National Data Protection Commission

OPINION/2021/80

I. Order

1. The Commission on Economy, Innovation, Public Works and Housing submitted to the National Data Protection Commission (hereinafter CNPD), for an opinion, the Draft Law n.° 99/XIV/2.3 (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.

II. Analysis

3. The Draft Law under analysis aims to transpose Directive (EU) 2019/1, of 11 December 2018, making the second amendment to the legal framework for competition, approved by Law No. 19/2012, of 8 23/2018, of 5 June, and the first amendment to the Statutes of the Competition Authority (AdC), approved by Decree-Law no. 125/2014, of 18 August.

4. 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.

5. 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 in order to ensure its impartiality.

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

6. 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.

7. 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.

8. With regard to fines and compulsory pecuniary sanctions, it is expressly provided as an offense punishable by a fine the lack or refusal of a response or the provision of a false, inaccurate or incomplete response, within the scope of investigation and search, examination, collection and seizure procedures. 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.

9. On the other hand, the maximum amount of fines is determined taking into account the turnover, and in the case of an association of companies, a circumscription of the aggregate turnover of the companies associated with the markets affected by the infringement.

10. Leniency programs are also foreseen for secret cartels and changes have also been made to 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.

i. General considerations

11. It should be noted, as a note, that the regime set forth herein includes a significant difference in quality, pertinence 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.

12. Insofar as many of the amendments introduced here closely follow the text of the Directive that is intended to be transposed, this pronouncement will only focus on the amendment to the legal regime for competition, approved by Law No. 19/2012, of 8 of May, amended by Law No. 23/2018, of June 5, in particular on articles 5-A, 16 to 19 and 30-A.

13. Among the amendments to Law No. 19/2012, of 8 May, article 16 (Notifications) now provides for the possibility of these being made, with prior consent, by email, to the address

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

indicated by the recipient, including through the Public Service of Electronic Notifications (SPNE), whenever it is verified that the notifying party has adhered to it, under the terms of 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, in compliance with Article 6(1)(a) of the GDPR

14. 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.

15. Article 17(3) (Opening the investigation) provides that proceedings relating to practices that restrict 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.

16. In turn, paragraph 5 of the same article, relating to 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, require 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.

17. 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.

ii. The investigative powers and authorization of the competent judicial authority

18. With regard to the changes to be introduced to the competition legal regime, 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».

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

19. 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 person concerned, or to the same affections” two

20. And, also, under the terms of subparagraph b) of the same item «Proceed with the search, examination, collection and seizure or copy, in any form, of information or data, in any physical or digital format, namely, documents, files, books, records or e-mail messages or of a similar nature, regardless of whether they appear to have been unread or to have been deleted, whatever the medium, state or location in which they are stored, namely in a computer system or another that is allowed to legitimate access from the first, servers, laptops, mobile phones, other mobile devices or other devices not previously precisely identified, accessible to the target or the person subject to search and related to the target3

21. 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 (cfr. Paragraph c) of paragraph 1 of article 18 of Law n.° 19/2012, in the proposed wording).

22. 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.

23. Bearing in mind that article 18 encompasses different types of investigative powers, with different impacts on the fundamental rights of citizens, it is important to clarify that the provisions of paragraph 2 of this article do not, and cannot alter, the exclusive competence of the judicial authority to authorize certain steps, especially in relation to correspondence and electronic communications.

24. This is an aspect that is specifically highlighted by the Directive that is intended to be transposed, in Article 6(3) (Competence to inspect company premises), when it establishes that the article 'is applicable without prejudice to the requirements provided for in national law for prior authorization by a national judicial authority to carry out such inspections' [emphasis added].

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

See also Recital 32 of the Directive.

25. Therefore, taking into account that in Portugal the judicial authority is the Judge, a solution that provides for a new element of validation for obtaining evidence with regard to e-mails or similar messages cannot be accepted. Such a solution would constitute a deviation from the general regime of the administrative offense procedure and would absolutely contradict the jurisprudence of the Court of Justice of the European Union (CJEU), translating into a degradation of constitutionally enshrined fundamental rights.

26. In fact, the regulatory precepts of criminal proceedings, applicable by virtue of article 41 of Decree-Law No. 433/82, of 27 October, require the mandatory intervention of a Judge to validate the obtaining of evidence in this field, thus reinforcing the guarantees of citizens, so it is not understood that in an administrative offense process a solution that diminishes these guarantees is admitted. So, let's see.

27. The regime for the seizure of correspondence provided for in the Criminal Procedure Code (CPP) is that contained in article 179, which provides that:

"(7) Under penalty of nullity, the judge may authorize or order, by order, the seizure, even at post and telecommunications stations, of letters, parcels, valuables, telegrams or any other correspondence, when he has well-founded reasons to believe that: a) The correspondence was sent by the suspect or is addressed to him, even if under a different name or through a different person; b) This is a crime punishable with a maximum prison sentence of 3 years; and c) diligence will prove to be of great interest for the discovery of the truth or for the proof.

(2) The seizure and any other form of control of correspondence between the accused and his defender is prohibited, under penalty of nullity, unless the judge has well-founded reasons to believe that it constitutes the object or element of a crime.

(3) The judge who authorized or ordered the investigation is the first person to become aware of the content of the seized correspondence. If he considers it relevant to the evidence, he has it added to the file; otherwise, it returns it to the person entitled to it, and it cannot be used as a means of evidence, and is bound by a duty of secrecy in relation to what it has learned and is not of interest to the evidence." (emphasis added).

28. This Draft Law should therefore clarify that the competence to authorize the steps described above rests with the judicial authority, to prevent the reference to the "competent judicial authority" from legitimizing the interpretation that this may still be up to the Public Prosecutor's Office, which would represent a disproportionate deviation from the regime provided for in the

CPP for the seizure of correspondence when required,

Av.D. Carlos 1,134.1st

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpcl.pt

wwwvecnpd.pt

precisely, that in the context of administrative infractions, the regime was even more contained in the affectation of the fundamental rights of the holders, especially privacy.

29. The option to implement the restriction of the constitutional right to the inviolability of correspondence, provided for in article 34 of the Constitution of the Portuguese Republic (CRP), through the reduction of citizens' guarantees and the reduction of constitutionally enshrined rights does not respond to the postulated requirements. in paragraphs 2 and 3 of article 18 of the CRP for the limitation or restriction of rights, freedoms or guarantees.

30. A note, as to the fact that such steps concern "e-mails or similar messages, regardless of whether they appear to have been unread or have been deleted" (emphasis added). Given the possibility that the communications in question may not yet have been known by the person concerned, the need for an express and clear provision for the intervention of the criminal investigation judge in this operation of validation of seizures becomes even more evident, in compliance with the principle of proportionality, to which no. 2 of article 18 of the CRP.

31. On the other hand, it is important to emphasize that this Proposal is explicit, in the explanatory memorandum, in terms of “safeguarding, at the substantive and procedural levels of application of competition rules, the principles of effectiveness and interpretation in accordance with EU law .“.

32. This is expressed in paragraph 3 of article 2 of Law no. 19/2012, of 8 May, which stipulates that it must be «interpreted in accordance with European Union law, in the light of the jurisprudence of the ECJ'.

33. Now, taking into account that the Competition Authority implements European law, as a result of the transposition of

directives related to the European Union's competition policy, greater importance must be recognized in the case law of the CJEU, in particular in the Judgment of 2 March of 2021, in case C-746/18, which the CNPD recently invoked in its Opinion 2021/36, of March 26, and which is closely followed here.

34. In that Judgment, the court focused on the legitimacy of the Public Ministry to authorize the access of a public authority to traffic data and location data for the purpose of criminal investigation, and specifically on the harmful question of "whether article 15 .°(1) of Directive 2002/58, read in the light of Articles 7, 8, 11 and 52(1) of the Charter, must be interpreted as meaning that opposes a national regulation that confers competence on the Public Prosecutor's Office, whose mission is to direct the criminal investigation

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and to exercise, where appropriate, public action in a subsequent proceeding, to authorize access by a public authority to traffic data and location data for the purpose of criminal investigation.

35. Starting from the undisputed idea that 'it is true that it is for national law to determine the conditions under which providers of electronic communications services must grant competent national authorities access to the data they have', the CJEU notes that, 'for satisfy the requirement of proportionality, such regulations must provide for clear and precise rules governing the scope and application of the measure in question and imposing minimum requirements, so that the persons whose data have been kept have sufficient guarantees to effectively protect that personal data against the risks of abuse.”5

36. These “material and procedural” rules must “be based on objective criteria to define the circumstances and conditions under which access to the data in question must be granted to the competent national authorities.”6. Court, "it is essential that access by competent national authorities to the data retained is, in principle, subject to prior review carried out by a court or an independent administrative body and that the decision of that court or that body is taken following a reasoned request from those authorities submitted, inter alia, in the context of prevention, detection or criminal prosecution procedures.

37. It goes on to note that 'That prior review requires (...) that the court or entity responsible for carrying out the aforementioned prior review has all the powers and presents all the guarantees necessary with a view to ensuring a reconciliation of the different interests and rights at stake. As regards, more specifically, a criminal investigation, such supervision requires that court or entity to be able to ensure a fair balance between, on the one hand, the interests linked to the needs of the investigation in the context of the fight against crime and, on the other hand, the fundamental rights to respect for privacy and the protection of the personal data of the persons to whom access concerns."5

38. Hence, the CJEU continues:

4 Cf. § 46 of the judgment.

55 Cf. § 48 of the judgment.

6 Cf. § 49 and 50 of the judgment.

7 Cf. § 51 of the judgment.

8 Cf. § 52 of the judgment.

«...the requirement of independence that the authority responsible for carrying out the prior inspection (...) must satisfy requires that that authority has the status of a third party in relation to the authority requesting access to the data, so that the former is able to exercise that supervision objectively and impartially, free from any external influence. In particular, in the criminal field, the requirement of independence implies (...) that the authority in charge of this prior review, on the one hand, is not involved in the conduct of the criminal investigation in question and, on the other hand, has a position of neutrality in relation to to the parties to the criminal proceedings.

This is not the case for a Public Prosecutor's Office that directs the investigation and carries out, where appropriate, public action. Indeed, the Public Prosecutor's mission is not to decide a dispute with complete independence but to submit it, if necessary, to the competent court, as a party to the process that carries out the criminal action.

The circumstance that the Public Prosecutor's Office is obliged, in accordance with the rules that regulate its powers and statute, to verify the incriminating and exculpatory elements, to guarantee the legality of the investigation of the case and to act only in accordance with the law and in accordance with its conviction is not sufficient to grant it the status of a third party in relation to the interests at stake in the sense described in paragraph 52 of this judgment.

It follows that the Public Prosecutor's Office is not in a position to carry out the prior inspection referred to in paragraph 51 of this judgment.'9

39. However, the CJEU is unequivocal in the indispensability of mediation by a judge or independent authority in the access to data kept under Directive 2002/58/EC10. This is another criterion that is added to those already defined by this Court11 12 and that applies directly to the national context, since here too, «[the] Public Ministry represents the State, defends the interests that the law determines, participates in the execution of the criminal policy defined by the sovereign bodies, carries out criminal action guided by the principle of legality and defends democratic legality, under the terms of the Constitution, the present Statute and the Law»n, «enjoy[ing] only autonomy in relation to the other organs of central, regional and local power"»'13.

9 Cf. §§ 54 to 57 of the judgment.

10 Conservation which, in Portugal, is regulated by Law no. 32/2008, of 7 July.

11 Cf. point 2 of the CNPD conclusions in Deliberation 641/2017.

12 Cf. article 2 of Law No. 68/2019, of 27 August (Statute of the Public Prosecutor's Office/EMP).

13 Cf. Article 3(1) of the EMP.

40. In any case, the consequences of this judgment cannot fail to be drawn on other pieces of legislation that provide for solutions to allow the Public Prosecutor's Office a wide scope for action in validating and ordering the seizure of e-mails or similar messages. Now, without postponing the competence of the Member States to define the criminal regime and internal

criminal procedure, the combination of national legal systems with that coming from the European Union - especially when partially or totally linked by obligations to transpose directives - must, at the very least, consider the structural implications arising from the obligations of the Member States, here, specifically, in terms of respect for the provisions of the Charter of Fundamental Rights of the Union.

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41. Basically, the perplexity arises from the pretension of admitting such interference with uncontroversially sensitive data, such as communications, when the CJEU requires much stricter criteria to admit access to other personal data (such as traffic and location)14. And it is reinforced by the clear contradiction with the provisions of Article 52(1) of the Charter of Fundamental Rights of the European Union.

42. In these terms, the CNPD reiterates its concern regarding the wording of paragraph 2 of article 18 of Law no. 19/2021, recommending the clarification of the rule to prevent its interpretation and application in clear divergence from the most recent CJEU jurisprudence.

43. 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.

44. However, paragraph 5 of the same provision stipulates that '4 house search shall apply the provisions of subparagraphs a), b) and f) of paragraph 1 and in paragraphs 4 to 9 and 12 of Article 18, mutatis mutandis'.

45. 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) and f) of paragraph 1 and in 4 to 9 and 12 of Article 18 be brought back to the same principle. Therefore, it is suggested to reformulate this section in the sense

14 In spite of the fact that the CNPD's position fully converges with that of the CJEU, as noted in Point II of the aforementioned Deliberation: "In fact, these are data that reveal at all times aspects of the private and family life of individuals: allowing the location of the citizen throughout the day, every day (provided that you carry your mobile phone or other electronic device for accessing the Internet) with whom you contact (call - including attempted and unsuccessful calls - by phone or mobile phone, sending or receiving SMS, MMS, or email), duration and regularity of these communications and which websites you consult."

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

to apply paragraph 1 of article 19 to these provisions, in order for the Investigating Judge to validate all the steps referred to above.

46. Finally, a note concerning 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, purged of personal data if necessary.

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

III. Conclusion

48. On the grounds set out above, the CNPD understands that the Draft Law, in the wording presented for paragraph 2 of article 18 of Law no. authorization of the competent judicial authority, without specifying this competence in terms of the different impacts of those on the fundamental rights of citizens, allows the interpretation that any judicial authority, and therefore also the Public Prosecutor's Office, would have the competence to authorize all the steps provided for in paragraphs a) to c) of paragraph 1 of that article. Such an option, contrary to the case law of the CJEU, would introduce unjustified restrictions on rights, freedoms and guarantees, in particular the right to inviolability of communications, provided for in article 34 of the CRP, with a direct impact on the protection of privacy and personal data of targeted and who incidentally interacted with them.

49. The CNPD therefore recommends clarifying the wording of paragraph 2 of article 18 of Law no. 19/2012, explaining that it is the exclusive competence of the judicial authority, therefore of the Criminal Investigation Judge, to authorize the proceedings

of seizing electronic communications or similar records, under penalty of the rule entailing a disproportionate deviation from the regime provided for in the Criminal Procedure Code for the seizure of correspondence, when it would be required, precisely, that in the context of administrative offences, the regime should be more contained in the definition of those powers.

50. As for the other provisions of the Proposal, the CNPD also 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) and f) 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 paragraph 5 of article 17, which provides for the possibility of anonymization of whistleblowers.

Approved at the meeting of June 22, 2021

Filipa Calvão (President)

Av.D. Carlos 1,134.1st

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpb.pt

www.cnpd.pt