

Portugal

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1. Introduction

The immense growth in the use of electronic means of communication in Portugal over the last decade has wit-

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nessed an equally exponential increase in their use for the purpose of direct marketing. This chapter seeks to provide a brief overview of how electronic direct marketing is dealt with under Portuguese legislation.

2. The Legal Framework

At the top of the legal pyramid, article 60(2) of the Portuguese Constitution states that advertising is regulated by law and that all forms of hidden, indirect or deceitful advertising is expressly forbidden. The Portuguese Code of Advertising (the "PCA")¹ provides the most general, yet concrete, level of "hard law" that is applied to the direct marketing sector, which is complemented by several "soft law" instruments, such as association code of conduct manuals.² Article 23 of the PCA states that advertising or marketing materials delivered to an individual's domicile, by post or any other means, must provide the full identification of the advertiser³ and enable the recipient to obtain all the necessary information⁴ about the good or service being advertised. Despite the PCA having been applied to electronic direct marketing during the latter's early stages, today it has only residual relevance since the current drafting of Article 23 clearly states that specific legislation on the matter, should it exist, will prevail.

On the 27th of October of 1998, the *Lei da Protecção de Dados Pessoais* (Personal Data Protection Law, hereinafter the "PDPL")⁵ came into force, introducing various rules regarding the collection of personal data and the data subject's rights regarding that data, in particular, when used for direct marketing purposes.

Following the impetus of the PDPL, three months later,

¹Approved by Law-Decree No. 330/90 of 23 October, and later amended in 1993, 1995, 1997, 1998, 2001, 2003, 2004, 2007 and 2008.

²The most important belonging to ICAP (*Instituto Civil da Autodisciplina da Publicidade*), a self-regulating advertising industry association that includes the majority of Portugal's largest companies. Others include the *Código de Conduta dos Profissionais de Marketing Directo* (Code of Conduct of the Direct Marketing Professionals).

³The mere indication of a P.O Box number is not deemed to be acceptable.

⁴In particular, an honest and reliable description of the good or service being advertised (a sample must be made available, if requested); the price of the good or service; the manner of payment; and other conditions regarding acquisition, warranty and post-sale assistance.

⁵Law No. 67/98 of 26 October.

Law no. 6/99⁶ was passed introducing specific regulation regarding direct marketing by post, direct distribution, telephone and fax to an individual's home. E-mail was expressly omitted⁷ from the scope of this law since it was known, at the time, that the European Union was contemplating harmonized legislation on this matter.

The EU legislation in question turned out to be the Directive on Privacy and Electronic Communications (Directive No. 2002/58/CE),⁸ which includes the restrictions applicable to unsolicited electronic communications in its article 13. Rather than implement said article 13 in the law⁹ that transposed the Directive on Privacy and Electronic Communications into domestic legislation, the Portuguese legislator opted to extract said article 13 and include it in another Portuguese law bill. The latter was eventually published as Law-Decree No. 7/2004 (hereinafter the "LEC")¹⁰ which implemented the Directive on Electronic Commerce (Directive No. 2000/31/CE).¹¹ More recently, Law-Decree no. 57/2008 of 26 March, known as the Law on Unlawful Commercial Practices, has also come to add some additional rules to electronic direct marketing.

In short, today electronic direct marketing is regulated in Portugal first and foremost by the LEC, but several other laws provide complementary or overlapping rules.¹²

3. Electronic Direct Marketing

Portuguese law does not provide a specific definition of what is to be understood as electronic direct marketing. The *Comissao Nacional de Protecção de Dados* (CNPD), the Portuguese authority charged with the task of ensuring the compliance of the law in matters of personal data, has often

⁶Law No. 6/99 of 27 January.

⁷Article 1(2) of the Law No. 6/99 of 27 January.

⁸Directive No. 2002/58/CE of the European Parliament and Council, of 12 July, 2002.

⁹Law No. 41/2004, of 18 August.

¹⁰Law-Decree No. 7/2004, of 7 January, as amended in by Decree-Law No. 62/2009 of 10 March.

¹¹Directive No. 2000/31/CE of the European Parliament and Council of 8 June, 2000.

¹²In particular, there seems to be a flagrant overlapping between Law No. 6/99 and the LEC with regard to direct marketing by automated telephone services and fax. However, since the LEC is more recent, it can be seen as having tacitly revoked and substituted Law No. 6/99's application to those forms of electronic communication.

made use of the definition developed by the Federation of European Direct and Interactive Marketing (FEDMA):¹³ “*Direct marketing is a collection of methodologies for communicating a message to individuals with a view to obtaining a measurable, cost-effective response. The most important communication channels for direct marketing are direct mail, mail order, door-to-door, SMS, tele-services and call centres, direct response TV, radio and posters, and the Internet.*”

The drafting given to article 22(1) of the LEC suggests that electronic direct marketing consists of marketing messages received through electronic means without any intervention of the receiver. The same legal norm lists a non-exclusive set of examples such as automatic calling machines, fax machines or e-mail. Although short-messaging-service (SMS) and multimedia-messaging-service (MMS) are not specifically mentioned by name in the LEC, the preparatory studies and the preamble of Law-Decree 62/2009 make it clear that these and other forms of electronic communication fall in the interpretation mentioned above.

There has been some debate regarding the necessary commercial nature of unsolicited electronic direct marketing in order for the rules of the article 22 of the LEC to apply, but the CNPD has come to defend that said commercial nature is not a pre-requisite.¹⁴

4. Opting-In

Portuguese legislation regarding electronic direct marketing has adopted a general opt-in policy. In other words, consent must have been obtained sometime in the past for an individual to receive direct marketing through electronic means such as e-mail, SMS or MMS.

As mentioned above, the PDPL regulates the collection and processing of personal data in Portugal. Article 10 of the PDPL establishes the rule that data subjects must be informed of the purpose of the data collection at the time the data are collected and the rights available to them regarding said personal data. Article 12 of the same law states that a data subject can oppose, at any time, the processing of his personal data for direct marketing purposes or any other form of market prospection. Furthermore, those entities

¹³www.fedma.org

¹⁴The CNPD has also interpreted the law as including direct electronic political campaigning. In other words, political parties may not send individuals e-mails without them having previously consented to this (*Parcer* of 20 Sen. 2005)

involved in the collection and processing of personal data (e.g. e-mail addresses) must notify the CNPD of their activities.

In practical terms, the opt-in system requires that in any paper or online form, an individual must deliberately tick a box consenting the use of his data for direct marketing. Several problems have been experienced in the past regarding these procedures. For example, when data subjects do not tick any box, some companies have been known to interpret that as consent, something, which the CNPD has condemned.¹⁵ It is therefore wise, when possible, to obtain a hard copy of the form containing the declaration of consent.

5. Exceptions to the Opt-In Rule

In accordance with article 22(2) of the LEC, prior consent is *not* necessary when the messages are sent to legal entities, albeit the opportunity of them opting out must always be possible. This exception to the general rule means that direct marketers can send electronic advertising messages at will to companies listed in phone books or other directories.

In practical terms, neither the law nor the CNPD have to date provided any further public guidance of how article 22(2) of the LEC should be interpreted in relation to an individual's professional e-mail address (e.g. name@company.com). Many entities involved in harvesting corporate contacts have assumed that if the individual's professional e-mail is listed in a directory as a company contact, then it can be used for direct marketing. In the absence of clarification on this matter, and in order to avoid spam, there has been a noted withdrawal from the practice of placing one's professional address on the company website or brochures.

Another exception to the general opt-in rule is given by article 22(3) of the LEC. Under this provision, it is legal for a supplier of goods or services to send advertising related to similar goods and services to its present or past customers, provided that said customer was given the opportunity of refusing direct marketing at the time of their mutual-commercial dealings and it does not imply any additional communication cost for the customer.

6. Opting-Out

In all cases, whether the receiver of the message had previ-

¹⁵The CNPD has convicted several Portuguese companies for this practice and has clarified that in cases where the data subject does not tick any box, the data collector should interpret that as no consent having been given.

ously opted-into a mailing list or otherwise fell into one of the exceptions mentioned above, means to refuse said marketing in the future must be provided free of charge and without the need to provide just cause.¹⁶ In particular, with regard to unsolicited e-mails, an address and easy electronic technical means of removing one's e-mail from the mailing list must be given.¹⁷

Entities involved in unsolicited direct marketing, either directly or through a representative, must each maintain an updated list of the individuals that have expressed the desire not to receive that type of messages in the future and it is strictly forbidden to send messages to anyone included in those lists.

More recently, Law-Decree no. 62/2009 of 10 March,¹⁸ introduced an amendment to the LEC in order to try and make the latter more efficient and respected. The amendment introduced a national list (a so-called "Robinson List")¹⁹ to which individuals can sign up to and thus exclude themselves from all direct marketing.²⁰ This list is managed by the *Direcção Geral do Consumidor* (DGC)²¹ and one can add one's name solely through a web page available at www.consumidor.pt. The list is updated every quarter and the entities involved in electronic direct marketing must consult this list regularly prior to sending any advertising messages. The inclusion of an individual's name in this national "Robinson List" prevails over any previous consent (opt-in) given to individual entities and the existence of the national list does not imply that direct marketing entities stop being obligated to have their own individual lists.

7. Message Content Requirements

In addition to the opt-out means, electronic direct marketing messages must abide by other requirements. Firstly, the *average* receiver must be able to immediately, clearly and unequivocally recognize a marketing message as such. Furthermore, the advertiser's name, any promotional offers

¹⁶ Article 22 (4) of the LEC.

¹⁷ Article 22 (6) of the LEC.

¹⁸ Law-Decree no. 62/2009 came into force on May 9, 2009.

¹⁹ An equivalent national list, managed by the Portuguese Association of Direct Marketing, exists for telephone and addressed post.

²⁰ Individuals must supply their name, ID number, e-mail and all the electronic addresses that they want to see included in the list.

²¹ General Directorate of the Consumer

(discounts, prizes or gifts; competitions and promotional games), and the conditions regulating them must be clearly visible.²²

8. Electronic Marketing Databases as Corporate Assets

Electronic Marketing Databases are often important assets for a given company and can be transferred to third parties either individually or part of the business as a whole. The PDPL requires that a data subject be informed before his personal data are transferred to a third party for the purpose of marketing and must be given the opportunity to oppose said transfer. Consent need only be given for the first transfer (*i.e.* between the data collector and a third party) and the data subject can expressly waive the right to be contacted at the time of the data collection. According to the PDPL, data can only be transferred to third parties that have been legalized at the CNPD.

9. Enforcement and Penalties for Non-Compliance

According to article 37(1)(b) of the LEC, the sending of unsolicited messages that do not comply with the limitations of article 22 of the same law is considered to be a misdemeanor punishable with a fine ranging from € 2,500 to € 50,000. When carried out by a legal entity, the minimum and maximum fines are increased by a third and doubled in cases of repeating offenders. Negligent misconduct is also punishable. In addition to the fines, particularly serious offences can result in additional penalties aimed at ensuring that the infringer cannot carry on with his activities.

Portuguese law is not too clear in specifying which authority is responsible for enforcing the rules surrounding electronic direct marketing, but the CNPD has assumed that mandate without great controversy and has applied numerous fines and penalties to companies that fail to respect the boundaries in place.²³

²²Article 2 of Law no. 6/99 and article 21 of the LEC.

²³Scholars have criticized the Portuguese legislator for this lack of clarity, since the drafting of the LEC could also theoretically mandate the ICP-ANACOM (authority for telecommunications).

10. Hot Topics—Persistent Direct Marketing

On April 1st, 2009, the Portuguese Law of Unfair and Unlawful Commercial Practices came into effect.²⁴ This law defines persistent unsolicited communications, by telephone, fax, e-mail or any other means of communication over distances, as an aggressive and unlawful commercial practice. No clarification is given as to what is considered as “*persistent*”, bar that it is legal to be persistent when attempting to obtain the fulfillment of a contractual obligation.

According to this new law, persistent unsolicited direct marketing is considered a misdemeanor but strangely the Portuguese legislator has imposed fines that are lower than those currently foreseen under the LEC for spam in general.²⁵ In other words, those convicted of persistent and aggressive spamming are potentially liable to pay fines that are inferior than those convicted of negligently forgetting to remove an individual from a mailing list.

Another incomprehensible part of the new law is that the authorities that are charged with controlling persistent unsolicited electronic direct marketing are the *Autoridade para a Segurança Alimentar e Económica* (ASAE)²⁶ and the DGC. The latter is responsible for setting the applicable fines and can request the assistance of ASAE to enforce its decisions and carry out all that is necessary for the respective misdemeanor procedures. The CNPD which is responsible for unsolicited electronic direct marketing in general has thus been completely side-lined under this new law, leading one to believe that insufficient care was taken when passing Law-Decree no. 57/2008, namely in checking for overlapping areas and incompatibilities with other legislation in force.

²⁴Law-Decree no. 57/2008 of 26 March

²⁵Fines ranges from €250 to € 3,740.98 if they are natural persons or € 3000 to € 44,891.81 if they are legal entities. Civil liability is also possible. For particularly serious violations of the law with intent, the following penalties may be applied: (a) loss of objects belonging to the infringer; (b) banishment from the exercise of a certain profession or activities that require a public title or public authorization; (c) the closure of a commercial establishment if it requires an administrative license or authorization; (d) the public disclosure of the fines and other penalties applied to the infringer. Penalties (a) to (b) may be applied for a maximum duration of two years.

²⁶ASAE is a police force whose mandate is to enforce law regarding food safety and fair competition.