

National Data Protection Commission

OPINION/2022/47

I. Order

1. The Economics, Public Works, Planning and Housing Commission submitted to the National Data Protection Commission (hereinafter CNPD), for an opinion, Draft Law No. 8/XV/1 a(GOV) that transposes the Directive (EU) 2019/1, of 11 December 2018, which aims to empower the competition authorities of the Member States to apply the law more effectively and ensure the proper functioning of the internal market.

2. The CNPD issues an opinion within the scope of its attributions and competences as an independent administrative authority with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57, in conjunction with subparagraph b) of paragraph 3 of article 58, and with paragraph 4 of article 36, all of Regulation (EU) 2016/679, of 27 April 2016 - General Regulation on Data Protection (hereinafter, RGPD), in conjunction with the provisions of article 3, paragraph 2 of article 4, and paragraph a) of paragraph 1 of article 6, all of Law no. 58/2019, of 8 August, which implements the GDPR (hereinafter, the Execution Law) in the domestic legal system and, also, as a result of the provisions of subparagraph c) of paragraph 1 of article 44 of Law no. 59/2019, of August 8th.

3. The CNPD has already commented on the Draft Law No. 99/XIV/2.3 (GOV) in Opinion No. 2021/801, whose articles have undergone significant changes, so in the matters that continue to deserve observations, it follows close to that Opinion.

II. Analysis

4. The Draft Law under analysis aims to transpose Directive (EU) 2019/1, of December 11, 2018, making the third amendment to the legal regime of competition, approved by Law No. 19/2012, of 8 of May, amended by Law No. 23/2018, of June 5 and by Decree-Law No. 108/2021, of December 7, and the first amendment to the Statutes of the Competition Authority (AdC), approved by the Decree -Law No. 125/2014, of August 18th.

5. Regarding the amendments to the statutes of the AdC, it is established that the national legal provisions applicable to the functioning of this entity must be interpreted in the light of Union law, including the Directive, to guarantee its functional independence.

1 Available at <https://www.cnpd.pt/decisoos/historico-de-decisoos/?year=2021&type=4&ent=&pgd=2>

Av. D. Carlos 1,134,10

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

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6. Under the terms of the Proposal, the members of the Board of Directors, directors and employees of the AdC do not request or accept instructions from the Government or any other public or private entity in the performance of their duties, the list of incompatibilities and impediments is increased and it is determined that the AdC's activity must not be financed through the proceeds of fines imposed for infringements of Articles 101 and 102 of the TFEU and the competition law regime, with a view to ensuring its impartiality.

7. The amendments to the AdC statutes, approved by Decree-Law No. 125/2014, of 18 August, do not raise new questions about the right to protection of personal data.

8. With regard to the amendments to Law No. 19/2012, in its current version, and closely following the Explanatory Memorandum, it is foreseen that the AdC will reject the treatment of issues that it does not consider to be a priority, and a minimum set of investigative and decision-making powers of the AdC, namely search and seizure procedures, requests for clarification from employees of companies or associations of companies, house searches, requests for information and inquiries.

9. With regard to fines and compulsory pecuniary sanctions, the lack or refusal of a response or the provision of a false, inaccurate or incomplete response, within the scope of inquiries and measures of search, examination, collection and seizure, is expressly provided for carried out by the AdC and the failure to provide information within the period set by the AdC's request, as well as the possibility of punishing failure to comply with the conditions imposed by decision at the end of the investigation.

10. On the other hand, the maximum amount of fines is determined taking into account the turnover and, in the case of an

association of undertakings, a circumscription of the aggregate turnover of the undertakings associated with the markets affected by the infringement.

11. Leniency programs are also foreseen for secret cartels and changes have also been introduced in some rules of the judicial remedies regime. Access to confidential documents is also facilitated by lawyers or economic advisors for the purposes of the exercise of defense.

12. It should be noted, as a note, that the regime set forth herein includes a significant difference in the quality, relevance and adequacy of the solutions in the service of a consistent performance on the part of the AdC which, unfortunately, was not included in a regime identical to the CNPD.

2 See, for example, the provisions on suspension of time limits, longer statute of limitations, cooperation mechanisms and competent court

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13. As many of the amendments introduced here closely follow the text of the Directive that is intended to be transposed, this pronouncement will focus only on Articles 5a, 16 to 19 and 30- A of the legal regime of competition, approved by Law No. 19/2012, of 8 May, amended by Law No. 23/2018, of 5 June.

14. Article 16, on notifications, now provides for the possibility of making these, with prior consent, by email, to the digital address indicated by the recipient, including through the Public Service of Electronic Notifications (SPNE), whenever it is verified that the person notifying him has adhered, pursuant to Decree-Law No. 93/2017, of 1 August. This provision follows on from article 5-A, now added by article 4 of the Proposal, which stipulates that, in carrying out their activities, the AdC and other competent entities must use electronic means, in order to promote efficiency. and administrative transparency and proximity to interested parties, namely “sending notifications or notifications through the Public Service of Electronic Notifications whenever it is verified that the notifying party has adhered to it, under the terms of Decree-Law No. 93/2017, of 1 August». The requirement of prior consent from the data subject as a basis for the lawfulness of this data processing is welcomed, in compliance with Article 6(1)(a) of the GDPR.

15. In turn, subparagraph d) of this new article 5.-A refers to the exemption from presenting documents in the possession of any Public Administration service and body in the event of consent to obtain them. This is data processing for purposes other than those for which the data were collected, so consent legitimizes it under Article 6(4) of the GDPR.

16. Article 17(3) (Opening the investigation) provides that proceedings relating to practices restricting competition may be processed electronically, under the terms of the regulation to be approved by the AdC. The CNPD recalls the need for this regulation to provide for measures that guarantee the security of communications under the terms of article 32 of the RGPD.

17. It should be noted that paragraph 5 of the same article, concerning complaints of a restrictive practice of competition, is now added 'the AdC being able to guarantee the anonymity of the complainants who, with good reason, request it'. However, since the initiation of an administrative offense process based on anonymous complaints is not allowed, the regime provided for herein allows the AdC to guarantee externally, vis-à-vis third parties, the anonymity of the complainant.

18. Although this option is in line with the recent legislation produced on the matter, it is emphasized that the introduction of such an item may have implications for the exercise of the right of defense of the person concerned, since the latter, by not knowing the identity of the complainant, sees the scope for exercising that right reduced.

Av. D. Carlos 1,134,1st

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

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19. With regard to the changes to be introduced to the legal regime of competition, from the point of view of data protection, the provision of «a minimum set of investigative and decision-making powers of the AdC, namely, search and seizure, requests for clarification from workers of companies or associations of companies, house searches, requests for information and inquiries».

20. Thus, paragraph a) of paragraph 1 of article 18 of Law no. 19/2012, of 8 May, as amended by article 2 of the Proposal

(Powers of search, examination, collection and seizure), provides that in the exercise of sanctioning powers, the AdC, through its bodies or workers, may, in particular, “access without prior notice to all facilities, land, means of transport, devices or equipment of the target, or to the same »³

21. Also, under the terms of the new subparagraph b) of the same item «Inspect the books and other records relating to the company, regardless of the medium on which they are stored, having the right to access any information accessible to the inspected entity», as well as take or obtain in any form copies or extracts of the controlled documents and, whenever it deems it appropriate, continue to carry out this type of information search and selection of copies or extracts at the AdC premises or at any other designated premises (item c).

22. It is also envisaged, following closely Article 6 of the Directive, that the AdC may proceed with the sealing of any premises, books or records relating to the person concerned, or to the same affections, in which they are or are likely to be found. information, as well as the respective supports referred to in the previous paragraph, during the period and to the extent necessary to carry out the steps referred to in the same paragraph (cf. 19/2012, in the proposed wording). The current version of the Draft Law maintains the reference to a previous item that appeared in Draft Law No. 99/XIV/2.a (GOV), which was eliminated in this version, so it is suggested to revise this item.

23. It should be noted, first of all, that under the terms of paragraph 2 of the aforementioned article 18, all these steps depend on authorization from the competent judicial authority.

24. On the other hand, with regard to the regulation of house searches, article 19, now amended, which provides for house searches without prior notice, maintains the obligation for the search to be authorized by the Investigating Judge, at the request of the AdC, in respect for Article 34(2) of the CRP.

25. However, paragraph 5 of the same precept stipulates that 'The provisions of paragraphs a), b), c) and g) of paragraph 1 and paragraphs 4 to 9 apply to house searches. and 12 of article 18, with the necessary adaptations'.

3 Cf. paragraph 1 of article 6 of the Directive and recital 30 of the same diploma.

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26. Now, in line with what we have been exposing, such provision must be interpreted in the sense that the Investigating Judge commands the entire search, and the provisions of subparagraphs a), b), c) and g) of no. 1 and in paragraphs 4 to 9 and 12 of

article 18 be brought back to the same principle. Therefore, it is suggested that this item be reformulated in order to apply Article 19(1) to these provisions, in order for the Investigating Judge to legitimize all the aforementioned steps.

27. Finally, a note to Article 30a, now added, concerning personal data. Here it is provided that "access to personal data contained in documents attached to the process is allowed to the person concerned for the purpose of exercising his rights of defence", and the data subjects prepare versions of documents attached to the process expunged of personal data if necessary.

28. When reading this section, it is not possible to notice the compatibility with paragraph 5 of article 17, where the possibility of anonymization of the whistleblowers is foreseen. It is therefore suggested that this provision be revisited and reformulated.

III. Conclusion

29. Based on the above grounds, the CNPD recommends:

The. The clarification of paragraph 5 of article 19, in the sense that the authorization or validation of the acts or steps provided for in paragraphs a), b, c) and g) of paragraph 1 and in paragraphs 4 to 9 and 12 of article 18 is the responsibility of the Investigating Judge; and

B. The reformulation of Article 30-A with a view to making it compatible with Article 17(5), which provides for the possibility of anonymization of whistleblowers.

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Maria Cândida Guedes de Oliveira (Rapporteur)

Av.D. Carlos 1,134.1°

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt