NATIONAL COMMISSION

DATA PROTECTION

OPINION/2019/16

I. Order

The Commission on Economy, Innovation and Public Works of the Assembly of the Republic sent the National Data Protection Commission (CNPD), for consideration, the Bill No. 439/XIII/2.a (PSD), which determines the creation, within the Directorate-General for the Consumer, a portal for the national registration of consumers who subscribe to telephone advertising.

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as an independent administrative entity with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and by the paragraph 4 of article 36 of Regulation (EU) 2016/679, of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of paragraph 1 of article 21, ° and no. 1 of article 22, both of Law no. 67/98, of 26 October, amended by Law no. 103/2015, of 24 August (Personal Data Protection Law - LPDP).

II. Of Appreciation

The parliamentary initiative now submitted for an opinion aims to introduce changes to the legislation on telephone advertising, allegedly regulated by the law on home advertising (Law No. 6/99, of 27 January).

While the CNPD understands the concerns underlying this legislative initiative, it nevertheless notes that the advanced normative solutions do not take into account the current European and national legal regime, nor do they seem to constitute an effective reinforcement of citizens' rights.

In fact, the Draft Law provides for the creation of a portal, managed and maintained by the Directorate-General for Consumers, with the national register of consumers adhering to telephone advertising. According to the explanatory memorandum, there are currently "(...)multiple lists, managed by an endless number of entities to which consumers do not access, nor were they asked for their consent to appear, associated with the fact that they are not aware generalized about the mechanisms of inclusion in the aforementioned lists", which "have generated a feeling of impunity in the face of

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violations of the right to privacy to which consumers have been subject', expressly refers to the list of citizens who express a desire not to receive such advertising [telephone advertising], provided for in the legislation in force that regulates home advertising, the making of which , maintenance and updating will be the responsibility of the commercial entities or bodies that represent them. In this regard, reference is made to the list maintained by the AMD - Portuguese Association of Direct, Relational and Interactive Marketing through a cooperation protocol with the Directorate-General for Consumers.

In this regard, the CNPD cannot fail to make three observations:

Firstly, it is important to point out the error on which this legislative initiative is based on the legal regime currently in force. In fact, and as will be better explained in the following point, the list provided for in article 5 of Law No. transposition of EU legislation. Thus, there is no legal framework for the list maintained by AMD, nor, strictly speaking, for the protocol related to it, and the entities that promote advertising must comply with other types of legal obligations, as will be specified below.

Secondly, it should be noted that this project, as it stands, seems to forget that what is at stake is, above all, the use of citizens' personal data for the purpose of promoting promotional actions, and with that, affecting their privacy. It is therefore important to refocus the proposed regime and assess it in terms of the fundamental right constitutionally enshrined in article 35 of the Constitution of the Portuguese Republic (CRP).

In fact, it is undeniable that sending an unsolicited communication using the telephone number constitutes processing of personal data, within the meaning of Article 4(1) and 2) of the GDPR. To that extent, all those who send communications of this type are subject to compliance with the principles and rules of the GDPR, and are responsible for demonstrating compliance (cf. Article 5(2) GDPR). It should also be noted that such communications using the telephone number cover not only the telephone call, but also the sending of SMS or MMS.

Thus, taking as a reference the current European and national legislative framework on the protection of personal data, it is

necessary to consider the special regime for the protection of privacy in the electronic communications sector, which undeniably covers communications by telephone. This regime is now included in Law No. 41/2004, of 18 August, amended by Law No. 46/2012, of 29 August, in transposition of the European e-Privacy Directive\ with solutions that must be considered in the context of this Bill.

In fact, the subject matter of this bill is already regulated in Portuguese law and in terms that seem sufficient to remove the concerns and fears expressed in the explanatory memorandum of this parliamentary initiative, as will be shown below.

Thirdly, attention is drawn to the fact that the review of the e-Privacy Directive is in progress, with the approval of a new European Regulation on this matter still expected this year, which, by its nature, will apply directly in the national legal order. Considering that the European proposal currently under discussion does not provide for a mechanism similar to the one now advanced in the Bill, the CNPD emphasizes that this is not the opportune moment for the approval of a new legal regime in this matter.

In any case, and because the processing of personal data for marketing purposes initially provided for, in particular, in Law No. in force, the CNPD considers it convenient to briefly recall here the history of the current legal regime, and then proceed to the appreciation of this Bill in the light of it and the legislative acts of the European Union.

A) Legislative evolution

The legal framework in terms of advertising/marketing has changed substantially since Law no.

1 Directive 2002/58/EC, of 12 July, on the processing of personal data and the protection of privacy in the electronic communications sector, as amended by Directive 2009/136, of 25 November.

in this provision, specifically the provision in its article 5, was implicitly revoked by later legal diplomas, in transposition of European Directives. If not, let's see.

Directive No. 2000/31/EC, of the European Parliament and of the Council, of 8 June 2000, concerning certain legal aspects of information society services, in particular electronic commerce, in the internal market, although not establishing a common regime on unsolicited commercial communications, allowed Member States2 to choose between the system of negative registration (opt out)3 4 and that of the necessary prior consent of the recipient (opt-irif.

In transposition of that directive, article 22 of Decree-Law no.), in the case of natural persons, maintaining the opt-out regime for customers on the occasion of a commercial transaction - sale or provision of a service - or at a later time.

In addition, and in line with Recital 31 of that Directive, it opened the possibility of creating an "updated list of people who have expressed a desire not to receive that type of communication" under the responsibility of entities that promote "the sending of unsolicited advertising ', or a body representing them, as already provided for in Article 5(3) of Law No 6/99.

Subsequently, Directive 2002/58/EC, of 12 July, on the processing of personal data and the protection of privacy in the electronic communications sector, in particular in its article 13 (see also Recitals 40 to 43), came to establish for the Member States

2 Recitals 14, 30, 31 and Article 2(f).

3 Opt-out system procedure for acknowledging the data subject's wishes by which he is offered the possibility of registering in a register of opponents to the processing of his personal data, with the person responsible (electronic communications issuer) being prohibited from processing the data (sending electronic communications) of that holder - Cf. tdem.

4 Opt-irr system. procedure for acknowledging the data subject's wishes by which he is required to express his acceptance and intention to see them processed (receive electronic communications) so that the data controller (communication issuer) can, legitimately and lawfully, proceed to this processing (sending electronic communication) - Cf. Luís Menezes Leitão, “Law of the Information Society”, Vol. IV, Coimbra Editora, p. 199.

standardizing principles and rules, in this matter, more restrictive with regard to the processing of personal data in unsolicited communications.

Indeed, the opt-in regime option was understandable, given the motivation and purpose of Directive 2002/58/EC, described in its recitals, but also given the actual distortions of the market and the real dangers to privacy5.

Later, Decree-Law no. of people who expressed «the general desire not to receive any advertising communications.», simultaneously with the opt-in regime for non-customers, a situation that raised difficulties in its interpretation and application.

With the current wording of article 13-A of Law No. 41/2004, of August 18, given by Law No. 46/2012, of August 29 (which

transposed Article 13 of Directive 2009 /136/CE, of 25 November6), the opt-in regime for non-customers was established, clearly and unequivocally, by requiring their prior consent, as a condition for sending communications for marketing purposes direct.

In turn, article 13-B of this diploma, determined, in relation to natural persons, the obligation on the part of the entities responsible for sending communications not

5 Firstly, because otherwise the recipient citizens would be forced to dedicate a great deal of time and considerable resources to expressing their intention not to receive unsolicited messages; secondly, since the sender's identity is not often known, there is a practice of senders not respecting citizens' opposition to sending messages to their terminals; thirdly, the receiver's opposition reveals to broadcasters that that citizen is an attentive and careful user of their terminal, which further stimulates the sending of Direct Marketing messages; fourthly, the frequent and widespread transmission of computer viruses and line obstructions, through mass unsolicited messages; finally, sending messages is such a cheap way of promoting and with such fruitful results that the tendency (or temptation) to ignore the negative record is great, especially considering, it is repeated, the anonymity of the sender to the receiver common. See Document on the General Principles applicable to Political Marketing in electronic communications at https://www.cnpd.pt/bin/orientacoes/PRINCIPIOS-MARKETING-POLITICO-eprivacy.pdf.

6 Amending Directive 2002/22/EC on universal service and user rights in electronic communications networks and services, Directive 2002/58/EC on the processing of personal data and the protection of privacy in the electronic communications and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for enforcing consumer protection legislation.

requested to maintain a "positive"7 list of non-customers who expressly and free of charge have expressed their consent to receive unsolicited communications, as well as customers who have not objected to receiving communications for direct marketing purposes that may to be sent by the supplier of a product or service.

In this new legal framework, the Directorate-General for Consumers remains responsible for a list of national scope, however, limited to legal entities that expressly express their opposition to the receipt of unsolicited communications - optout (Cf. article

13-B , no. 2).

Thus, the national legal order requires two types of lists: the positive lists, in the hands of each data controller for marketing purposes, and the negative list, limited to legal persons, under the responsibility of the Directorate-General for Consumers.

From the foregoing, it is common ground that Article 13-A of Law No. 41/2004, in its current version, regulates the regime for unsolicited communications, of a commercial and non-commercial nature, in the electronic communications sector8, when recipients are natural persons and there is recourse to their email address, fax, telephone number, mobile and landline, and other similar means.

The current solution of imposing the conservation of "positive lists", which is the responsibility of entities that intend to send communications for direct marketing purposes, which, for that reason, are obliged to maintain by themselves, or by an organization that represents them , an up-to-date list of individuals who have expressly given their consent, free of charge, to receive such communications, is in full compliance with the provisions of the GDPR. In fact, from this regime stems the obligation for those who process personal data to verify in advance and demonstrate that the legal conditions for its implementation are fulfilled - in this case, that the data subjects have given their prior and express consent (article 13, °-A of Law No. 41/2004), which,

7 As opposed to the expression “negative list”, which until then was open to people who had refused to receive unsolicited communications.

8 Naturally, the sending of direct marketing/advertising communications using the postal service is not included in the scope of this legal provision.

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in compliance with the provisions of Articles 4(11) and 7 of the GDPR, it also corresponds to a free, specific and informed expression of will.

B) Consideration of the bill

Entering now into the analysis of the content of the Draft Law, and assessing its compliance with the European regime for the

protection of personal data and the European regime of privacy in the electronic communications sector, the first conclusion is that the list whose creation is foreseen Article 2 of the Bill does not exclude the obligation to verify the existence of consent with those attributes, nor can it strictly exclude it (under penalty of violating the e-Privacye Directive of the RGPD). Nor does it rule out the regime specifically provided for in Article 13-A of Law No. 41/2004, which imposes on each entity wishing to send communications for direct marketing purposes the duty to maintain a positive list of persons individuals who consented to it and customers who did not oppose it - a regime that, incidentally, encompasses more means of electronic communication than the telephone and therefore would always be maintained in relation to these other means.

1. However, in these terms, the Draft Law fails to achieve the purposes of simplifying the communications regime for direct marketing purposes and of making it more transparent for data subjects who processes their data.

In fact, the practical result of such a regime is a multiplication of lists: in addition to the lists that each entity that sends communications for direct marketing purposes must maintain, there would still be a national list with the data of people who consented to direct marketing. by using the telephone number; and also a list with the telephone contacts of those who revoke the consent initially given or who oppose the processing of data (cf. subparagraph b) of paragraph 1 of article 2 of the Bill).

On the other hand, the regime of Law no. 41/2004 is not regulated in the Project, nor is it understood how it can be articulated with the regime now under analysis. In particular, when a customer of a particular entity objects to the processing of their personal data for marketing purposes (right recognized in paragraph 2 of article 13 of the e-Privacy Directive, this entity cannot ensure respect for the exercise of that right, in the context

from such a national list - first of all, as it guarantees that, in the meantime, other entities do not continue to use the contacts collected in the national list.

It is not clear, therefore, to what extent it can be considered that there is a strengthening of the control of personal data by the respective holders, nor, consequently, of their rights.

2. In addition, the CNPD has reservations regarding the compliance of the regime provided for in Article 1 of the Bill with the e-Privacy Directive and the RGPD, read together.

First, and starting with the provisions of paragraph 2 of article 1, it is not clear how the suppliers of a certain product or service

can guarantee, within the aforementioned national register, the provisions of paragraph 2 of article 13. .° of that Directive: that the processing of customers' personal data for the promotion of products or services is restricted to products or services similar to those transacted. This is because the national registration provided for in Article 2 appears to be broad and generic in nature and does not allow differentiation according to the type of product or service marketed.

Secondly, because it is doubtful whether the legitimacy of a register in that national register and thus make public the telephone contact number of one of your customers. It is reiterated, in the cases provided for in paragraph 2 of article 1, there is no consent from the data subject. It appears, at this point, that the Bill is incurring an excess, adopting a solution that clearly goes beyond the intrusion of citizens' privacy than what is justified and, surely, than what follows from the European directive. . Unless it is understood, which is not evident from the wording of the two precepts, that the definitive registration in the national register still depends on the confirmation of registration by the customer in the registration portal. Even so, serious reservations remain as to whether a company is recognized as having the legitimacy to transmit a customer's personal data to a portal without the latter having given his consent and without this solution being, in fact, justified in terms of the need for such processing to achieve the purposes pursued by that company.

Secondly, the terms in which the national registry portal is provided for and regulated preclude the possibility of the declaration of consent provided for in paragraph 1 of article 1, respecting the provisions of the RGPD.

In fact, there is no doubt that the consent referred to in Article 13 of the e-Privacy Directive must comply with the requirements set out in Article 4(11) of the GDPR and, therefore, has, for what now it matters, to be informed and specific. And the information must cover the data processing elements listed in Articles 13 and 14 of the GDPR.

It is recalled that the right to information implies the duty to inform the data subject, before consent is given, in addition to other aspects of the treatment, the identification of the entity that intends to send communications about products, services, promotional or informative nature, or at least the categories of entities that intend to send such communications. This does not seem to be possible under the regime provided for in the Bill.

Furthermore, from the perspective of the CNPD, the specificity of consent concerns not only the purposes, but also the

recipient entities of your personal data (here the contact and identification data) - or, at least, the categories of recipient entities. Because the data subject may consent to communications from entity A being sent to them and not intend to do so in relation to entity B. The power to consent to the processing of personal data must be exercised depending on the entity that is, or may become, responsible for your personal data. Aspect of regime that this Bill does not comply with.

III. Of the Conclusions

On the above grounds, the CNPD expresses serious reservations as to the compliance of the Bill under analysis with the European legal regime for data protection and privacy protection in the electronic communications sector.

In particular, it understands that:

1. This parliamentary initiative is based on an error regarding the legal regime in force on the sending of promotional communications using the telephone number;

2. This parliamentary initiative does not seem appropriate, as the review of the e-Privacy Directive and its replacement by a European regulation is in progress;

3. This Bill does not make the communications regime for direct marketing purposes more transparent for data subjects in relation to who processes their data, nor does it determine a strengthening of the control of citizens' personal data and, consequently, of their rights. , once:

i. It adds to the existing lists, a national list with the data of people who have consented to direct marketing by telephone, it does not allow them to know who is accessing and using their data;

ii. It does not articulate the exercise of data subjects' rights, in particular the right of opposition;

4. The consent referred to in article 13 of the e-Privacy Directive to comply with the requirements set out in subparagraph 11) of article 4 of the GDPR and, therefore, for what is relevant here, must to be informed and specific, a requirement that the regime provided for in the Project does not allow to be fulfilled.

Lisbon, March 25, 2019

Filipa Calvão (President)