

Data privacy and political marketing – a Portuguese approach

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Complaints against the violation of data privacy through electronic communications have recently increased in Portugal. Of these, a growing number (recently, as much as 15 percent of the total number) relates to political marketing.

Political marketing is common practice worldwide, but it is still a potential source of conflict between politicians and the electorate. If unsolicited electronic initiatives (SPAM) in general are disliked by its receivers, disapproval of SPAM containing political marketing seems to be especially high. The market segment that political marketing tries to reach seems to reject the idea for a number of reasons. To start with, political marketing tends to be seasonal and, while scarce in general, it can be very insistent during election years. Moreover, political marketing creates a sense of “false advertising” in the sceptic; annoys the politically active who is not partisan to that particular Party; and generates distrust in those who believe in old-fashioned, face-to-face political salesmanship.

Naturally, the right to express one’s political ideas and opinions is dearly protected in the developed world, which means political parties and candidates are given all possible means to publicise and market their opinion and image during election time.

But there are limits to the right of expression and of free speech. Political campaigning must submit to the general principle of respecting the privacy of its target, the voting public. In an increasingly global society, the goal is to ensure that the public is informed of, not badgered with, political opinion and agenda. That means limiting the forms in which political campaigning may take place in a society with easy access to new technologies.

The limitations for the use of new technologies in marketing initiatives in Portugal are established mainly in Decree-Law 7/2004, which sets forth the legal framework applicable to information society services and electronic commerce¹. According to such decree-law and as a general rule, direct marketing through automatic calling machines, e-mail, SMS or MMS (as well as any other automatic machines that do not require human intervention) may only take place upon prior consent by the receiver. It is a matter for discussion whether such a regime – established on a legal instrument regulating electronic commerce – could or should be applied to political marketing communications. Nevertheless, that is how the Portuguese Data Protection Authority (PDPA) has perceived it to be.

And in being so, Portuguese law seems to safeguard the individual’s prior written consent. Which means political parties should obtain prior consent from their targets before choosing such electronic means to promote their ideas.

¹ 1 This decree-law transposes into Portuguese law Directive 2000/31/CE of the European Parliament, as well as Article 13 of Directive 2002/58/CE of the European Parliament and Council.

The fact that a little over 15 percent of all complaints recently filed with the PDPA were caused by illegitimate political marketing has caught the PDPA's attention. If, as of yet, no political Party has been fined in Portugal, it is not due to the PDPA's lack of concern. In fact, this organisation has refrained from fining political parties only because it believes that the reason why they were non-compliant in the past was due to uncertainty and lack of information as to what rules to follow.

So, in order to clarify the matter, the PDPA issued a deliberation regarding the principles to comply with in political marketing through electronic communications. The main conclusion to retain is that any treatment of personal data through the use of electronic mail must be notified with the PDPA, as any other personal data treatment – a legal necessity that is also a practical difficulty. Obtaining the voter's written consent prior to a politically-motivated electronic communication may prove a difficult task to fulfil.

In light of the PDPA's recent stand on the matter, circumstances are thus expected to change in the future. As both the public and political parties have access to more information, less tolerance is bound to be shown to the illegitimate and unlawful use of personal data.

Ultimately, if and when political campaigning respects the legal boundaries of data privacy, both political parties and the electorate will have benefited: the first will have used the legal instruments which insure free and reasonable democratic speech during election periods. The latter will have enough information so as to decide how to cast its vote – no more, no less.

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