

National Data Protection Commission

OPINION/2022/55

I. Order

1. The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, of the Assembly of the Republic, submitted to the National Commission for Data Protection (hereinafter CNPD), for an opinion, Bill no.

179/XV/1,a, «which protects freedom of expression online», of the Liberal Initiative Parliamentary Group.

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 enforces the GDPR in the domestic legal order.

II. Analysis

3. The Bill amends Law No. 27/2021, of 17 May, which approves the Portuguese Charter on Human Rights in the Digital Age, revoking Article 6, concerning the right to protection against disinformation.

4. It is recalled that, in the scope of the legislative process that led to the approval of that law, the CNPD pointed out regarding the provision of the right to protection against disinformation in opinions 2020/116 and 2020/117, both of 28 September¹:

«The CNPD recognizes the sensitivity of the process of harmonizing fundamental rights to freedom of expression with other fundamental rights or constitutionally relevant interests and, specifically, the difficulty of this conciliation with the objective of public protection against certain opinionated and disinformation content.

In any case, taking into account that the exercise of the right to freedom of expression and opinion may involve the processing of personal data {e.g., the use of this data, especially in the context of profiling processes based on the personal information collected in social networks), recalls that, in another context (which is the political campaign), the European Union has provided for a sanctioning regime only when the disinformation process is based on, or takes advantage of, the violation of the

rules for the protection of personal data - cf. Article 10a of Regulation (EU/Euratom) 1141/2014 of the European Parliament and of the Council of 22 October 2014, last amended by the

1 Accessible at <https://www.cnpd.Dt/decisoos/histonco-de-decisoos/?vear=2Q20&type=4&ent=&pad=1>

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Regulation (EU/Euratom) 2019/493 of the European Parliament and of the Council of 25 March 2019».

5. This observation aimed to alert to the difficulty of the State, through administrative entities, to ensure the balance between the fundamental rights of freedom of expression and opinion with the public interest in the protection against disinformation, precisely by giving the example of the solution normative found by the European Union to combat disinformation in the context of political propaganda.

6. This Union solution makes the powers of public intervention dependent on the verification of a processing of personal data in breach of the data protection regime. And this is because, in fact, the special novelty that the technological means that exist today bring about in terms of disinformation is that they allow it to be constructed and directed according to the specific profile of the recipient, which was created on the basis of information systems. that collect and cross-reference personal data about users of digital platforms and the Internet in general. It is this direction of disinformation tailored to the individual profile of each citizen that today represents the greatest risk of manipulation and conditioning in the formation of citizens' thoughts and will.

7. In other words, the normative regulation found by the European Union focused on the upstream violation of objective and specific legal provisions, and not on generic and imprecise predictions of prohibition of a result: disinformation.

8. The CNPD therefore maintains the view that the harmonization between freedom of expression and opinion and the objective of protecting against disinformation is difficult to achieve at the state level, especially at the level of administrative activity, so nothing has to oppose the repeal of legal norms providing for indeterminate (or inaccurate) public administrative intervention in this matter.

III. Conclusion

9. On the grounds set out above, the CNPD, from the perspective of the protection of personal data, has nothing to oppose the repeal of article 6 of Law No. 27/2021 of 17 May.

Lisbon, June 28, 2022

ipa Calvão (President, who reported)