

THE USE OF CHATBOTS AS A FORM OF DIRECT MARKETING: IS IT DIRECT?

By

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DECLARATION

I declare that this report is my own, unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws in the field of Information Communication and Data privacy at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

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ABSTRACT

The use of Artificial Intelligence (AI) powered chatbots as a form of marketing is increasing rapidly, is the Protection of Personal Information Act 4 of 2013 (POPIA) fit for purpose? The evolving nature of new technologies in the period of Artificial Intelligence (AI) poses a conundrum for the privacy of individuals, to the extent that the use of personal information may be used for illicit/questionable purposes. This paper argues that despite the enforcement of the POPIA provisions in respect of protecting personal information from direct-marketing, the use of modes of AI such as chatbots by organisations does not fall within the ambit of the POPIA direct marketing protections. Section 69 of the POPIA and the definitions of direct-marketing therefore require legislative alignment to cater for the fast-evolving nature of technology. Literature demonstrates that the Consumer Protection Act 68 of 2008 (CPA) provisions in respect of direct marketing and the Electronic Communications Act 25 of 2002 (ECTA) have not been very effective in curtailing direct-marketing tactics from organisations, this has been shown by authors such as Papadopoulos and Tladi. Notwithstanding the fact that section 69 of the POPIA revised the opt-in method for direct-marketing, this paper illustrates that operational loopholes that exist in the practical sense and how these render the adherence to processing personal information in accordance with the POPIA ineffective.

This paper shows that legislative reform such as simple and clear language within the existing provisions may be used to curtail the conundrum, international legislation such as the DPA 2018 and the GDPR are useful reference points in this regard. Effective privacy by design principles such as consent management processes also provide a way forward. Ultimately, the legislature is in need of adopting language and practical implementation and monitoring that will be applicable and relevant to the ever-changing fast pace of new technologies.

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I. INTRODUCTION

In March 2024, the Chairperson of the Information Regulator (Regulator) announced a decision which may arguably have an impact on the manner in which direct marketing takes place in South Africa. The Regulator confirmed that a telephonic communication is a form of electronic communication which will therefore fall within the ambit of section 69 of the Protection of Personal Information Act 4 of 2013 (POPIA).¹

This decision is significant for the purpose of this paper. Notwithstanding that the decision by the Regulator may appear to solely focus on the aspect of telemarketing,² the principle of the decision serves as an appropriate lens for an illustration to understand the practical manner in which provisions around the Consumer Protection Act 68 of 2008 (CPA)³ and the POPIA⁴ require the implementation of legal reforms to serve new technologies. Furthermore, the commentary that has arisen in respect of the decision announced by the Regulator is applicable to the key discussion in this paper in aiding the critical analysis that will be conducted.

The overall standpoint of this paper is that although one could argue that the term *any form of electronic communication* provision that is provided for in section 69(1) of the POPIA may cover new forms technology such as AI-powered chatbots, given that the provision speaks to *any electronic communication*, section 69(2) would still be a hurdle as the element of consent would need to be met. There are specific provisions within the POPIA that deal specifically with the subject of direct marketing.

Direct marketing through electronic communication is dealt with significantly in the POPIA and the rules are complex. One of the focus points of paper is direct marketing in relation to electronic communication. In such instances, Papadopoulos and Hamann note how we see that the Electronic Communications and Transactions Act 25 of 2002 (ECTA)⁵ no longer has a bearing on certain aspects of direct marketing in the form of electronic communication following the repeal of section 45 of ECTA by section 69 of the POPIA. All data subjects of

¹ Simnikiwe Mzenkandaba 'EXCLUSIVE InfoReg cracks whip on pesky direct marketing calls' *IT Web* 21 February 2024, available at <https://www.itweb.co.za/article/exclusive-info-reg-cracks-whip-on-pesky-direct-marketing-calls/KzQenvjy6oeqZd2r>, accessed on 27 February 2024.

² Ibid.

³ Consumer Protection Act 68 of 2008.

⁴ Protection of Personal Information Act 4 of 2013.

⁵ Electronic Communications and Transactions Act 25 of 2002.

digital marketing material must be given the opportunity to unsubscribe from a marketing list/database every time they receive marketing material.⁶

The aims of the above are seen as a significant win in respect of the privacy of data subjects. However, given the fast-paced evolution of the internet of things it is not with certainty that new technologies have been considered from a legislative perspective in South Africa.

(a) Problem Statement

The CPA and the POPIA explicitly provide definitions of the terms direct marketing and electronic communication. However, given the rise of the use of new technologies such as AI-powered chatbots, this raises the question whether direct marketing is limited to a specific type of telemarketing or if the meaning of direct marketing is broad enough to include AI-powered chatbots. The paper will therefore investigate if AI-powered chatbots fall within the ambit of direct marketing and this will help determine whether legal reform is required in this regard.

Given the significant impact of new technologies on direct marketing, this study seeks to establish whether the existing terminology and provisions in the CPA and a specific focus on the POPIA in relation to direct marketing accommodate a world that is constantly evolving within the cyber sphere. Research conducted in this study will determine if the POPIA current terminology and provisions can provide adequate legal protections to consumers in South Africa; and whether we need to implement reforms in respect of the legal definitions and context for legal certainty in relation to direct marketing and the protections for consumers in order to capture the impact of the increase of new technologies with a specific focus on AI-powered chatbots.

(b) Research Objectives

The first objective of the study is to analyse the meaning of specifically defined terms within the CPA and the POPIA in a critical manner, namely, direct marketing and electronic communication and therefore the position and rules of the CPA and the POPIA in relation to direct marketing. In trying to determine this meaning, it is this analysis that will determine the scope, purpose and application of these words in the respective provisions. This will therefore

⁶ Hamann, Bernard and Papadopoulos, Sylvia. Direct marketing and spam via electronic communications: An analysis of the regulatory framework in South Africa. *De Jure (Pretoria)* 2014, vol.47, n.1, available at https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602014000200004, accessed on 23 May 2023 p43 – 60.

address the need to interrogate whether the impact of new technologies such as AI-powered chatbots have adapted to this shift in meaning. Therefore in order to aid this, significant provisions that will be investigated are sections 8, 11 and 69 of POPIA, section 11 of the CPA and the definitions of direct marketing located in the CPA and the POPIA.⁷ The definition of electronic communication in respect of the POPIA will also be fleshed out.⁸ Lastly, automated decision-making as defined in section 71 of the POPIA will be assessed given the increased use of AI-powered chatbots by organisations.⁹ Having looked at these aforementioned provisions, the aspects of opting in and out and the concurrent application of the CPA and POPIA shall be assessed.

The second objective is to briefly compare traditional and new direct marketing methods. The study shall focus on AI-powered chatbots as a form of new technology, with the aim to establish the gaps given the promulgation of the POPIA by questioning whether these new technologies fall within the ambit of direct marketing concerning consumer protection and processing of personal information and whether General Data Protection Regulations (GDPR) and the Data Protection Act 2018 (DPA 2018) concepts such as the opt-in method are useful to address the applicable challenges.

Accordingly, a key part of this objective will naturally critically assess whether the existing terminology captures new dynamics that have altered traditional direct marketing methods and technologies. A subset of this objective is critically assessing the effectiveness of the opt-in principle and whether we should still be regulating the ability of consumers to actually opt-in rather than placing a focus on the methods that are used to entice consumers, such as AI-powered chatbots as mentioned earlier.

(c) Limitations

The parameters of the research will consider the impact of the use of AI-powered chatbots in respect of data subject's personal information and direct marketing within the realm of the POPIA and CPA. Although an array of case law exists in terms of privacy law in South Africa, there are a handful of the POPIA specific cases.¹⁰ The terrain *specifically* in relation to AI-

⁷ Op cit note 4 ss 1, 8, 11 and 69 and Op cit note 3 Chapter 1 Part A and ss 11(1) - (4).

⁸ Op cit note 4 s 1.

⁹ Op cit note 4 s 71.

¹⁰ Op cit note 4 introductory section {"judgments and cases linkout"} available at <https://popia.co.za/>, accessed on 8 February 2025 and Tayla Pinto 'POPIA Judgments and 'Cases' Michalsons 16 January 2023, available at <https://www.michalsons.com/blog/tag/popia-judgments>, accessed on 8 February 2025.

powered chatbots has not been explored within our courts. A Canadian tribunal ruling will however be considered as a lens to determine the potential consequences of legal uncertainty within POPIA in relation to AI such as chatbots.¹¹ Furthermore, principles set out in the case German *Fashion ID GmbH & Co KG v Verbraucherzentrale NRW e.V* are a useful lens to determine how the question of AI-powered chatbots can be explored by South African courts from a privacy perspective.¹²

The National Credit Act 34 of 2005 (NCA)¹³, the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA)¹⁴ and the Promotion of Access to Information Act 2 of 2000 (PAIA)¹⁵ privacy and consumer practices provisions will not be investigated.

Lastly, it is of high importance to note that the research will focus on AI-powered chatbots, specifically conversational and promotional AI-powered chatbots, as opposed to chatbots in the general sense. The distinction between these two concepts shall be illuminated in the body of this paper.

(d) Research Methodology and Framework

The basis of the study will take the form of traditional desktop research. Accordingly, library textbooks and scholarly articles and journals shall be used. Given that the topic of new technologies such as AI-powered chatbots is quite novel, a number of news articles and sources such as technology sites shall be used to analyse the impact of new technologies and the legal implications thereof. Various commentary shall be used. Legislation will be used as key primary sources. International legislation and case law will also be used for the purpose of comparison. Secondary sources will include journal articles and online news articles. An analytical and comparative approach shall be adopted.

A comparative legal methodology will be used to leverage the benefits of comparing laws from different jurisdictions which generally allow for solutions.¹⁶ This method is advantageous

¹¹ *Moffatt v. Air Canada* 2024 BCCRT 149.

¹² *Fashion ID GmbH & Co KG v Verbraucherzentrale NRW e.V* C-40/17 CJEU Second Chamber 29 July 2019.

¹³ National Credit Act 34 of 2005.

¹⁴ Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002.

¹⁵ Promotion of Access to Information Act 2 of 2000.

¹⁶ Edward J. Eberle. 'The Method and Role of Comparative Law' 8 *WASH. U. GLOBAL STUD. L. REV.* 451 (2009), available at https://openscholarship.wustl.edu/law_globalstudies/vol8/iss3/2_p.452, accessed on 10 November 2024.

because if a certain jurisdiction has the same issue, one can observe how these issues are dealt with.¹⁷ Given that the research is focusing on direct marketing and privacy concepts, this method will therefore be used to probe principles in the United Kingdom (UK) and the European Union (EU).

The type of comparative approach that will be used is the law-in-context method. Legal scholars believe that comparing of legal rules using a black-letter method should not be the sole approach used in the comparative method.¹⁸ In order to understand the law from a practical perspective and the judicial aspects, it is therefore useful to consider domestic law,¹⁹ which will be useful from a practical perspective of the application of the definitions of direct marketing.

II. KEY TERMINOLOGY

AI and Chatbots

Artificial Intelligence is defined as “machines that receive inputs from the environment, then learn from or interpret those inputs, and then potentially take certain actions or decisions that affect the environment.”²⁰ The Oxford Dictionary provides a simpler definition of AI as “The capacity of computers or other machines to exhibit or simulate intelligent behavior.”²¹ Generative AI is described as a type of AI technology that generates content such as text, images, audio, and video which is also referred to as a generator.²² Chatbots, in very simple terms are defined as “a computer program that uses an LLM (large language model) to simulate a conversation with human users, typically through typed text in a software application.”²³

¹⁷ Ibid.

¹⁸ Mark Van Hoecke ‘Methodology of Comparative Legal Research’ *Law and Method* (2015) 16.

¹⁹ Ibid.

²⁰ Sonia K Katyal ‘Private Accountability in the Age of Artificial Intelligence’ (2019) 66 UCLA Law Review 54 at 62

²¹ Artificial Intelligence, N.” *Oxford English Dictionary*, Oxford UP, December 2023, available at <https://doi.org/10.1093/OED/7359280480> , accessed on 18 April 2024.

²² ‘Generative AI’ *Techopedia* 15 January 2024 available at <https://www.techopedia.com/definition/34633/generative-ai>, accessed on 19 January 2024.

²³ ‘Defining AI and chatbots’ *Stanford University Teaching Commons*, available at <https://teachingcommons.stanford.edu/teaching-guides/artificial-intelligence-teaching-guide/defining-ai-and-chatbots#:~:text=Chatbot%E2%80%94computer%20program%20that,text%20in%20a%20software%20application>, accessed on 5 February 2024.

Chatbots are categorised as rule-based, menu-based, contextualised, hybrid and key-word based and promotional based.²⁴ Promotional and conversational chatbots are the focus of this paper as these are generally used for direct marketing.²⁵ Chatbots may appear as a notification on an application or website. Once a user immediately starts browsing a website or application, a chatbot may appear immediately. The content presented to a user by an AI-powered chatbot in the context of direct marketing is promotional content for particular goods or services. Rudimentary conversational software agents existed in the 1960s as a form of the first type of chatbots.²⁶ A new wave of AI has therefore led to AI-powered chatbots that essentially uses AI to engage in sophisticated dialogue.²⁷ They have the ability to hold and capture data of users that is historical based whilst being able pre-empt certain requirements and providing complex consumer decision making.²⁸

Direct Marketing

The POPIA defines Direct marketing as a

“means of approaching a data subject, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting or offering to supply, in the ordinary course of business, any goods or services to the data subject; or requesting the data subject to make a donation of any kind for any reason.”²⁹

Additionally, the POPIA provides a new definition of electronic communication:

“to mean any text, voice, sound or image message sent over an electronic communications network which is stored in the network or the recipient’s terminal equipment until it is collected by the recipient”.³⁰

²⁴ ‘The Different Types of Chatbots: AI, NPL, Rule-Based & More’ *fullview* 24 October 2023 available at <https://www.fullview.io/blog/types-of-chatbots>, accessed on 4 January 2024.

²⁵ ‘How to Use Chatbots in Marketing – An Honest Guide for 2024’ *Chatbot* 10 June 2024 available at <https://www.chatbot.com/blog/chatbots-in-marketing/#:~:text=Chatbot%20platforms%20can%20deliver%20marketing,news%20effectively%20reaches%20your%20audience>, accessed on 13 June 2024.

²⁶ Adam, M., Wessel, M. & Benlian, A. ‘AI-based chatbots in customer service and their effects on user compliance’ *Electron Markets* 31, 427–445 (2021), available at <https://doi.org/10.1007/s12525-020-00414-7>, accessed on 14 November 2024.

²⁷ *Ibid.*

²⁸ Ma L, Sun B. Machine learning and AI in marketing—Connecting computing power to human insights. *International Journal of Research in Marketing*. 2020;37(3):481–504, available at <https://www.sciencedirect.com/science/article/abs/pii/S0167811620300410>, accessed on 10 February 2025.

²⁹ Op cit note 4 chap 1 part A.

³⁰ Op cit note 4 chap 1 part A.

The CPA defines direct marketing as the act:

“to approach a data subject, either in person or by mail or electronic communication, for the direct or indirect purpose of: (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the data subject; or (b) requesting the data subject to make a donation of any kind for any reason.”³¹

The key point here is that the definition of direct marketing in respect of POPIA may be interpreted as one that is quite broad given that the definition of electronic communication includes a catch-all as we see that it includes any text, voice, sound or image message. Whilst this may afford a simple interpretation that would allow for an AI chatbot to be included in this definition in terms of section 69 (especially in the context of opt-in approaches), this paper will demonstrate that obtaining consent from data subjects proves to be a hurdle when looking at the mechanism of how AI chatbots actually operate.

III. DIRECT MARKETING - SOUTH AFRICA

The analysis of the concurrent application of direct marketing is important because if we do not have certainty around the inclusion of chatbots in the applicable legislation - how certain are we that consumers would be afforded protections around the opt-in rules?

Notwithstanding that section 45 of ECTA has been repealed by section 69 of the POPIA, understanding the limitations in respect of this is useful as this points to the conundrum of this research question, where the absence of insufficient definitions of direct marketing poses a threat to being able to protect consumers, both from a CPA and the POPIA perspective. Notably, there is an absence of a direct marketing definition in ECTA.³²

The general requirements of the POPIA entail that responsible parties must adhere to requirements such as a lawful basis for the collection and use of the personal information in order to process the personal information of a data subject, this would take the form of the data subject's consent or the responsible party's legitimate interests.³³ Secondly, notifying data subjects that their personal data will be used for marketing purposes is required.³⁴ Thirdly, securing the integrity and confidentiality of personal information in the responsible party's possession or under its control by taking reasonable, technological and organisational measures

³¹ Op Cit note 3 chap 1 part A.

³² Op cit note 5 and Op cit note 6.

³³ Op cit note 4 s 11.

³⁴ Op cit note 4 s 69.

to protect the personal information being processed is provided for. This is inclusive of ensuring contractual arrangements are in place with service providers that are responsible for sending direct marketing on behalf of the responsible party's behalf to ensure that the correct data protection obligations are in place.³⁵

Direct marketing that takes place in the form of electronic communication, may not take place generally, (however, if the data subject³⁶ is an existing customer of the responsible party there is an exception); is not a customer of the responsible party, but has provided consent to the direct marketing; has not previously withheld consent; and consent was obtained in the prescribed manner and form an exemption to the prohibition is granted.³⁷

Although given the aforementioned announcement by the Information Regulator regarding telephonic communication in the context of direct marketing, the general rule under the POPIA is that most forms of digital marketing, other than telemarketing, require the prior opt-in consent of the intended recipient.³⁸ It is however important to note that the exception is the soft opt-in rule where a responsible party may process the personal information of a data subject in the instance where the data subject is a customer of the responsible party.³⁹

Van Eden and Barnard make an interesting observation regarding the parameters of the POPIA and CPA. The POPIA is prescriptive as and sets out the parameters of processing personal information. The CPA in their view does not outwardly prohibit direct marketing.⁴⁰ The POPIA, on the other hand, is protective of the right to privacy as the instances for processing such personal information are prescriptive.⁴¹

(a) Concurrent application of Direct marketing governing provisions

(i) POPIA Governing provisions:

³⁵ Op cit note 4 s 19 and 'A South African guide to direct marketing' *Eversheds Sutherland* 4 November 2021 available at <https://www.eversheds-sutherland.com/en/south-africa/insights/a-south-african-guide-to-direct-marketing>, accessed on 4 November 2023.

³⁶ Op cit note 4 s 69.

³⁷ Ibid

³⁸ Ibid.

³⁹ Op cit note 4 s 69(3).

⁴⁰ Ibid and Van Eeden E & Barnard J *Consumer Protection Law in South Africa* 2 nd ed (2017) 587.

⁴¹ Op cit note 4 s 69 and Ibid.

Section 69 (1) notes that the processing of personal information for direct marketing in the form of electronic communication is permitted if the data subject has provided their permission for such processing and is a customer of the responsible party.⁴²

Further, section 2 informs us that a responsible party may approach a data subject whose consent is required, has not previously withheld consent and only on one occasion to request such consent.⁴³ Moreover, a responsible party may only process the personal information of a data subject who is a customer of the responsible party in terms of subsection (1)(b) where the details of the data subject have been obtained in lieu of a sale of a product or service, for direct marketing which are related to the said product or service. The key point here is that a chance is afforded to a data subject to object to such processing. Timing is also important because whilst the information is collected during real time engagement with the data subject, an opportunity to object to the use of the information must be provided to the data subject.⁴⁴

(ii) Section 8

During the processing of information, the responsible party is required to abide with all lawful processing conditions set out in the POPIA and this must be done when the purpose and means of processing are being determined.⁴⁵

(iii) Section 11(3)(b)

This section stipulates that:

“A data subject may object, at any time to the processing of personal information for purposes of direct marketing other than direct marketing by means of unsolicited electronic communications as referred to in section 69.”⁴⁶

Whilst it is clear that the legislators of these provisions above had purposeful intentions which may seem to be future proof, the rate at which new technologies have arisen such as AI-powered chatbots has created legal uncertainty. The objective of trying to provide protections to data subjects is, to a certain extent curtailed because of the methods such as targeted advertising in the form of AI-powered chatbots explored later in the study.

⁴² Op cit note 4 s 69(1).

⁴³ Op cit note 4 s 69(2).

⁴⁴ Op cit note 4 s 69(3).

⁴⁵ Op cit note 4 s 8.

⁴⁶ Op cit note 4 s 11(3)(b).

(iv) Right to opt-out

In simple terms, no matter what means are used, according to the CPA, a consumer may opt out of direct marketing. Organisations are therefore required to ensure appropriate measures are in place to receive and process such opt-out requests and a fee thereof may not be charged to consumers.⁴⁷

In the event that data subjects essentially want to enforce their opt-out rights, the responsible party is required keep a record of data subjects who no longer want to receive marketing material. This is however subject to individuals revoking such a decision and opting in again.⁴⁸ Eversheds Sutherland therefore recommend that responsible parties should always keep updated contact databases.⁴⁹

(v) Soft opt-in rule

A limited exemption may be applied to the strict opt-in consent requirement when looking at the POPIA where direct marketing takes place in the form of electronic communication in the event where the information related to the data subject in question were obtained due to a sale of a product or service by the responsible party.⁵⁰

Eversheds Sutherland therefore provide practical guidance in respect of the above where electronic communications on an opt-out basis may therefore be sent (for the most part), subject to a responsible party obtaining information such as an email address in the ambit of a sale of a product or service of the responsible party. This is further exempted as the goods or services must be in respect of similar goods or services.⁵¹ The responsible party must also provide the data subject with an opportunity to opt at without any cost.⁵²

For a further practical example, Monique Hayward explains the approach that may be used in respect of the CPA. She notes that in the event that a supplier reaches out to a consumer for direct marketing activities, the consumer is then entitled to demand that the supplier should stop any form of communication. This is however associated with the requirement that this has

⁴⁷ Op cit note 3 s 11.

⁴⁸ Op cit note 3 s 11 and 'How consumer rights can protect you from direct marketing' 1 June 2024 *The Citizen*, available at <https://www.citizen.co.za/business/personal-finance/direct-marketing-consumer-rights/>, accessed on 4 September 2024.

⁴⁹ 'A South African guide to direct marketing' *Eversheds Sutherland* 4 November 2021 available at <https://www.eversheds-sutherland.com/en/south-africa/insights/a-south-african-guide-to-direct-marketing>, accessed on 4 November 2023.

⁵⁰ Op cit note 4 s 69 and *Ibid*.

⁵¹ Op cit note 49.

⁵² *Ibid*.

to be done within a reasonable time period being contacted after receiving such communication, it is worth noting that the request may be in a practical manner such as replying to an sms or email saying no or opt out.⁵³ If the supplier has received such a demand, they then have to refrain from directing or allowing any associated person to reach out to the consumer again. It also forbidden that the supplier may request a fee from the consumer to stop this form of communication.⁵⁴

(b) Forms of direct marketing

The potential gaps in our South African legislation essentially relate to what we actually consider as direct marketing as a definition in the different set of laws and the function of processing personal information in relation POPIA.

Looking at the different forms of direct marketing paints a picture in terms of understanding the potential gap of the current definitions potentially not being able to cover new technologies such as AI-powered chatbots.

This section of the research paper therefore aims to assess and compare traditional and new direct marketing methods and to consider various forms with a focus on AI-powered chatbots. The purpose of this section is to provide context as to why our current legislation may possibly be in a conundrum.

The main distinction between traditional and non-traditional marketing methods is really centred on the method that is used to market a product.⁵⁵ Traditional marketing entails methods that can essentially be used without the means of the internet for advertising purposes. These include directly mailed postcards, coupons, billboards and newspaper adverts.⁵⁶

Digital marketing on the other hand requires the use of the internet or smartphones. Given that statistics illustrate 4.95 billion internet users that are active in the world and 4.62 billion users that are active on social media, the aggressive rise in digital marketing seems justifiable.⁵⁷

⁵³ Monique Hayward 'DIRECT MARKETING VS THE CONSUMER PROTECTION ACT AND POPI ACT (PART 1)' 7 June 2018 available at <https://serr.co.za/direct-marketing-vs-the-consumer-protection-act-and-popi-act-part-1?print=print>, accessed on 23 November 2024.

⁵⁴ Ibid.

⁵⁵ Ankita Mondal 'Marketing & Traditional Marketing' 7 April 2023, available at <https://www.linkedin.com/pulse/difference-between-modern-marketing-traditional-ankita-mondal>, accessed on 3 September 2023.

⁵⁶ Elena Poddighe, Pieremilio Sammarco, Vincenzo Zeno-Zencovich *European Media and Communication Law* (2023) 34.

⁵⁷ Kurniasari, Desi & Soekardi, Rodiyah & Kurniasih, Dwi & Krisdiyanto, Joko. (2023). 'The Correlation between Intensity of Social Media Use and The Level of Social Anxiety Students' *Jurnal Formil (Forum Ilmiah) Kesmas Respati*. 8. 174. 10.35842/formil.v8i2.500., available at

Examples of digital marketing includes website content, email campaigns and affiliate marketing.⁵⁸

It is of significance that new approaches used in direct marketing make the distinction between spam and direct marketing difficult as Hamann and Papadopoulos indicate that it is not all forms of spam that that will be deemed as direct marketing and vice versa.⁵⁹ Ultimately, the purpose of conveying the concurrent application of the POPIA and the CPA above is to pinpoint how the law should apply and how the aspect of consent is required for direct marketing.

IV. REGULATORY FRAMEWORK IN SOUTH AFRICA

The purpose of relaying the regulatory framework in this paper is to demonstrate the intention of the drafting by legislators at the time. This section does not discount the foundation that was laid by ECTA and the CPA in regulating electronic communication and a fair consumer space in the context of direct marketing. The purpose rather, is to critically note, through the perspective of Papadopoulos and Hamann that certain components of both legislative pieces were not adequate to curtail issues in respect of direct marketing and how the law initially applied in this space. This therefore dovetails with the thread of this paper in highlighting the gaps that may not necessarily be fully covered by POPIA in particular for technologies that have evolved such as AI chatbots.

(a) ECTA

ECTA was drafted with a key focus on monitoring and the facilitation of transactions and any electronic communication in the public interest.⁶⁰

The key provision for this paper is section 45 of ECTA reads as follows:

“(1) Any person who sends unsolicited commercial communications to consumers, must provide the consumer (a) with the option to cancel his or her subscription to the

file:///C:/Users/lebogang74/Downloads/The_Correlation_between_Intensity_of_Social_Media_.pdf, accessed on 6 December 2023.

⁵⁸ Alexa Gustavsen ‘From SEO to Social Media: What Are the 8 Types of Digital Marketing?’ 17 July 2024, available at <https://www.snhu.edu/about-us/newsroom/business/types-of-digital-marketing>, accessed on 4 December 2023.

⁵⁹ Op cit note 6 s2.3.

⁶⁰ Op cit note 5.

mailing list of that person; and (b) with the identifying particulars of the source from which that person obtained the consumer's personal information, on request of the consumer, ”⁶¹

section 45 of ECTA is essentially repealed by section 69 of POPIA, noting however that this may not be fully effective as the paper demonstrates the loopholes of s69 of the POPIA.⁶²

(b) CPA

The CPA essentially aims to create a marketplace that is fair for consumers in respect of consumer products and services and to prevent business practices that are unfair to the consumer.⁶³ Hamann and Papadopoulos believe that similar to how section 45 is ineffective in curtailing the challenges related to spam and electronic direct marketing, section 11 of the CPA has not been able to effectively prevent these challenges.⁶⁴ This research paper will also demonstrate that this could equally be the same in the case of chatbots.

Given the absence of the technicalities that appear to exclude or rather, a lack of clearly defining the scope in respect of the technology of AI-powered chatbots in the current definitions of direct marketing, it is important for us to highlight these gaps which are discussed in this paper.

(c) Latest developments

The Department of Trade, Industry and Competition published proposed amendments in respect of the Consumer Protection Act Regulations, 2011 which would create an opt-out registry. This would entail that consumers will be able to pre-emptively block unsolicited electronic communication relating to direct marketers.⁶⁵ Public consultations were closed by the 15th of January 2025.⁶⁶

A Guidance Note was also published on 3 December 2024 by the Regulator in respect of direct marketing under the POPIA. Notably, for the purposes of this paper, the note emphasises the difference between electronic and non-electronic communication wherein electronic

⁶¹ Op cit note 5 s 45.

⁶² Op cit note 6 s3.3.2.

⁶³ Op cit note 3, Preamble.

⁶⁴ Op cit note 6 s2.3.

⁶⁵ DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION NOTICE 2798 OF 2024, Consumer Protection Act, 2008. Consumer Protection Act Regulation 4 Amendment.

⁶⁶ Ibid.

messaging includes communication via telephone, push notifications and cookies.⁶⁷ Interestingly, given the lack of a definition of lead generation in POPIA, the guide provides that it constitutes a form of direct marketing given the collection of personal information by using methods such as sign-up forms, landing pages and pop-ups.⁶⁸ Although the Guidance Note would not serve as a legally binding document, it does to a certain extent provide somewhat of a sense of direction and may have a significant impact in practical terms, with a hope that the same can be achieved for the context of AI-powered chatbots and processing of personal information. In essence, the law requires that consent from the data subject must be obtained in line with section 69 of the POPIA. We have seen through examples provided in this paper that the mechanism in which AI chatbots work, the aspect of consent being obtained is not always adhered to by mechanisms such as AI chatbots, even if the legislators were to confirm that new technologies such as AI chatbots are catered for by the POPIA.

V. THE ISSUE / THE GAPS

If we breakdown the definitions of the POPIA and CPA direct marketing definitions, can we confirm that chatbots fall within the ambit of this definition? As previously mentioned, the POPIA provides a new definition of electronic communication which is a fundamental aspect for the definition of direct marketing, which “means “any text, voice, sound or image message sent over an electronic communications network which is stored in the network or the recipient’s terminal equipment until it is collected by the recipient.”⁶⁹ It is important to note that this paper does not aim to address telemarketing as a concept in any manner or form in respect of POPIA. Whilst it may appear that the expanding on the term “electronic communication” may point towards telemarketing, this is not the case. The discussion on the term "electronic communication" is inclusive of this paper given that it is a key term in the POPIA definition of direct marketing.

⁶⁷ Guidance Note on Direct Marketing In terms of the Protection Of Personal Information Act 4 Of 2013 (POPIA), Information Regulator of South Africa, available at https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=aLXd2pNW0Xx8VOad00pM7LX%2FYHOhFO%2FXrL%2Fk9IztlmISdHs%2FFqUZKgE8uPL9Td0w5kWm2HOne%2B0QjPRRfYrouapxp3k2BEml%3D&nav=pt7Y0TwB1zSvFFtxzb4SfUoLGSoV42muUtkAW3xP%2BqvB1EpDhb6qAec4lyjf5hwBUzvKI2dfoPg%3D&attdocparam=7uyUXuY%2BjYJb8ozYZv9WbLXTmvAoHV%2BgV5rOk8OrhzQWczf%2FW7pq%2BBGcys23q1x7YplQDWu49uaJA%3D%3D&fromContentView=1, accessed on 8 January 2024 p.15.

⁶⁸ Ibid p.22.

⁶⁹ Op cit note 4, definitions section.

Considering the definitions of AI and AI-powered chatbots that have been provided above, it does not appear to be certain that chatbots are certainly categorised within the scope of electronic communication. However, my view is that chatbots *may* be considered as a form of electronic communication based on further definitions such as the following as they involve elements of electronic communication.

AI-Powered chatbots are also defined as “an Artificial Intelligence program that can hold a simple digital with text or voice-based conversation and provide information and support to automate business communication.”⁷⁰ If we do not have certainty around the inclusion of AI-powered chatbots in the legislation how certain are we that consumers would be afforded protections around the opt-in rules? Whether or not the mechanism of AI-powered chatbots falls within the ambit of direct marketing in respect of the POPIA there are certain considerations that need to be made by the legislature discussed below and how the law could be interpreted.

Electronic Communication – Collection and Storage

The use of the terms collected and stored in the electronic communications definition recorded in the POPIA’s definitions section has caught the attention of Maririmba, who notes the insertion of these two specific words in the definition.⁷¹ The analysis of these terms assists in trying to classify whether or not direct marketing through electronic communication considers the scope of business practice. Maririmba uses the analogy below to illustrate this point.

The author compares social media as a physical platform accessible to data subjects such as physical streets, roads or highways. By using these platforms on a day-to-day basis, data subjects are faced with content as they navigate such platforms.⁷² The significance of the analogy is that such content is not necessarily targeted at an individual. Given that this content is not targeted at individuals as an endless number of data subjects are faced with such content

⁷⁰ ‘What is a chatbot?’ IBM available at <https://www.ibm.com/topics/chatbots#:~:text=A%20chatbot%20is%20a%20computer,and%20automate%20responses%20to%20them>., accessed on 23 January 2024 and ‘The Benefits of Chatbots and Automated Communication in 21st Century Business’ 4 January 2022, available at <https://www.cellfind.net.za/the-benefits-of-chatbots-and-automated-communication-in-21st-century-business/>, accessed on 23 January 2024.

⁷¹ Pedzisai Maririmba ‘POPI ACT AND ELECTRONIC DIRECT MARKETING - YES COLD CALLS ARE ALLOWED’ 4 March 2022 available at <https://serr.co.za/popi-act-and-electronic-direct-marketing-yes-cold-calls-are-allowed#:~:text=To%20use%20a%20simple%20analogy,these%20social%20media%20%E2%80%9Cstreets%E2%80%9D>, accessed on 29 January 2024.

⁷² Ibid.

by scrolling through the platforms, the author's point is that content does not fall within the ambit of store and collect in accordance with the POPIA.⁷³

If one applies the same analogy for when you happen to be browsing on the internet and you come across an AI-powered chatbot, in certain instances, as Maririmba aptly notes, the content may be directed to countless individuals who happen to pass through this particular *street* (the use of the term street in this regard refers to a colloquial, metaphoric term according to the author and not the physical sense of an actual street).⁷⁴ Furthermore, due to the countless number of individuals that may browse a particular website, the data may not necessarily be stored and collected by this website.⁷⁵ To make further use of Maririmba's practical analogy, she goes on to further note that data subjects are exposed to online content due to their personal online activities which may be due to various reasons. Her view therefore is that this activity would fall within the realm of mass media consumption as opposed to electronic direct marketing.⁷⁶

It is interesting that the POPIA does not provide a definition or any guidance in respect of the definition of electronic communications network, consequently, the Electronic Communications Act 36 of 2005 provides a term of reference as it provides the following definition:

“any system of electronic communications facilities (excluding subscriber equipment), including without limitation – mobile systems; and other transmission systems, used for conveyance of electronic communications.”⁷⁷

The definition of electronic communications network is a focal point in an article written by Katzav who notes that any message essentially sent/transmitted via an electronic communications network must be stored in order for the direct marketing to be constituted as electronic communication.⁷⁸ Similar to the view shared by Maririmba, Katzav believes that storage of the message is, therefore, an essential and necessary element to the definition of electronic communication.⁷⁹

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Electronic Communications Act 36 of 2005, chap 1.

⁷⁸ Gilad Katzav ‘Opting out: How does POPIA impact telemarketing?’ *De Rebus* 1 April 2023, available at <https://www.derebus.org.za/optiming-out-how-does-popia-impact-telemarketing/>, accessed on 25 May 2023.

⁷⁹ Ibid.

Given the decision that has been made by the Regulator, in that telephonic communication is now considered as a form of electronic communication in relation to direct marketing, Katzav makes the point that the medium used to convey the message is important.⁸⁰ Katzav notes that although the Regulator holds the view that telephonic communication is considered a form of electronic communication for direct marketing, he cautions the manner in which we should frame the form of communication by noting that the medium is not necessarily the message. Therefore, it is inconsequential whether the message was sent by human or machine (the telephone call), for the purposes of section 69.⁸¹

In a similar vein to Maririmba, the inquiry into determining if electronic communication is applicable should be placed on whether a message has been stored in the network or the device of the recipient.⁸²

The point made by Katzav may also be used for the argument of determining whether the use of AI-powered chatbots constitutes direct marketing. Regardless of whether the message of direct marketing is made by human or machine, and in this instance – AI-powered chatbots or humans, it could also be argued that the crux is whether or not the message is stored within the recipient's terminal. Considering the mode of communication by promotional or conversational AI-powered chatbots, such content would not be stored by the users terminal. Furthermore, in the sole instance of an AI-powered promotional chatbot approaching a user on a website, it is not certain if such interaction between the user and AI powered promotional chatbot would be stored and collected by the particular site (this view is aligned with the position made by Maririmba).

Further commentary has been made in respect of the concept of *storage* and *collection* in respect of electronic communications. Pierce sheds light by drawing the distinction between calls received from chatbots where an actual conversation takes place or not.⁸³ He further provides a practical example where he exemplifies that if direct marketing calls are received from robots, *robocalls*, such calls can be stored in a network. However, in the event that the calls are conducted by AI software – the question then arises as to whether such a conversation

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Op cit note 71.

⁸³ Lucien Pierce 'My heart is with the Information Regulator in the upcoming POPIA telemarketing battle – but I think the Regulator's prospects are low' available at <https://www.linkedin.com/pulse/my-heart-information-regulator-upcoming-popia-battle-i-lucien-pierce-5pvee>, accessed on 28 February 2024.

was stored or a real-time conversation took place. Pierce therefore believes that the stance taken by the Information Regulator regarding electronic communication will need to be polished.

The purpose of comparing the substantive viewpoints by Katzav, Pierce and Maririmba is to convey the point that one of the approaches to interpreting the legislation to accommodate AI chatbots is to widen the extent to which concepts should be analysed, such as “collection”, “storage” and electronic communication network etc in order to make provision for AI chatbots in the context of direct marketing. Having provided the definition of electronic communication earlier in this paper, the drafters of this provision evidently tried to widen the scope by including the term *any*. One may recognise the attempts of the drafters, it is however important to note that given the novelty of new technologies such as AI-powered chatbots, a broader definition would be more effective to achieve certainty.

VI. COMPARATIVE ANALYSIS

Similar to the POPIA, the general rule of thumb in respect of the GDPR is that in order for direct marketing to take place, consent must be obtained from a consumer by the company in question.⁸⁴ There are however exceptions in this regard.⁸⁵ Analysing provisions of the GDPR and the DPA 2018 are fundamental for this study as the drafting of the POPIA was influenced by the GDPR to a certain extent as highlighted by Professor Snail ka Mtuze’s statement that “what is good for Europe is good for Africa also.”⁸⁶ Furthermore, certain direct marketing principles found within the GDPR and DPA 2018 have similar nuances and therefore useful to consider the extent to how some of these provisions can be interpreted to aid with the fundamental question of whether AI-powered chatbots fall within the ambit of direct-marketing for the POPIA purposes. The definitions of direct marketing and electronic communication will therefore be the key themes of analysis.

⁸⁴ Sarune Zaybartaitė ‘Direct marketing rules and exceptions under the GDPR’ 2 November 2022, available at <https://www.gdprregister.eu/gdpr/direct-marketing-rules-and-exceptions/>, accessed on 17 September 2023.

⁸⁵ Ibid.

⁸⁶ Privacy Laws and Business ‘Data protection law enters fully into force in South Africa in July, and Mauritius takes first steps towards applying for EU adequacy’ 18 June 2021, available at <https://www.privacylaws.com/reports-gateway/articles/int171/int171samauritius/>, and [GDPR-oriented privacy laws in South Africa and Mauritius](https://www.privacylaws.com/events-gateway/events/sa_mauritius_2021/) - PL&B webinars, accessed on 8 February 2025 at https://www.privacylaws.com/events-gateway/events/sa_mauritius_2021/.

The processing of personal data in the context of direct marketing may be categorised as being carried out for a legitimate interest.⁸⁷ It is important to note that direct electronic marketing is monitored and governed by the Privacy Directive, and engaging in a direct marketing activity would require consent for the most part.⁸⁸ Extensively, this therefore entails that even if you are relying on legitimate interests, the ePrivacy Directive would still require consent.⁸⁹ Similar to the POPIA, if a data subject's details were collected, the exception is that marketing emails may be sent on an opt-out basis if the recipient's details were gathered in lieu of the sale related to a product or a service.⁹⁰

It appears that the premise of direct marketing provisions in the GDPR are centred on the principle of consent which are manifested through the opt in rule. The DPA 2018 provides an interesting definition of direct marketing, which in my view has both pros and cons. The analysis in this regard is covered further on in this study, with a particular focus on the definition of electronic communication.

(a) Considering direct marketing through the lens of the Data Protection Act 2018 and GDPR view of direct marketing

Direct marketing is seen as communication that takes place by whatever means in terms of advertising or marketing material that is directed to particular individuals according to the DPA 2018.⁹¹ Breaking down this definition will assist with determining whether our existing provisions are suitable for the purposes of AI-powered chatbots.

The term *by whatever means* is effective as this does not fully place a limitation on the form of communication that may take place in respect of the type of communication used in respect of direct marketing. In South Africa, whilst the drafters of the POPIA definition of direct marketing have included the term electronic communication, they may have attempted to incorporate many forms of communication in respect of direct marketing, however the manner in which the provision has been drafted arguably may place a limitation on the inclusion of other forms of direct marketing by using the phrase: either in person or by mail or electronic communication. Furthermore, even if it may be argued that the definition of electronic

⁸⁷ Directive 2002/58/EC, Article 13(2).

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ 'UK email marketing rules' *Data Protection Network* January 2025, available at <https://dpnetwork.org.uk/email-marketing-rules/>, accessed on 2 January 2025 and Op cit note 4 s69.

⁹¹ Data Protection Act 2018 s 122(5).

communication in terms of POPIA appears to widen the scope of the ambit of direct marketing – it is really worthwhile for the drafters to consider the approach used by the DPA by simply denoting that the direct marketing may take the form of whatever means, rather than denoting it to any form of *electronic* communication. The suggestion here is really for the purpose of ensuring that the provision will not have to constantly play catch up with fast paced technological advancements. Alternatively, specific technical definitions of these new technologies should be included in the legislation or regulations for specificity.

The second phrase in the term directed to particular individuals is illustrated in practical terms by the Information Commissioner’s Office (ICO) as follows: “To count as direct marketing, a communication must be “directed to” particular people. For example, personally addressed post, emails to a particular account or calls to a particular number.”⁹² This component is fundamental for this study firstly because the term directed to particular individuals would automatically exclude any form of direct marketing by AI-powered chatbots as they appear as pop-up messages on a website chat window where they are not directed to a specific person. If anything, AI-powered chatbots are arguably randomised or rather programmed to use any opportunity to begin a conversation with the user in respect of direct marketing. My observation is therefore similar to the important point raised by Maririmba raised earlier in this study in that the idea of targeted marketing is not necessarily the case as a countless number of individuals may navigate *the streets* and be exposed to online content.⁹³ To further illustrate this point the examples of introductory conversations that AI-powered chatbots use are demonstrated in Image 1 below.

⁹² ‘Direct marketing and regulatory communications’ *Information Commissioner’s Office* available at [⁹³ Op cit note 71.](https://ico.org.uk/for-organisations/direct-marketing-and-privacy-and-electronic-communications/direct-marketing-and-regulatory-communications/#:~:text=To%20count%20as%20direct%20marketing,%2C%20email%20or%20text%20message), accessed on 24 February 2024.</p></div><div data-bbox=)

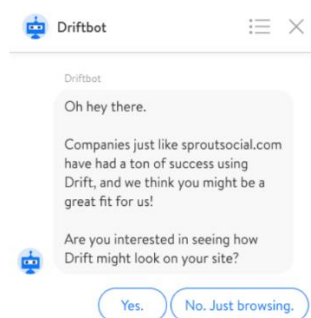


Image 1⁹⁴

The above Driftbot example appears on site immediately once the user lands on the site.⁹⁵ The initial message in this conversation proceeds to begin with the aspect of direct marketing. Whilst it may appear that that the latter of this message is asking for consent/opt-in from the user one cannot fully confirm that if the user was not interested in such material, this would amount to an opt out.⁹⁶ In some instances, certain chatbots continue their intention to market further material even during the opt out process.⁹⁷ The element of consent for the purposes of direct marketing is crucial in accordance with section 69 of POPIA. This is a principle shown through this Driftbot example and case law demonstrated below, which assists in showing us how the law should apply.

(b) Valid consent - opt-in approaches

Planet49

The German case of Planet49 GMBH involved an online promotional lottery organised by a company called Planet49.⁹⁸ Participation of the lottery involved the acceptance of terms and conditions online where cookies would be used for analytics tracking of a user on the website. This checkbox included a pre-selected tick with the following wording:

“I agree to the web analytics service Remintrex being used for me. This has the consequence that Planet49 sets cookies, which enables Planet49 to evaluate my surfing and use behaviour

⁹⁴ ‘The complete guide to chatbots for marketing’ *sproutsocial* April 6 2023, available at <https://sproutsocial.com/insights/chatbot-marketing/>, accessed on 8 May 2023.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Planet49 GmbH*, C-673/17, 1 October 2019.

on websites of advertising partners and thus enables advertising by Remintrex that is based on my interests.”⁹⁹

The fact that the tick box was pre-selected (with the option to de-select or refuse consent) gave rise to the legal question of whether this constituted valid consent in respect of processing personal data by Planet49. The ECJ’s ruling essentially contemplated any active behaviour by the user. It was therefore decided that a pre-selected checkbox cannot be deemed as valid consent.¹⁰⁰

The court ruled that an overt action or active behaviour by the user is required for valid consent. Wiedmann believes that this decision is aligned with the DPD and the GDPR. Article 2(f) of the ePrivacy Directive establishes a connection between the ePrivacy Directive and the Data Protection Directive (DPD).¹⁰¹ Under the ePrivacy Directive, the concept of "consent" is defined as set out in Article 2(h) of the DPD. However, in accordance with Article 94(2) of the GDPR, this reference now points to the definition of consent provided in Article 4(11) of the GDPR.¹⁰²

Firstly, Wiedmann holds the view that the ECJ adopts a literal approach to interpret the wording of Article 5(3) of the ePrivacy Directive. While this provision does not explicitly specify the method by which consent should be given, it nonetheless suggests that granting consent requires an active step (“given his or her consent”).¹⁰³ This interpretation is reinforced by Recital 17, which cites “ticking a box when visiting an internet website”- an example of active conduct, in the context of consent.¹⁰⁴ Furthermore, Article 2(h) of the DPD defines consent as a “freely given specific and informed indication” of the wishes of the data subject. The use of the word “indication” reinforces the notion that an active expression is necessary. Moreover, consent must be provided “unambiguously,” which can only be achieved if the user takes a deliberate action rather than remaining passive.¹⁰⁵

The GDPR offers an even more explicit legal framework regarding consent. Article 4(11) GDPR defines consent as "any indication of the data subject's wishes...by a statement or by a

⁹⁹ Ibid at para 26.

¹⁰⁰ Ibid.

¹⁰¹ Wiedemann, K. The ECJ’s Decision in “*Planet49*” (Case C-673/17): A Cookie Monster or Much Ado About Nothing?. *IIC* 51, 543–553 (2020). <https://doi.org/10.1007/s40319-020-00927-w>.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid and Art. 7(a) DPD.

¹⁰⁵ Ibid.

clear affirmative action."¹⁰⁶ The phrase "clear affirmative action" clearly implies that the user must take an active step. In this context, Recital 32 of the GDPR delivers a decisive point by stating that "silence, pre-ticked boxes or inactivity should not...constitute consent."¹⁰⁷ This interpretation of Article 4(11) GDPR leaves little room for doubt: a pre-selected checkbox does not amount to valid consent.

Widemann makes the important point that that the shift from the 2002 Privacy Directive demanded in its Art. 5(3) that the user "is provided with clear and comprehensive information in accordance with the DPD and is offered the right to refuse such processing".¹⁰⁸ The opt-out requirement now requires the user to have "given his or her consent". Widemann further notes that given this amendment, there is a clear intention that the consent must be in the form of an active opt-in.¹⁰⁹

Orange Romania

In the case known as "Orange Romania" heard in the Court of Justice of the European Union, regarding the concept of valid consent under the General Data Protection Regulation 2016/679/EU (GDPR) and Directive 95/46/EC, it was held that consent obtained via a pre-selected box in a customer contract was not considered "freely given," since customers did not actively express their agreement through a deliberate action.¹¹⁰

The Advocate General essentially observed factors that would inform the burden of proof and determined that, when proving valid consent, it is up to the controller to show that the individual has agreed to their data being processed, as specified in Article 7(1) of the GDPR. This same standard is reflected in Article 7(a) of Directive 95/46, which also required that the individual's consent be given clearly and unmistakably.¹¹¹

It was maintained that "freely given consent" requires the individual to take an active role, not simply remain passive. To grant valid consent, the data subject must retain significant autonomy in deciding whether or not to agree. Consent cannot be deemed active if it is implied by a preselected checkbox on a physical document that the individual merely signs at the end.¹¹²

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ *Orange România SA Autoritatea Națională de Supraveghere a Prelucrării Datelor cu Caracter Personal (ANSPDCP)*. C-61/19 Orange Romania.

¹¹¹ Ibid at para 42.

¹¹² Ibid at para 8.

Furthermore, "informed consent" demands complete clarity there should be no possibility that the data subject was not fully informed before consenting.¹¹³ We therefore see that in comparison to the principles of s69 of POPIA, the Orange Romania and Planet 49 cases are aligned with explicit consent principles required by POPIA.

It is useful to consider GDPR principles as Roos holds the view that EU data protection has set the benchmark for data protection globally.¹¹⁴ This section of the research paper is a further demonstration of how the law should apply. The case of *Fashion ID GmbH & Co KG v Verbraucherzentrale NRW e.V* involved Fashion ID as the appellant that operated an online retail business in Germany. Fashion ID used the mechanism of embedding a plug-in from Facebook into its website by means of a like button. The social plug-in entailed that IP addresses and browsing habits were collected whether or not the like button used in respect of subscribers and non-subscribers of Facebook,¹¹⁵ The modus operandi of the social plugin appears to align with the assertion being made in this paper in that these new technologies are designed in such a way that they are able to bypass requirements such as obtaining consent to process and collect such information. It also important to note that the data being collected by such plug-ins was then obtained for commercial use and stored in Facebook's servers for analytics.¹¹⁶

(i) *The Consent Inquiry*

Various issues such as locus standi were brought before the court, however for the purpose of this paper, the following two issues are a useful lens to analyse the POPIA's provisions in relation to AI-powered chatbots. The court considered whether there was a requirement to get consent for the processing of personal information and therefore looked at articles 2(h) and 7(a) of Directive 95/46, the Court of Justice of the European Union (CJEU) pondered on whether it was Fashion ID who acted as the operator of the website or whether Facebook acted in its capacity by providing the plugin.¹¹⁷ Furthermore, postulating on Article 10 of Directive

¹¹³ Op cit note 111.

¹¹⁴ Annelise Roos 'Data Protection principles under the GDPR and the POPI Act: A Comparison' (2023) 86 THRHR at 3, available at https://scholar.google.com/citations?view_op=view_citation&hl=en&user=R7KhUo4AAAAJ&citation_for_view=R7KhUo4AAAAJ:8k81kl-MbHgC, accessed on 3 February 2024.

¹¹⁵ Op cit note 12 and Schultz, H, & Freedman, W. 'Plugins and POPI: A Critical Discussion into the Legal Implications of Social Plugins and the Protection of Personal Information' (2024) *Potchefstroom Electronic Law Journal (PELJ)*, 27(1), 1-32, available at <https://dx.doi.org/10.17159/1727-3781/2023/v26i0a15758>, accessed on 14 November 2024,

¹¹⁶ Ibid.

¹¹⁷ Op cit note 12 at para 100.

95/46, the CJEU also considered who was responsible for providing notifications to visitors informing them that third parties were collecting data that belonged to them and considering the manner in which the notification had to take place.¹¹⁸

Article 2(h) provides that that consent is deemed as being informed, voluntarily provided and indicating an agreement to process the information, accordingly the court took guidance from this section.¹¹⁹

Furthermore, Article 7(a), directs that personal data may be processed only where the data subject has unambiguously given his consent.¹²⁰ Since data was being collected by a third party, the court concluded that Fashion ID was obliged to notify website visitors of such. Moreover, visitors of the website were entitled to options where their consent should be withheld.¹²¹

The above principles can also be applied to the POPIA as consent is defined as:

“any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information.”¹²²

Personal information must be collected through explicit consent in terms of the POPIA.¹²³ Furthermore, a justified ground for processing personal information is the lawfulness of such processing according to section 11(1) of the POPIA which is a requirement.¹²⁴ Section 13(1) provides that personal information may be collected only for a “specific, explicitly defined and lawful purpose relating to a function of the responsible party.”¹²⁵

(ii) *Processing of personal information – legitimate interests*

The second consideration was around the processing in terms of the legitimate interests of the website operator and the determination essentially embarked on questioning if the mechanism used by Fashion ID embedding the social plugin served a legitimate interest in accordance with Article 7(f) of Directive 95/46, which had to be read in conjunction with Directive 2002/58.¹²⁶

¹¹⁸ Ibid.

¹¹⁹ GDPR Article 2(h), Article 10 and Op cit note 12 at para 100.

¹²⁰ Ibid Article 7(h).

¹²¹ Ibid and note 12.

¹²² Op cit note 4 s 1.

¹²³ Op cit note 4 s6 and s11.

¹²⁴ Op cit note 4 s 11 and 18(1).

¹²⁵ Op cit note 4 s 13 of POPIA.

¹²⁶ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications

The provision of Article 7(f) entails if the fundamental rights of the data subject are not infringed upon, the personal data can be lawfully processed by the controller. In instances where the personal data has been shared to the third party and there is no infringement of fundamental rights and freedoms, this is also acceptable.¹²⁷

Ultimately, the court held that a legitimate interest must be in by both Facebook and Fashion ID in order to justify the collection of data given that a social plugin was embedded on Fashion ID's website and automatically collected personal information.¹²⁸

The facts and methodology that was used by the court may be used to further compare with the application of the POPIA. As illustrated earlier in this paper, the principles taken from the case have a similar strand with the provisions of the POPIA when looking into direct marketing. Consequently, if there is a legal obligation that the responsible party has to fulfil, or it is necessary to enter a contract or the data subject has consent, the processing of personal information may take place in accordance with Section 11(1) of the POPIA which further notes that personal data may be processed inter alia where the data subject has consented, where it is necessary to enter or fulfil a contract, or where the processing complies with a legal obligation imposed on the responsible party.¹²⁹

It is of significant interest that neither the POPIA or Article 7(1) define the term legitimate interests. Schultz and Freedman make a significant analysis in this respect:

“Section 11(1)(f) of POPI is similar to Article 7(f) of Directive 95/46. Both paragraphs provide for the processing of personal information to meet the responsible party's (alternatively the controller's) legitimate interests. This includes a third party to whom the personal information is supplied, depending on the facts in each specific circumstance.”¹³⁰

Sector (2002) (Directive on Privacy and Electronic Communications) (hereafter Directive 2002/58) and op cit note 12.

¹²⁷ *Valsts Policijas RTgas Regiona Pārvaldes Kārtības Policijas Pārvalde v RTgas PaSvaldības SIA RJgas Satiksme* (Case C-13/16) EU:C:2017:336 para 28 and Op cit note 12 at para 95.

¹²⁸ Op cit note 12 at paras 96-97.

¹²⁹ Op cit note 4 s11 and Schultz, H, & Freedman, W. ‘Plugins and POPI: A Critical Discussion into the Legal Implications of Social Plugins and the Protection of Personal Information’ (2024) *Potchefstroom Electronic Law Journal (PELJ)*, 27(1), 1-32, available at <https://dx.doi.org/10.17159/1727-3781/2023/v26i0a15758>, accessed on 14 November 2024,

¹³⁰ Schultz, H, & Freedman, W. ‘Plugins and POPI: A Critical Discussion into the Legal Implications of Social Plugins and the Protection of Personal Information’ (2024) *Potchefstroom Electronic Law Journal (PELJ)*, 27(1), 1-32, available at <https://dx.doi.org/10.17159/1727-3781/2023/v26i0a15758>, accessed on 14 November 2024 s5.3.

Following an analysis of the Sheburi matter, authors such as Papadopolous hold the view that the principle of legitimate interest may be used as a strong defense by an applicable party for the purpose of processing personal information.¹³¹ Consequently, the paper will demonstrate through the observations of automated decision making below in the context of AI chatbots, that consent becomes a problem, further requiring clarity from legislators on whether AI chatbots as a means of communication fall within the scope of direct marketing provisions.

(c) Automated decision making - anonymised personal information

In an article describing the possibility of AI privacy concerns in the workplace, the element of automated decision making was explored by a legal practitioner specialising in labour and employment law. The argument made by Naidoo fundamentally highlights that although data may be de-identified or anonymised, the training of AI systems, (AI-powered chatbots as an example) may be susceptible to curtailing lawful processing conditions (both in the context of the GDPR/DPA 2018 and the POPIA).¹³² Whilst the analysis by Naidoo is based on the relationship between employers and employees, the principles are equally applicable to this study for the significance of the fact that the outcome of a direct marketing engagement between a consumer and an AI-powered chatbot may result in the conclusion of a sale and therefore a contract. These consequences in my view are a crucial reason as to why we require legal certainty around the use of AI powered chatbots within direct-marketing for the purposes of the POPIA and legal consequences that may arise due to direct marketing activities from AI-powered chatbots. The case of *Moffat v Air Canada* highlighted later in this study shall demonstrate this point further.

Naidoo holds the view that the scope of the POPIA is also applicable to AI or machine learning systems that need special personal information and personal information, even if it is anonymized would fall within the parameters of the POPIA.¹³³

The reasonably foreseeable method in Naidoo's view, would be applicable in practice with the use of AI systems and their categorization of de-identified or anonymized personal

¹³¹ S. Papadopoulos 'The Long Road to Mastering the POPIA: Lessons from Sheburi v Railway Safety Regulator - Sheburi v Railway Safety Regulator GATW' 15200-21 (CCMA, 2 March 2022) (2022) 85:3 *THRHR* 397 at 406.

¹³² 'Does POPIA impact AI software or ML systems? Venolan Naidoo 3 May 2021, available at <https://www.linkedin.com/pulse/does-popia-impact-ai-software-ml-systems-venolan-naidoo/>, accessed on 3 May 2023.

¹³³ Ibid.

information.¹³⁴ This is significant when considering the varying intricacies of a machine learning system, such as AI-powered chatbots have developed more intuitive training methods and whether this reasonably foreseeable method, viewed as objective will be fit for purpose for these training methods.¹³⁵

Naidoo explains that to the extent that the POPIA is applicable, there are implications on machine learning systems, such as automated decision making explained below. Automated decision making is dealt with in section 71 of the POPIA, and as Naidoo emphasizes, this is in respect of personal information.¹³⁶ To the extent that POPIA is applicable, POPIA provides 8 conditions in respect of lawful processing of personal information.¹³⁷ Due to the constraints of space, the condition of “processing limitation” shall be analysed in the context of automated decision making. Given that AI machine systems are trained it is arguable as to whether the information is directly obtained from the data subject, because once the information is processed through the machine learning system, it may be argued that this information is not directly sourced from the data subject. In insights provided by Webber Wentzel highlighting thoughts to consider for chatbots operators who need to adhere to POPIA, similar to Naidoo, automated decision making was raised.¹³⁸ The view is that prudence must be exercised by organisations where chatbot operators are used and therefore human oversight or involvement needs to take place when an AI chatbot is involved.¹³⁹ A second condition for the lawful processing of personal information stipulates that information must be collected for a specific, lawful purpose that is aligned with a function or activity of the responsible party.¹⁴⁰ It is arguable therefore that automated decision making to a certain extent curtails this principle as a user engaging with an AI chatbot may go beyond the purpose, as shown in practical examples in this paper.

Section 71(1) of POPIA, simply put, provides data subjects may not be subject to a decision which results in the outcome of legal consequences for a data subject or affecting the data subject. Since an AI or machine learning system is automated, Naidoo believes that section 71

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Op cit note 4 s 71 and Ibid.

¹³⁷ Op cit note 4 Chap 3 Part A.

¹³⁸ “Is your Chatbot POPIA compliant?” Webber Wentzel 31 May 2021, available at <https://www.webberwentzel.com/News/Pages/is-your-chatbot-popia-compliant.aspx>, accessed on 16 August 2025.

¹³⁹ Ibid.

¹⁴⁰ Op cit note 4 Chap 3 Part A.

of the POPIA is applicable.¹⁴¹ He further asserts that the ability to process personal information conducted by a machine learning system is hampered by section 71(1) and the result is that the decision results in a legal consequence or if there is a substantial impact on the data subject employee which extends to work performance or credit worthiness.¹⁴²

The exceptions in respect of section 71 regarding a decision that has been taken extend to such decision being taken that is related to the conclusion or execution of a contract. Following which, the request of the data subject regarding the said contract has been met or appropriate measures thereof to ensure that the protection of the data subject has been taken into consideration and lastly, such is restricted bylaw or a code of conduct to protect the legitimate interests of the data subject concerned.¹⁴³

Naidoo's insights are relevant for the purpose of this study as he raises the point that there are challenging questions and scenarios that should be considered given the interplay between the POPIA and the AI software systems as part of their sole purpose is to use personal information as part of datasets to achieve results.¹⁴⁴ Naidoo is curious to see how the interplay between AI and machine learning will be explored under the POPIA and if these will be mutually exclusive or function together and whether a code of conduct shall be created for this realm of law.¹⁴⁵

A study focusing on the data privacy implementation in light of the POPIA on South African e-commerce websites expressed that although there are websites that are compliant with data privacy law in South Africa, a significant improvement can still be made to ensure the protection of personal information. Moreover, the study highlights that a specific focus should be placed on improving the collection of data securely from data subjects and specifically making the data subject explicitly aware of the purpose of collecting data.¹⁴⁶ Practical views expressed earlier on in this paper and further below are synonymous with the investigations of this study and illustrate the need for alignment with the fast rate of technology evolving and legislative intervention. I do however note that such legislative intervention may rather lean towards more practical implementation rather than actual amendments to the legislation. There

¹⁴¹ Op cit note 133.

¹⁴² Op cit note 4 s 71 and op cit note 133.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ DV, A and Abdullah, Hanifa and Ochola, Elisha and Mujinga, Mathias and Mwim, Emilia, 'The State of Implementation of Data Privacy Requirements on South African E-Commerce Websites' 9 September 2024 available at <http://dx.doi.org/10.2139/ssrn.4947935>, accessed on 23 November 2024.

are existing concerns with the manner in which AI such as AI-powered chatbots may process information discussed below.

Collecting large amounts of personal data may in certain instances be go against the grain as the principle of data minimization of the GDPR which requires that volumes of personal data should be limited to what is necessary in a very strict sense.¹⁴⁷ Furthermore, combining and analyzing large sets of personal data to get new trends, goes against the GDPR principle of purpose limitation, which entails that the information of data subjects may only be used for pre-defined, specific purposes and nothing else, similar to POPIA.¹⁴⁸

The processing of personal information must be conducted in a manner where there is transparency and accuracy.¹⁴⁹ Key to this conundrum is that an unknown bias or prejudice may exist where AI systems are trained using data generated by humans.¹⁵⁰ Accordingly, data subjects can simply demand for their data to be deleted or corrected and this extends to the objection of automated decision making.¹⁵¹

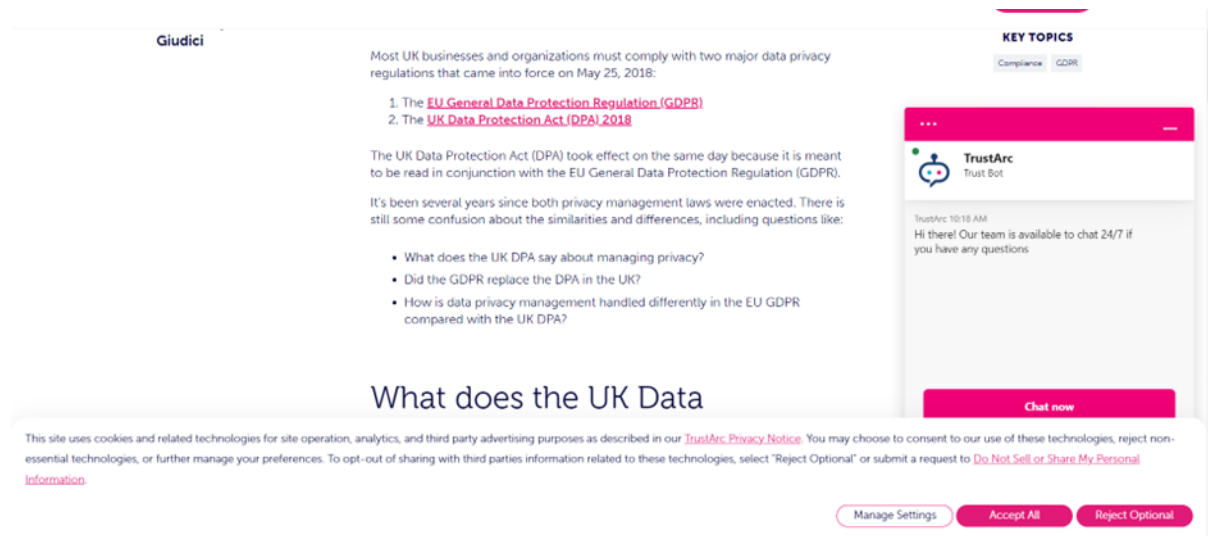


Image 2¹⁵²

¹⁴⁷ General Data Protection Regulations.

¹⁴⁸ Op cit note 147 Article 5(1)(b).

¹⁴⁹ Ibid.

¹⁵⁰ 'Tackling bias in artificial intelligence (and in humans)' *McKinsey Global Institute* 6 June 2019 available at <https://www.mckinsey.com/featured-insights/artificial-intelligence/tackling-bias-in-artificial-intelligence-and-in-humans>, accessed on 24 May 2024.

¹⁵¹ Op cit note 147 Article 22.

¹⁵² 'What's the Difference Between UK Data Protection Act & GDPR?' *TrustArc* available at <https://trustarc.com/resource/uk-data-protection-act-gdpr/>, accessed on 23 January 2024.

To add further to this point regarding purpose minimization and accuracy principles, in the example above, a user has essentially entered a website where the notification of the use of cookies appears simultaneously when the promotional AI-powered chatbot appears.¹⁵³ The irony here is that the concept of privacy by design does not really come into play for the following reasons. Firstly, prior to the promotional AI-powered chatbot appearing a user should first be presented with the cookies notification and have the option to manage preferences, accept all cookies or to reject unnecessary cookies. In this instance, this does not take place. Furthermore, once the user clicked on the *reject all cookies* the AI-powered promotional chatbot did not disappear, instead, more promotional content was presented. One could therefore argue that the opportunity to opt out immediately does not exist. A secondary concern is that despite opting out and rejecting the acceptance of cookies, does the instruction filter through to the correct channels or back-end operations? This arguably goes against the principle of being able to question automated decision-making and object to such.

In an article titled '*Chatbots, AI and the future of privacy*' by Ali Jessani, an interesting observation is made where he emphasizes that the frequency of the use of AI-powered chatbots essentially entails that the AI-powered chatbot would be able to learn more about a particular individual. These AI-powered chatbots are therefore able to make well informed assumptions.¹⁵⁴ Advertisers are essentially relying on such deterministic data for analysing trends and targeting which has been heavily scrutinized by privacy regulators.¹⁵⁵ Jessani holds the view that companies may develop AI-powered chatbots without restrictions where assumptions regarding any internet users may be derived from their tweets, comments and any other data points. Furthermore, the possibility exists where malicious actors could use AI-powered chatbots as a means to steal passwords and sensitive data for questionable means.¹⁵⁶ It is therefore trite to proactively address the unique privacy ramifications of generative AI by setting explicit rules about data use and purposes for generative AI from the very beginning. Ultimately, how the law should apply is that consent should always be obtained from a data subject in accordance with section 69 (1) of POPIA.¹⁵⁷ This position is further illuminated with the principles laid down in the case of Planet 49 and GDPR and DPA principles.

¹⁵³ Ibid.

¹⁵⁴ Ali Jessani '*Chatbots, AI and the future of privacy*' *International Association of Privacy Professionals* 31 March 2023 available at <https://iapp.org/news/a/chatbots-ai-and-the-future-of-privacy>, accessed on 29 September 2023.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Op cit note 4.

VII. RECOMMENDATIONS

Although the Planet49 and Orange Romania cases provided a practical framework around opt-in solutions, the recommendation is therefore that consent should be freely given and voluntary in the context of the use of chatbots. A step further must however be taken in the context of POPIA (given that explicit consent is already a requirement for the purpose of direct marketing), which would entail the active monitoring of consent processes within organisations and a more rigorous enforcement mechanism by the Information Regulator is required. Given the lack of South African case law specifically applicable to AI-powered chatbots as aforementioned, the paper delved into European case law to help us understand how the law can be applied in a practical manner. Considering that the question is based on whether the use of AI-powered chatbots amount to direct marketing and given the elements of consent and legitimate purposes for processing information, a German case will assist with this analysis.

Having looked at the principles from the Fashion ID case, the aspect around consent that is obtained by the data subject is important for direct marketing where new technologies such as AI-powered chatbots are used and the introduction of telephonic communication being considered as a form of direct marketing. Schultz and Freedman hold the view that websites need to stipulate clearly that the collection of personal information of a user may take place by a third party. Their view is based on a study conducted by themselves on the legal implications of social plug-ins and POPIA. They note that this practise has been implemented well in Europe and how much work is still to be done in South Africa.¹⁵⁸ They also assert that greater transparency is required and more overt warnings for collecting personal information by third parties and that opt out procedures would essentially go a long way. I believe the same thoughts shared by Schultz and Freedman are also applicable to AI chatbots for the purposes of direct marketing given the Information Regulator's new stance previously discussed in this paper.¹⁵⁹

Clarification made by the Information Regulator in the Guidance note mentioned earlier present a chance to believe that greater clarity may be provided in respect of the use of chatbots by organisations given that cookies are deemed as electronic communication and pop-ups are

¹⁵⁸ Schultz, H. & Freedman, W. 'Plugins and POPI: A Critical Discussion into the Legal Implications of Social Plugins and the Protection of Personal Information' (2024) *Potchefstroom Electronic Law Journal (PELJ)*, 27(1), 1-32, available at <https://dx.doi.org/10.17159/1727-3781/2023/v26i0a15758>, accessed on 14 November 2024,

¹⁵⁹ Ibid.

considered as a form of lead generation.¹⁶⁰ As previously mentioned, technical definitions in respect of new technologies can be added to regulations to ensure that there is certainty and delineating the differences where required, such as the distinction between general chatbots and AI-powered chatbots.

Given that we will consistently find ourselves within a space where technology is constantly evolving, perhaps the need for legislative reform does not only lie within the specific words that are used within the law but rather mechanisms that need to be put in place. Consent management processes (CMP) are an avenue to consider, specifically for large organisations in South Africa. An example of this is Google's Consent Mode which controls how the data of a visitor on a site is used by setting up the configuration of google tags and scripts and this is guided by the consent of the user.¹⁶¹ It is interesting that the views of Tladi hold weight even after the promulgation of the POPIA wherein her view was that opt-out mechanisms are not effective and well-regulated in South Africa.¹⁶² Furthermore, the move by the Information Regulator to add telephonic communication within the ambit of direct marketing to a certain extent affirms Tladi's views. Therefore, by incorporating privacy by design principles and making the implementation of consent management processes an obligation on businesses, this helps diminish the impact of new technologies such as chatbots bypassing the correct channels.

In addition to privacy by design principles, it is worthwhile to consider that even if the South African legislature is tasked with providing legal certainty for the use of new technologies such as AI-powered chatbots, simultaneously relying on existing law and practices thereof is still useful. In Canada, the *Moffat vs Air Canada* tribunal matter held that consumers should not be placed in a risky situation where consumers have to decipher between conflicting information given by an organisation on their website on a static page, or a chatbot.¹⁶³ Following information provided to the applicant by a chatbot on Air Canada's website that he would be able to apply for discounted bereavement fees retroactively, the court held that a chatbot could not be seen as a legal entity that operated separately and responsible for its actions. The court

¹⁶⁰ Op cit note 67.

¹⁶¹ 'Google consent mode and consent manager' 2023, available at <https://www.consentmanager.net/knowledge/google-consent-mode/>, accessed on 9 November 2024 and 'What Is Google Consent Mode? (And How To Implement It)', available at <https://targetinternet.com/resources/what-is-google-consent-mode-and-how-to-implement-it>, accessed on 9 November 2024.

¹⁶² Tladi "The regulation of unsolicited commercial communications (SPAM): is the opt-out mechanism effective?" 2006 SAMLJ, available at <https://uir.unisa.ac.za/handle/10500/15248>, accessed on 3 September 2023 at 181.

¹⁶³ *Moffatt v. Air Canada*, 2024 BCCRT 149 paras 24 - 32.

did not uphold the claim by Air Canada in that this was not a provision of their policy (which was made available on their website).¹⁶⁴ The legal principle that employers are responsible for their employees' conduct was a key argument in the tribunal and that it applied in the case of chatbots as well.¹⁶⁵

It is therefore trite that research has suggested that a code of conduct should be created authorising automated decision making by the Information Regulator.¹⁶⁶ The scope and power of the Information Regulator includes the capacity to issue and amend codes of conduct, which are in the practical sense a start to including AI-powered chatbots accordingly for direct marketing in relation to privacy concerns.¹⁶⁷

The POPIA appears to include a non-exhaustive list of forms of electronic communication for the purposes of direct marketing in terms of section 69(1).¹⁶⁸ Given that the section specifically notes that it is "any form of electronic communication", perhaps it is worthwhile to consider that this is a catch-all that aims to broaden the scope of communication practices used in direct marketing that accommodate new technologies such chatbots as previously discussed. The Information Regulator provides frameworks that are practical, which is useful for business organisations through Guidance Notes. It is therefore worthwhile for a Guidance Note in this regard to be drafted by the Regulator.

VII. CONCLUSION

This paper has provided insights into the existing circumstances for processing of personal information using AI by organisations, with a focus on AI-powered chatbots. In doing so, the study has demonstrated that although the provision of section 69 in particular, of POPIA was essentially premised in trying to ensure the aspect of consent around processing of personal information is adhered to, the practical methods used to circumvent this are evident. Furthermore, the scope of the meaning of electronic communication in the context of direct marketing should be widened to keep abreast with evolving technologies. We therefore need to look at the law of other jurisdictions as a guide for effective implementation relating to

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Andrew Rens, Research ICT Africa. *Misleading chatbots, corporate responsibility and the myth of unregulated AI*. 2024 available at <https://researchictafrica.net/2024/02/28/misleading-chatbots-corporate-responsibility-and-the-myth-of-unregulated-ai/> accessed on 4 February 2024.

¹⁶⁷ Op cit note 4 s 40 (6)(f).

¹⁶⁸ Op cit note 4 s 69.

consent as shown with provisions of the DPA, GDPR and foreign legal decisions. Latest developments such as the guidance note published by the Information Regulator should be applied in the context of providing direction for AI such as AI-powered chatbots.

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