while also drawing comparisons to similar regulations in other jurisdictions.

## Global Data Protection Laws and the emerging challenges in Nigeria

In recent years, there has been a global surge in the enactment and awareness of data protection and privacy laws. For businesses operating within the European Union (EU), the General Data Protection Regulation (the "GDPR")<sup>1</sup> imposes strict guidelines on how personal data must be handled, including provisions around direct marketing. In the United States of America (the "US"), the state of California's Consumer Privacy Act (the "CCPA") grants data subjects<sup>2</sup> the right to access, erase, and port their

<sup>1</sup> The GDPR sets a global benchmark for privacy legislation, influencing similar laws in countries in many countries of the world including Nigeria. It is often ranked as the gold standard for data protection and privacy regulations worldwide.

<sup>2</sup> A data subject is an individual to whom personal data relates.

data, the right to know what personal information is being collected, and right to opt-out of the sale of their personal information. It also governs how personal data is handled and imposes penalties for non-compliance.

Nigeria has kept pace with global data protection efforts through the enactment of the Nigeria Data Protection Act, 2023 (the “**NDPA**” or the “**Act**”), established by the Nigerian Data Protection Commission (the “**NDPC**”). The NDPA seeks to safeguard the fundamental rights and freedoms, and the interests of data subjects, as guaranteed under the Constitution of the Federal Republic of Nigeria, 1999. It provides a robust framework for safeguarding personal data, aimed at protecting the privacy rights of Nigerian citizens and regulating the processing of personal data. The Act aligns with international standards, including the GDPR. Despite these advancements, a significant challenge persists; the widespread violation of opt-out provisions by many data controllers<sup>3</sup> and data processors<sup>4</sup> (collectively to be referred to as the “**data controller**”). This issue has become increasingly important, particularly as the NDPC signals its intention to enforce stricter sanctions for data breaches.

### The Legal Framework for the Right to Object and to Opt-Out in Nigeria

The NDPA recognises and protects a data subject's **right to object**.<sup>5</sup> In fact, a data controller is required to inform a data subject of its right to object<sup>6</sup> at the point of data collection.<sup>7</sup> This right can be exercised by a data subject at any time and must be immediately honoured by a data controller<sup>8</sup> unless the data controller demonstrates a public interest or other legitimate grounds, which overrides the fundamental rights and freedoms, and the interests of the data subject. In this case, the data controller may continue to process the data subject's personal data.<sup>9</sup> On the other hand, the **opt-out** right is more specific and closely tied to the right to object. It allows a data subject to withdraw consent for the processing of their personal data, particularly for direct marketing purposes, and to cease receiving unsolicited communications, such as emails or SMS, from the data controller. Direct marketing, in this context, refers specifically to advertisements targeted at individual recipients. Unlike the right to object, the right to opt-out of direct marketing is absolute; it cannot be overridden by any other right or legitimate interest.<sup>10</sup> Once the data subject objects to processing for direct marketing purposes, personal data should not be processed for such purposes.

The position of the NDPA on this subject matter is aligned with the practices in foreign jurisdictions. In the EU, the GDPR explicitly grants data subjects the right to object to the processing of their personal data at any time, including for direct marketing, with no limitations. Similarly, the CCPA allows data subjects to opt-out of the sale of their personal information.<sup>11</sup> The Ghanaian Data Protection Act (DPA) 2012 also provides similar rights to object and opt-out.<sup>12</sup>

<sup>3</sup> A data controller is an individual, private entity, public Commission, agency or any other body who, alone or jointly with others, determines the purposes and means of processing of personal data.

<sup>4</sup> A data processor is an individual, private entity, public authority, or any other body, who processes personal data on behalf of or at the direction of a data controller or another data processor.

<sup>5</sup> This is a data subject's ability to refuse the processing of their personal data.

<sup>6</sup> The exercise of a data subjects right to object includes making a request to the data controller or processor to: a) erase the data subjects personal data, b) correct errors in the applicant's personal data, c) restrict the processing of the data subjects personal data, d) stop profiling or stop the processing of data completely, etc.

<sup>7</sup> Section 34(1)(a)(v) of the Nigeria Data Protection Act, 2023.

<sup>8</sup> Section 36 of the Nigeria Data Protection Act, 2023.

<sup>9</sup> Section 36 (2) of the Nigeria Data Protection Act, 2023.

<sup>10</sup> Section 36 (3) & (4) of the Nigeria Data Protection Act, 2023.

<sup>11</sup> Article 3 of the California Consumer Privacy Act, 2020.

<sup>12</sup> Section 29 of the Data of Protection Act, 2012.

In the same vein, the **Nigeria Data Protection Regulation (NDPR) 2019**<sup>13</sup> also grants data subjects the right to object to the processing of their personal data for direct marketing purposes<sup>14</sup>. This reinforces the fundamental rights of data subjects to withdraw consent and object to data processing, particularly in the context of direct marketing. It also outlines the responsibilities of data controllers, who must not continue processing personal data in violation of the data subject's rights. Data controllers are required to act promptly and ensure that objections are respected. As such, data subjects have the unequivocal right to opt-out of direct marketing communications—such as emails and SMS—and data controllers must honour this right without exception.

A data controller can facilitate the exercise of the right to opt-out by implementing opt-out mechanisms in its digital communications e.g. by including an unsubscribe button, SMS/Message opt-out codes, digital and physical opt-out forms, phone call requests, email responses, etc. enabling data subjects to easily unsubscribe from marketing communications going forward. When this is done, the data subject retains the right to either utilise the opt-out mechanism or formally request that the data controller immediately ceases to send such communications altogether through any other means. In the light of the provisions of the Act, once the data subject exercises this right, the data controller is obligated to promptly cease processing the personal data altogether.<sup>15</sup>

The critical question that arises is whether the inclusion of an opt-out provision would absolve a data controller of legal liability for unsolicited communications. The answer is no. The mere inclusion of an opt-out provision or mechanism is not a shield against legal liability on the part of the data controller. Even if an opt-out mechanism exists, from recent case law, the data subject still retains the right to make a direct request to be removed from marketing lists.

On December 5, 2024, the High Court of Lagos State (the “**Court**”) delivered a noteworthy judgment in the case of **Tokunbo Olatokun v. Polaris Bank Limited**<sup>16</sup>, which addresses a data subject's right to object and opt-out. In this case, Tokunbo Olatokun (the “**Applicant**”), a customer of Polaris Bank Limited (the “**Respondent**” or the “**Bank**”), requested the closure of his bank account and asked the bank to stop sending unsolicited emails. However, the Bank continued sending promotional emails despite his explicit request. The Applicant argued that these unsolicited emails were intrusive and offensive, especially after he had objected. He contended that the Bank had no lawful basis to continue sending these emails and that the repeated communications caused him emotional distress due to the improper use of his personal data.

The Respondent acknowledged that the Applicant had once been a customer but argued that they were authorized to send unsolicited promotional emails based on guidelines from the Central Bank of Nigeria (CBN)<sup>17</sup>, which allow such communications if an opt-out mechanism is provided. They further claimed that an unsubscribe button was included in the promotional emails sent to the Applicant, which he could have used to opt-out.

Notwithstanding the Respondent's submission, the Court ruled that the Applicant had explicitly instructed the Respondent to stop sending unsolicited emails. Despite the opt-out option being available, the Court emphasized that the Respondent was obligated to honour the Applicant's clear request without requiring any further action from him. The Court also highlighted that the continued emails, even after the Applicant's request, infringed on his right to privacy under the Act.

<sup>13</sup> Article 3.1(9)(c) of the Nigeria Data Protection Regulation (NDPR) 2019.

<sup>14</sup> This is often referred to as the right to opt-out.

<sup>15</sup> Section 36(1) (4) of the Nigeria Data Protection Act, 2023.

<sup>16</sup> Unreported case with Suit no: LD/17392MFHR/2024

<sup>17</sup> CBN Consumer Protection Framework Guidelines on Disclosure and Transparency, 2019.

Additionally, the Court dismissed the Respondent's argument that the CBNs guidelines permitted the Bank to send unsolicited messages, stressing that the Applicant's explicit instruction to stop receiving messages took priority over those guidelines. As a result, the presence of an opt-out provision did not relieve the Respondent of liability, as the Applicant's clear request should have been honoured and implemented without delay.

## Conclusion

While the decision in *Tokunbo Olatokun v. Polaris Bank Limited* may be subject to appeal and the general damages awarded were only up to ₦1,000,000 (One Million Naira), it reinforces the clear provisions of the NDPA. Data controllers should not assume that the inclusion of opt-out mechanisms would be sufficient in all situations but must be mindful to honour explicit requests of data subjects. Given that the NDPA imposes substantial fines for non-compliance, data controllers must have efficient systems in place to promptly process opt-out requests. Failure to do so could result in fines of up to ₦10,000,000 (Ten Million Naira) for individuals and ₦20,000,000 (Twenty Million Naira) for organizations, or 2% and 4% of their annual turnover, respectively, as outlined in Section 43 of the NDPA.