

NATIONAL COMMISSION
OF DATA PROTECTION

OPINION R/2019/49

I. Order

The Office of the Minister for the Environment and Energy Transition sent the National Data Protection Commission (CNPD), for consideration, the Draft Decree-Law that approves the legal regime applicable to the self-consumption of renewable energy - Directive 2018/2001 of the European Parliament and of the Council of 11 December.

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as an independent administrative entity with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and by the paragraph 4 of article 36 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of article 3 .° and 6.°, no. 1, al. a) of Law No. 58/2019, of August 8.

The assessment of the CNPD is limited to the rules that provide for or regulate the processing of personal data.

II. appreciation

The draft Decree-Law under analysis does not specifically address matters related to the protection of personal data. With regard to the competence of this Committee, there are, however, aspects whose regulation appears to be somewhat deficient or purely non-existent and which would require better implementation.

In order to understand the scope of the pronouncement rendered here, it is important to start by reproducing the concept of “Self-consumer of renewable energy” to which the project refers: a fine consumer / who produces renewable energy for his own consumption, in its facilities located in the national territory , and that can store or sell electricity from renewable sources of its own production...!'. As can easily be seen, the self-consumer may be a natural person, which, as

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demonstrate, has a sensitive impact on the way in which any personal information concerning you can or should be treated.

• Portal

Concerns about the protection of personal data begin with the fact that the creation of a portal is planned, which will be the electronic platform, accessible through Porta! from DGEG, as well as through Porta! ePortuguese! in which applications for registration, licensing and other procedures provided for in this decree-iei are presented, processed and communicated, for the management and control of the activity of self-consumption of renewable energy and which contains the registration of the UPAC [Unit of Production of Self-Consumption of Electricity] existing (cf. Article 2(u) of the project)¹.

If it is true that it is not because there is one more electronic platform that the potential risk to personal data automatically increases, it is no less certain that the profusion of these platforms and databases on numerous aspects of the personal life of data subjects , reflecting the dematerialization of the relationship of citizens and companies with the public administration, constitutes an increasingly detailed and structured collection of who, how, when and what citizens are in their relationship with the State. Furthermore, it is evident that the concern with this type of databases and platforms should deserve special attention and concern by those who design, implement and manage them.

The person responsible for processing personal data for this portal is determined in Article 8(2)(al). a) - DGEG, even if there is no mention of this condition, but only the fact that it is responsible for creating, maintaining, managing and operating the Portal. As such, the DGEG will be the entity that should ensure the fundamental aspects of the treatment, since the draft decree-law is not entirely clear as to the personal data to be processed.

¹ Article 9 details, in greater depth, the functions of the Portal.

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include in the access profile, its retention period or in relation to information security matters, among other relevant aspects².

It is true that it is mentioned that the authentication process should preferably be carried out "through the central authentication mechanism «Autenticação.Gov», namely using the citizen card or digital mobile key, provided for in Law no. June 26" (cf. article 9, no. 1, al. a)), but nowhere is it fully specified what should be included in this profile. Therefore, and why it is, under the terms of article 4. 7 of the GDPR, the person responsible for processing the natural or legal person, public authority, agency or other body that, individually or jointly with others, determines the purposes and means of processing personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria applicable to his appointment may be provided for by Union or Member State law;

- Consent as a legal basis for accessing information on the portal

Article 9(3) provides that "Access to the information referred to in paragraph a) of paragraph 1 must be authorized by the data subject, upon registration on the Portal". wording, it seems to us to be equivocal if it refers to access to personal data, as it also seems to happen³, given the functionalities foreseen for the portal.

The current wording of subparagraph a) of paragraph 1 of article 9 provides for secure authentication of users that allows access to the information contained in their reserved area. Now,

2 Such as those listed in article 13, paragraph 1 and 2 of the RGPD, there as information to be provided to the data subject.

3 to item a) of Article 9(1) provides the following: O Porta! provides the following functionalities: a) Secure user authentication that allows access to the information contained in the area reserved for self-consumers of renewable energy and CERs and other stakeholders in the procedures regulated by this decree-law, namely network operators, suppliers, independent aggregators, installers and inspectors and third-party owners or managers of the UPAC, preferably through the central authentication mechanism «Authentication. Gov", namely using the citizen card or digital mobile key, provided for in Law No.

37/2014 of 26 June

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if that is the purpose of the subparagraph, how can this paragraph 3 prescribe that access to the information contained in that portal depends on the authorization of the data subject himself? Or there is a clear writing deficiency and what is intended, contrary to what is written, is to authorize several individuals and different entities to access the information of other people who are registered on the portal - and this conclusion is not clearly apparent from the wording; or else, what you want is to allow the data subject to have access to his profile and to the information about him on the portal, which he will do through secure authentication.

In the case of the first hypothesis, consent will only make sense if it is about some access by third parties to the data subject's information that is not already legally accessible by them. This will only make sense if, from the point of view of the purpose of access, it is justified that third parties can know this information, which, for the time being, needs to be demonstrated and is therefore hardly defensible. All the more so since it is not even defined what information can be accessed, for what purpose and for how long.

If the legislator intends to embrace the second hypothesis, then it will make even less sense to refer to consent, since it is only the user himself who can access his personal information, and there is no reason to seek a legal basis for that can access your information.

• Smart counters

Article 15(1) of the project requires counting the total electrical energy produced by the UPAC in various circumstances⁴. And this counting, according to no. 2 of the same article, "is carried out by telecounting, and the counting equipment must be able to count in both directions, fulfilling the technical and functional requirements established in Ordinance no. 231/2013, of July 22nd". In turn, paragraph 6 points to a measurement of the energy consumed, the surplus injected into the network and the

4 In the case of collective self-consumption; in the case of individual self-consumption, when the UI associated with the UPAC is connected to the RESP and the installed power is greater than 1.5kVA; in all cases of self-consumption where guarantees of origin are sought.

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consumption imported from RESP based on each 15-minute period. Finally, paragraph 7 obliges that, in cases of collective self-consumption, the telemetering is carried out using a smart meter.

This article, by imposing counting obligations through means with a high potential for intrusion into the privacy of data subjects, such as smart meters, justifies an additional note, although possibly repetitive in relation to other pronunciations of the CNPD.

We can see the facilitation of processes that these meters can bring to the daily lives of energy users and suppliers, however, as this Commission has recently pointed out, the convenience of procedures cannot legitimize violations of the fundamental rights of data subjects^{5 6}.

It was said, then, about the project of Regulation of the Services of the Intelligent Grids of Electric Energy Distribution, and now it is recovered that taking into account that the consumption data must be kept for two and three years (cf. no. 8 of article 17.0 of Decree-Law n.º 68-A/2015, of 30 April, which transposes Directive 2012/27/EU, of 25 October 2012) and that its registration is carried out with an intense frequency (every 15 minutes - see article 7 of Ordinance no. 231/2013, of 22 July, and paragraph 1(f) of the respective Annex i), the processing of information regarding consumption, by individuals, of electricity allows the creation and analysis of behavior profiles on end consumers, with a significant impact on their private life. OK! impact is not only reflected in the marketing adapted to the detailed profile of the customer or in the risk of discrimination in the price to be

charged for the energy distribution and supply service, but also in the risk of improper use of the information and the pretension of its use for the purposes of criminal investigation.

3 Opinion 2019/32, available at https://www.cnpd.pt/bin/decisoes/Par/PAR_2019_32.pdf.

6 In this sense, see the opinions of the Working Group of Art. 29, which brought together the data protection commissioners of the Member States of the European Union, No. 12/2011, of April 4, 4/2903, of April 22, 2013 (WP205), accessible at https://ec.europa.eu/iustice/article-29/documentation/opinion-recommendation/files/2011/wpl_83_en.pdf
https://ec.europa.eu/iustice/article-29/documentation/opinion-recommendation/files/2013/wp205_en.pdf

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Above all, the massive set of information on people's habits or characteristics and health status that georeferencing and the Internet of Things allow to potentially collect the risk of combination or relationship of different types of personal data, making it imperative to adopt measures to mitigate such impacts.

To this extent, the CNPD considers it essential that entities that will process personal data from intelligent electricity distribution networks comply with the GDPR, in particular with regard to the obligations to carry out an impact study on data protection. personal data, as well as the adoption of data protection measures by design and by default (cf. articles 25 and 35 of the RGPD, as well as CNPD Regulation n.º 1/2018, published in the Diário da República 2 .a Series, of 30 November7).

This quote serves to note the indispensability of, here too, the legislator to promote the awareness of controllers and subcontractors involved in the management of this type of accountants of the obligation to carry out these impact assessments prior to their use. In fact, the State, which will play a fundamental role here, through the DGEG, should promote these assessments in order to understand the potential impacts of accessing and managing the information that will be transmitted to

it within the framework of the operationalization of the data reporting solutions included in this project.

III. conclusions

This draft decree-law lacks some wording clarifications in order to clarify doubts regarding the processing of personal data that must actually be carried out in the context of the portal provided for in it.

7 Accessible at https://www.cnpd.pt/bin/decisoos/regulamentos/r8gulamento_1_2018.pdf

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It is also alerted to the fact that the referred portal is not sufficiently regulated with regard to the personal data that will have to be entered and accessed in the context of the legal regime applicable to the self-consumption of renewable energy.

Furthermore, as it stands, the mandatory use of smart meters to measure the energy consumed, the surplus injected into the grid and consumption imported from RESP, implies, in accordance with CNPD Regulation No. Diário da República 2nd Series, of 30 November, carrying out impact assessments on data protection, as provided for in article 35 of the GDPR.

Lisbon, August 9, 2019

Jo Dgal, who reported)

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