CNPD

National Data Protection Commission

OPINION/2022/45

I. Order

1. The Commission on Economy, Innovation, Public Works and Housing of the Assembly of the Republic asked the National Data Protection Commission (CNPD) to issue an opinion on Draft Law No. 06/XV/1,a (GOV) , which “Approves the Electronic Communications Law and transposes Directive (EU) 2018/1972, which establishes the European Electronic Communications Code”.

2. The CNPD issues an opinion within the scope of its powers 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, subparagraph b) of Article 58(3) and Article 36(4), all of Regulation (EU) 2016/679, of 27 April 2016 - General Data Protection Regulation (hereinafter GDPR), 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 December August, which enforces the GDPR in the domestic legal order.

II. Analysis

3. The Draft Law, which aims to define the new regime for electronic communications, in transposition of Directive (EU) 2018/1972 of the European Parliament and of the Council, of 11 December 2018, also introduces changes in other legal instruments, highlighting Due to their direct relevance to the processing of personal data, amendments to Law No. 41/2004, of 18 August, amended by Law No. 46/2012, of 29 August (hereinafter, Privacy Law in Electronic Communications).

4. Although this Draft Law essentially corresponds to Draft Law No. 83/XIV/2.3 (GOV), on which the CNPD has already commented (cf. Opinion/2021/53, of 11 May1) , this opinion will not limit itself to repeating the observations made at the time, highlighting now, after a second analysis, other provisions that raise reservations as to their compliance with the Law on Privacy in Electronic Communications.

5. Therefore, we will begin by analyzing the changes introduced in the Electronic Communications Privacy Law (on this point, reiterating the recommendations made in the previous opinion), and then, in the analysis of the proposal for a new Electronic

Communications Law, focus on other provisions, most of which have a direct impact on the Electronic Communications Privacy Act.

1 Cf. Seem; The CNPD's perspective was also explained at a hearing at the Economy, Innovation, Public Works and Housing Commission, on September 28, 2021.

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i. Amendments to the Electronic Communications Privacy Act

6. With regard to the Law on Privacy in Electronic Communications, article 3 of the Draft Law amends articles 7 and 10. Essentially, the changes relate to the expansion of the universe of organizations to which personal data on the location of emergency communications2 may be communicated, encompassing not only organizations that have the legal competence to receive such communications but also those competent to treat them. As for this change, the CNPD has no objection, given the adequacy and need for access to such personal data by the universe of organizations typified therein.

7. Note that the name of the personal data processing operation is also changed - now using the concept of availability instead of transmission. The CNPD admits that the proposed amendment aims at more agile ways of accessing information on the location of emergency communications, which is understandable, without prejudice to the fact that its execution must take into account the principles and rules provided for in the RGPD.

8. Just a note regarding the exemplary location data reference. It is not possible that other location data may be at stake other than information on the location of the caller, taking into account the definition contained in the new regime concerning electronic communications introduced by the Draft Law.

9. Indeed, taking into account the definition of information on the location of the caller contained in subparagraph p) of paragraph 1 of article 3 of the proposed Electronic Communications Law, which thus covers the location of those who make

emergency communications , whatever the type of communication used (e.g., call, SMS), it is not clear that other location data may be relevant here.

10. Therefore, the CNPD recommends reviewing the proposed wording for paragraph 2 of article 7 and paragraph 3 of article 10 of the Electronic Communications Privacy Law, in order to eliminate the exemplification of location data or, alternatively, eliminate the reference to location data, keeping the reference only to the information about the location of the caller.

ii. The Electronic Communications Law

11. In general, the proposed new Electronic Communications Law maintains the provisions of the previous law with regard to the processing of personal data. With some relevant exceptions, which will be analyzed.

2 Strictly speaking, in the Draft Law, the term emergency calls is replaced by emergency communications, an amendment that does not give rise to any reservation from the perspective of the protection of personal data.

The. The legal provision for the commercialization of personal data

12. First of all, the great novelty of this Law Proposal with regard to the processing of personal data is highlighted. At issue is subparagraph ss) of paragraph 1 of article 3 of the Electronic Communications Law, where the concept of remuneration is defined as "compensation for the provision of electronic communications services, which can be provided by the end user or by third party, covering the payment of a pecuniary amount, as well as cases in which, as a condition of access to the service, personal data are requested or provided, directly or indirectly, within the meaning of Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 April 2016, or cases where access to other automatically generated information is allowed or the end user is exposed to advertising».

13. Now, by assuming in a legal norm that the remuneration of a service, in the case of electronic communications, may correspond to the provision of personal data, the possibility of monetization or commodification of personal data is recognized,

which, in the Portuguese legal system and in the articles of the European Union's legislative acts has never been recognized.

14. In fact, such a legal provision is based on a materialist view of personal data, embedded in the perspective of the protection of personal data as a manifestation of the right to property over the data, which is clearly not the underlying ratio of the Constitution of the Portuguese Republic (CRP) and the Charter of Fundamental Rights of the European Union (hereinafter, the Charter). On the contrary, Article 35 of the CRP and Article 8 of the Charter aim to guarantee and promote the dignity of the human person, with the right to data protection being a fundamental guarantee of respect for private life, freedom and free development. personality, as well as the right to non-discrimination.

15. Precisely because this is the reason for enshrining that fundamental right, the legal regime for the protection of personal data, and specifically the GDPR, recognizes that, in the context of contractual relationships, the contract may justify the collection and subsequent processing of personal data of the co-contractor as long as these prove necessary for its conclusion or execution (cf. point b) of paragraph 1 of article 6 of the RGPD); but not more than this data: the data strictly necessary for the conclusion or performance of the contract to which the data subject is a party.

16. What the aforementioned legal definition of remuneration implies is the alleged legitimation of the processing of personal data not necessary for the performance of the contract based on an implicit contractual clause on the price to be paid for the electronic communications service - and which would cover, not only the personal data actively provided by the data subject, but also those observed (relating to the data subject's interaction in the use of the services, including cookies).

17. However, this condition of lawfulness or legitimation of the treatment is not supported by the RGPD, nor by any other norm of European Union law or national law. Indeed, the Directive that is now intended to be transposed does not define the concept of remuneration, a concept that, incidentally, was not defined in the previous Electronic Communications Law.

18. It is therefore very strange that the national legislator now chooses to subvert the legal regime for the processing of personal data - too much, in the context of a law that does not have such a regime as its main object -, changing the data protection paradigm in Portugal and Europe, in gross contradiction with the GDPR and the CRP.

19. Of course, the provisions of recitals 15 (/n fine) and 16 of Directive (EU) 2018/1972 will be invoked, which have no effect in the articles of this European law. In fact, recital 16 admits that the remuneration for this type of service may cover personal data provided and observed, but, as it can be read, because "[in] the digital economy, market participants increasingly consider that information concerning users have a monetary value'. However, the assumed pressure of the market objectively implies a change in the perspective under which the Law and the Law view citizens: from subjects of Law they become mere receptacles of tradable goods. In fact, it is not because personal data have value from an economic perspective that their transformation into goods is justified, converting the guarantee of a fundamental right into a tradable good. In fact, having a monetary value does not automatically legitimize your transaction (in the same way that the transaction of certain goods - narcotics, human organs - is not legitimate just because there is an interest in the market).

20. We insist that the perspective explained in the aforementioned recitals is not translated into the text of the Directive that is intended to be transposed here. And it does not, precisely because the provision of a provision defining the concept of remuneration, such as the one found in this Draft Law, would grossly conflict with the provisions of the RGPD, by admitting that the processing of personal data not necessary for the execution of a contract could be consideration for a service provided in the context of the contractual relationship.

21. In fact, what is found in the articles of Directive (EU) 2018/1972 is the express safeguard that what is established therein does not prejudice the legal regime for the protection of personal data and privacy (cf. subparagraph b) of no. 3 of article 1), so the absence of the provision in the articles of the Directive that Member States may allow the remuneration of electronic communications services through the provision of personal data, therefore, implies the inadmissibility of a national legal provision in violation of the GDPR. Let's take a closer look at this violation.

22. Article 6(1) of the GDPR provides as a source of lawful processing of personal data - as already done by Directive 95/46/EC and Law No. 67/98, of 26 October, which transposed it - the contract to which the data subject is a party. Only when the controller intends to carry out other processing operations (not necessary for the performance of the contract) can he seek

another legal basis among those provided for in the same article. As can easily be concluded from reading such a rule, the relevant basis would be the consent of the data subject to legitimize operations on data not necessary for the performance of the contract, under the terms provided for in subparagraph a) of paragraph 1 of the same article.

23. However, consent, in order to be legally relevant, must be informed and free - under the terms of Article 4(11) of the GDPR (and the general rules of law). However, if the provider of a service requests personal data from the data subject as a condition of providing the service, it is not clear that there is freedom in the action of the data subject who "knowsly provides personal data, [...] directly or indirectly to the supplier»3, due to the conditioning resulting from the need to provide the service. In other words, consent (explicit or implicit) is only legally relevant when “the act of giving or refusing consent does not produce any negative consequences”4, so that “[t]he consent should not be considered to have been freely given”4. will if the data subject does not have a true or free choice or cannot refuse or withdraw consent without prejudice»5.

24. Indeed, that is precisely the meaning of Article 7(4) of the GDPR. This does not deny the possibility for a consumer to consent to the processing of personal data not necessary for the performance of a contract for the provision of digital services or for the acquisition of digital content, but it is required that, "[I act to assess whether consent is freely given , [it is verified] with the utmost care whether, in particular, the performance of a contract, including the provision of a service, is subject to consent to the processing of personal data that is not necessary for the performance of that contract”.

25. Thus, the GDPR does not provide that the lawfulness of processing personal data not necessary for the performance of the contract may be based on the mere consideration of a (contracted) service, and given that consent is only a basis of lawfulness where freedom to issue it, under penalty of violating Article 7(4) of the RGPD, the definition of remuneration contained in Article 3(1)(ss) of the proposed Electronic Communications Law is being create a new basis for the lawfulness of the treatment, outside the mandate

3 Cf. Recital 16 of Directive (EU) 2018/1972.

4 Cf. GDPR Consent Guidelines, revised and approved on 10 April 2018 by the Article 29 Working Group, and assumed by the European Data Protection Board on 25 May 2018, available at http://ec.europa.eu/newsroom/article29/item-detail.cfm?itemjd=623051

5 Cf. recital 42 of the GDPR, brought up here as it reinforces the provisions of paragraph 1 and paragraph 4 of article 7 of the same diploma.

conferred by the Union legislator and in clear violation of the rules of the GDPR, in addition to reversing the humanist conception of the right to protection of personal data underlying the CRP and the Charter.

26. In this way, the CNPD considers that subparagraph ss) of paragraph 1 of article 3 of the Electronic Communications Law, as proposed, should be deleted.

B. Detailed billing

27. Article 122(5) of the new Electronic Communications Law, now proposed, provides that detailed invoices do not require the identification of calls provided free of charge, including calls to assistance services.

28. The CNPD highlights this rule to point out that not being chargeable is not the same as being prohibited or not being included in the detailed billing.

29. In fact, the wording presented here will allow calls to be identified free of charge on the detailed bill - because it only states that 'it is not chargeable', not prohibiting or ruling out such a possibility. When it is certain that European Union law and national law determine that such calls must not be identified (cf. last paragraph of subparagraph a) of Annex I of Directive 2009/136/EC and paragraph 4 of article 8. ° of the Electronic Communications Privacy Act, which also transposed it).

30. In fact, the reason why the wording of a similar provision in the previous Electronic Communications Law was changed (cf. final part of paragraph 3 of article 94, in the wording introduced by Law no. /2011, of 13 September), to opt for a wording that does not correspond to the provisions of Directive 2009/136/EC (cf. last paragraph of item a) of Annex I) and which, moreover, contradicts the prohibition imposed in the 4 of article 8 of the Law on Privacy in Electronic Communications, when, of course, the Directive that is now transposed in no way changes the detailed billing regime defined therein.

31. It is recalled that this provision not only implies the processing of personal data not necessary for the purpose pursued with the detailed billing, which is directly related to price/cost control by those who contract the telecommunications services, violating the principle of data minimization enshrined in subparagraph c) of paragraph 1 of article 5 of the RGPD, as well as having a significant impact on the rights and freedoms of users, especially when users are part of the same household as the

subscriber, as they do not ensure the concealment of calls to assistance and support services, for example in contexts of domestic violence.

32. The CNPD therefore recommends that the wording of paragraph 5 of article 122 of the Electronic Communications Law be revised, in order to replace the expression “the identification of calls provided free of charge is not required [.. .]», calls provided free of charge are not identified [...].

ç. 0 contract prevention mechanism

33. The observation made regarding a terminological change in article 126 of the Law is also reiterated. At issue is the regulation of the contract prevention mechanism, but, where subscribers previously appeared, the proposed wording refers to end users.

34. Bearing in mind that the concept of end-user, defined in Article 3(1)(ggg) is quite broad, it remains to be clarified whether the persons whose data appear in the shared database - and which is a database of debtors - are the actual users of electronic communications services, or if they are those who have contracted the services.

35. Explanation specifically, from reading article 126 it is not clear whether, in the case of services provided to a company, who will integrate the database is the company that contracts the electronic communications services or if it is the employees as permanent (“end”) users of the services.

36. Considering that this is a “negative” database for the people registered therein, preventing them from entering into new contracts for the provision of communication services, it is important to clarify precisely the universe of those who are prevented from doing so, otherwise there is a risk of discrimination in the access to communications services of a natural person (in the example given above, a worker) who is not attributable to the non-payment of invoices.

37. Interestingly, it is believed that by mistake, the only provision of article 126 in which the reference to subscribers was kept is the one that provides for the right to erase data after payment of the debt (cf. point h) of paragraph 3 of that article).

38. The CNPD therefore recommends specifying in article 126 the subjective universe of application of this regime regarding the mechanism for preventing contracting, which appears to be limited to those on whom the duty to pay for the services falls. provided.

d. Clarification of other legal provisions

39. Finally, two notes on the provisions of the new Electronic Communications Law.

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40. The first, to point out that the provisions of paragraph 7 of article 5, in particular, in subparagraphs b) and c), present a dubious wording as to its exact meaning or intention, and must be read in harmony with the provisions of the Citizen Card Law (Law no. 7/2007, of February 5, in the current wording established by Law no. No. 37/2014, of June 26).

41. At issue is the prescription in subparagraphs b) and c) of paragraph 7 of article 5 for the use of '[...] electronic means, in order to promote administrative efficiency and transparency and proximity to the interested parties, namely [...] b) Use the means of electronic authentication with a Citizen's Card and Digital Mobile Key, as well as the means of electronic identification issued in other Member States recognized for this purpose, under the terms of article 6 of the Regulation (EU) No. 910/2014, of the European Parliament and of the Council, of 23 July 2014; c) Adopt the signature of documents using qualified electronic signatures, including those of the Citizen Card and Digital Mobile Key, with the possibility of using the Professional Attributes Certification System, or others that appear on the European List of Trusted Services

42. Bearing in mind that Law No. 7/2007 (see Article 18(3) and (5) and Article 18(A)(1) and Law No. 37/ 2014, of 26 June (see paragraph 1 of article 3 and paragraph 1 and 2 of article 3-A) always recognize that it is an option for citizens holding a citizen card and digital mobile key (i.e., they always recognize that it depends on the will of the citizens) the use of these means for the purpose of their electronic authentication or for a qualified electronic signature, this prescription addressed to the National

Regulatory Authority and the other authorities can only mean imposing on these entities a duty of provide the necessary means so that citizens who wish to use these authentication and signature mechanisms can do so. At the same time, as for citizens who work in these administrative authorities, this option can also be ensured, but precisely on an optional basis, therefore, making available other means of electronic authentication as an alternative to the use of the Citizen Card or Digital Mobile Key.

43. Thus, in order to clarify the provisions therein, the CNPD suggests that subparagraphs b) and c) of paragraph 7 of article 5 be revised, suggesting that they begin with “Allowing the use of electronic authentication means [.. .]» and «Enable the adoption of the signature [...]», respectively.

44. The second note serves to recall that the technical implementation measures that the National Regulatory Authority (in this case, ANACOM) may eventually approve, under the terms of article 61 of the Electronic Communications Law, may have to be subject to prior opinion of the CNPD, whenever they contain prescriptions regarding the processing of personal data or imply the processing of such data (cf. paragraph 4 of article 36 and paragraph b) of paragraph 1 of article 57, both of the RGPD, and paragraph a) of paragraph 1 of article 6 of Law n.° 58/2019, of 8 August).

III. Conclusion

45. On the grounds set out above, in relation to the changes introduced by Article 3 of the Draft Law to the Law on Privacy in Electronic Communications, the CNPD recommends reviewing the proposed wording for paragraph 2 of Article 7. and paragraph 3 of article 10, eliminating the exemplification of location data or, alternatively, the reference to location data (keeping only the mention of information on the location of the caller).

46. With regard to the new Electronic Communications Law, the CNPD believes that the concept of remuneration contained in subparagraph ss) of paragraph 1 of article 3 of the proposed Electronic Communications Law must be eliminated, since there The possibility of monetization or commodification of personal data is recognized, creating a new basis for the lawfulness of

the treatment, outside the mandate given by the Union legislator and in clear violation of the rules of the RGPD (maximum, of paragraph 4 of article 7. °), in addition to reversing the humanist conception of the fundamental right to the protection of personal data underlying the Constitution of the Portuguese Republic and the Charter of Fundamental Rights of the European Union, forgetting the dignity of the human person as the sole and ultimate end of the consecration of rights, freedoms and guarantees.

47. Still regarding the proposal for a new Electronic Communications Law, the CNPD recommends the revision:

The. of paragraph 5 of article 122 of the Electronic Communications Law, in order to replace the expression "the identification of calls provided free of charge is not required [...]" by calls made available free of charge not identified [...] (cf. above, points 26 to 30).;

B. of article 126, in order to specify the universe of persons who can be part of the shared database of debtors, which appears to be limited to those on whom the obligation to pay for the services provided falls (cf. above, points 32 to 36);

ç. of subparagraphs b) and c) of paragraph 7 of article 5, for their clarification, suggesting that they begin with “Allow the use of electronic authentication means [...]” and “Enable the adoption of the signature [...]' respectively (see above, paragraphs 39 to 41).

Lisbon, May 25, 2022

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