National Data Protection Commission

OPINION/2021/166

I. Order

1. ANACOM - Autoridade Nacional de Comunicações asked the National Data Protection Commission (CNPD) to issue an opinion on two "cooperation protocols for access to information on the eligibility conditions for the allocation of the social tariff for the provision of access service broadband internet".

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.

3. The request also requests the CNPD to pronounce on «the future consecration of the collection and transmission of information with the name and address of potential beneficiaries of IST, which is not included in the protocols [...]», so that ANACOM the obligation to disclose information about TSI.

4. The CNPD intends to start by highlighting that this request was submitted to the CNPD services on December 23, 2021, for the issuance of a pronouncement "as soon as possible", taking into account the short term available for implementation of TSI", which is intended to take place "in early January 2022".

5. Even if the urgency invoked is understood, it is worth noting that the usefulness of prior consultation with the CNPD, legally required in the context of the procedure for approving legal norms (even if in the form of a protocol or agreement) that provide for or affect on the processing of personal data, it depends on giving this entity sufficient time to analyze the legal rules - time which, under the terms of paragraphs 3 and 4 of article 92 of the Code of Administrative Procedure, is at least of 10 (working) days -, and sufficient time for the parties to consider the recommendations contained in the opinion, under penalty of having such consultation as a mere formality empty of any substantial content.

6. This reminder serves here to explain that the CNPD limits itself to pointing out little more than the aspects that clearly

deserve alteration in the protocol drafts, without taking care to analyze in more detail some of its provisions.

II. Analysis

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7. Thus, it begins by clarifying that, following the issuance of Opinion/2021/61, of May 17, on Draft Decree-Law No. 963/XXII/2021, which, with amendments, came to be published as Decree-Law No. 66/2021, of 30 July, and having been requested by the Office of the Secretary of State for Digital Transition (by communication of 13 June) to pronounce on article 11 of the aforementioned project, however amended, the CNPD, by letter No. SALCNPD/2021/2038, of June 16, 2021, provided the following clarifications and made the following recommendations regarding the new version of the project:

At issue is the introduction of a new paragraph 2 in the aforementioned article 7 7.0, with the following content: «Under the terms of the previous paragraph, the potential beneficiaries are identified by ANACOM, through consultation with the competent security services and the Tax and Customs Authority, and subsequently communicated to companies that offer broadband Internet access services until September 20 of each year."

In fact, the previous version of the Project on which the CNPD had commented only determined that ANACOM's consultation with the competent services of Social Security and the Tax and Customs Authority is carried out through the Public Administration interoperability platform (iAP) managed by AMA - Agência da Modernização Administrativa, I. P„ upon prior conclusion of a data protection agreement, to be submitted to the National Data Protection Commission for consideration. (cf. Article 9(4)).

It further determined [the previous version of the Project, in paragraph 7 of article 9, that the procedure for attributing the social tariff for the provision of broadband Internet access services be automatic, not requiring a request or request from the

interested parties, and, as proposed in paragraph 2 of article 9, it is up to companies that offer broadband Internet access services to obtain the eligibility of a contract holder, from ANACOM, by sending personal data "tax identification number and tax address".

Article 9(7) of the Project now has a different wording, stating that the automatic allocation of the social tariff for the provision of broadband Internet access services depends on the request of the interested party with the companies that offer access services broadband internet access and after confirming the applicant's eligibility.

In view of the new wording of articles 9 and 7 7.0 of the Project, the CNPD considers that communication by ANACOM to companies that offer broadband internet access services depends on access via webservice, over a secure channel, through the which the tax identification number (NIF) and the tax address of the customer are sent by the companies.



Secondly, the consultation of data by ANACOM with the competent services of Social Security and the Tax and Customs Authority must be carried out through iAP, sending the citizen's N!F and tax address, and in response those services only confirm if fulfills any of the assumptions set out in the Bill (hit/no hit response).

In a third moment, ANACOM, by reference to the NIF and tax address, confirms or informs the company, through the same channel mentioned above in point 5, whether the holder of that data is a potential beneficiary (hit/no hit response).

Notwithstanding the legislative option for processing NIF and fiscal address data, the CNPD points out that the search by address is prone to errors, recommending that the need to use the address be reconsidered, possibly considering the use of the data "postal code" .

This appears to be the solution that ensures that access to personal information is restricted to what is strictly necessary to achieve the intended purpose, thus preventing personal data endowed with some sensitivity (precisely because they identify categories of citizens in a vulnerable economic and financial situation) are subject to processing beyond what is strictly necessary to guarantee an advantage for the data subjects.

In this sense, and in compliance with the principle of minimization of personal data, enshrined in point c) do. the CNPD

recommends that this be the procedure to be adopted.

i. Protocol project for access to personal data in Social Security information systems

8. Firstly, the protocol to be concluded between ANACOM and Social Security is considered, of which, in addition to that authority, the Social Security Institute, I.P., the Social Security Institute of Madeira, I.P.-RAM are parties , the Azores Social Security Institute, I.P.R.A., as well as the Agency for Administrative Modernization, I.P., and the Instituto de Informática, I.P. (the last two entities acting as subcontractors - see clause 9 of the draft protocol).

9. It highlights clause 7.a, whose title is “Prior consent”, and which requires the prior consent of potential beneficiaries of the social internet tariff (TSI) to access their personal data. Such a requirement would seem prima facie excessive, as the processing of personal data that translates into the aforementioned access by ANACOM to the personal information necessary to implement the IST results

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of obligation provided for in a legal diploma, in accordance with the provisions of subparagraph c) of paragraph 1 of article 6 of the RGPD.

10. However, it is recognized here that the provisions of article 6 of the RGPD must be reconciled with the constitutional recognition of political-legislative autonomy for the Autonomous Regions, the CNPD admitting that this is the reason why it is understood that the obligation to carry out of the processing of personal data provided for in the Government's legislative act is not sufficient to legitimize such processing. Not going into this issue in depth, given the time constraints for issuing this opinion, the CNPD limits itself to indicating the possible reason for providing for prior consent.

11. In any case, it is always added that, contrary to what is required in paragraph 1 of clause 7.a, consent does not have to be

express for the purpose of fulfilling the condition of lawfulness provided for in subparagraph a) of Article 6(1) of the GDPR (see Article 4(11) of the GDPR, after the correction it was made to), as long as it is unequivocal. Thus, it is accepted that the data subject's interest in benefiting from the TSI (assumption provided for in Article 9(1) of Decree-Law No. 66/2021, of 30 July, for its attribution), provided that it is preceded by clear information on the fact that the attribution of TSI implies or depends on access, by ANACOM, to certain personal data stored in the Social Security information system for this specific purpose, may constitute an expression of will free, specific, informed and unambiguous regarding the aforementioned processing of personal data, in accordance with the requirements of the RGPD.

12. Therefore, in view of the above, the CNPD is limited to recommending that, in paragraph 1 of clause 7.a, the term "express" referring to prior consent be eliminated.

13. Another clause that needs to be revised is the one concerning the subcontractor's obligations. In subparagraph e) of clause 11,a, conditions are set for carrying out audits and inspections by those responsible for the processing of personal data, which appear to deprive (or remove usefulness from) the power of audit and inspection recognized by subparagraph h) of Article 28(3) of the GDPR. Indeed, it is quite evident that the forecast of a period of one month in advance for the information that the audit or inspection is going to be carried out, as well as the obligation to identify (it is assumed at that moment) which means will be the subject of of auditing and inspection, limits the ratio underlying that provision of European Union law.

14. What the European legislator wants is for the controller to have effective control over the operations carried out by the processor, so, taking into account that the responsibility for non-compliance with the principles and rules of the GDPR falls on him (cf. n. 2 of Article 5 and Article 24 of the GDPR), the possibility of carrying out specific controls on such operations is essential for the person responsible



fulfill this primary obligation. The fact that the exercise of this power of control is subject to such a specified duty of notification

and with such extensive notice does not allow the person in charge (or, at least, is likely to prevent it) to identify possible situations of non-compliance in the execution of the treatment and, therefore, prejudices any actions that the same could adopt to correct or mitigate the effects, in the legal sphere of the holders of personal data, arising from such non-compliance with the protection and personal data regime.

15. Thus, the CNPD understands that the provisions of subparagraphs i) and iii) of subparagraph e) of clause 11,a restrict the scope of the power provided for in subparagraph h) of paragraph 3 of article 28 of the GDPR, recommending , therefore, the elimination of item iii) and the provision of a substantially shorter period in item i) (e.g., a period of 24 hours or 48 hours, which only allows to guarantee that they will be present or available, during the inspection or audit, representatives and/or workers of the subcontractor to guarantee access to the information system).

16. Also in clause 11,a, since the purpose of the processing of personal data is defined, it is not seen that international transfers of data are intended in paragraph g), recommending their elimination, for uselessness.

17. Finally, there are three notes left.

18. The first with regard to subparagraph d) of clause 10.a, noting that it is not understood why the period for storing personal data is not already set in the protocol (especially when in paragraph 2 of clause 7.a, the period of conservation of the document that proves the alleged legality of the treatment is established).

19. The second note concerns clause 14.a, to highlight the generic, almost programmatic nature of its wording, recommending that specific information security measures and guarantee of confidentiality and integrity of personal data be defined therein, so that the clause assumes autonomous utility or relevance in relation to that established in the RGPD, in Law no.

20. The third note, relating to point b) of paragraph 1 of clause 13.a, only serves to clarify that the duty of information that falls on the subcontractor to "inform those responsible for processing any corrections or deletion of personal data», following a request from the data subjects, must be interpreted as meaning that this request is directly submitted to the controller and not to the processor, who only carries out the instructions of the controller regarding the guarantee of such rights.

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ii. Protocol project for access to personal data in the information systems of the Tax and Customs Authority

21. Considering, now, the protocol to be signed between ANACOM and the Tributary and Customs Authority (AT), of which the Agency for Administrative Modernization, I.P., as a subcontractor, is also a party - cf. clause 10 of the draft protocol), only two notes stand out.

22. In clause 1.a, it is recommended to indicate the legal diploma to which the cited articles refer (Decree-Law No. 66/2021, of 30 July).

23. In paragraph 3 of clause 2.a and in point a) of clause 6, it is recommended to eliminate the reference to “privacy conditions”, as they are associated with the data being processed. The expression "data privacy" is not accepted in our legal system, where the protected privacy concerns only natural persons, with a specific protection for personal information (called protection of personal data), in this context, the reference to confidentiality conditions is sufficient. , integrity and security of personal data.

iii. Access to personal data to ensure the duty to disclose information about TSI

24. Finally, it is important to analyze the question posed regarding the «future consecration of the collection and transmission of information with the name and address of potential TSI beneficiaries», by ANACOM, in order to comply with the obligation to disclose information on TSI, provided for in paragraph 2 of article 11 of Decree-Law no. 66/2021, of 30 July.

25. In fact, the perspective of the CNPD, which was not specifically explained in its previous pronouncements, was, and still is, that the duty of information regulated in article 11 must be generic, under penalty of duplication of the processes of consultation or access to personal data.

26. Indeed, the procedure for accessing personal data in the AT and Social Security information systems provided for in article 9 of Decree-Law No. 66/2021, of 30 July, and developed in the draft protocol , complies with the principle of minimizing personal data (enshrined in Article 5(1)(c) of the GDPR), as the CNPD recommended in its last statement.

27. However, prior consultation by ANACOM to the AT and Social Security information systems, in order to know the exact

universe of potential beneficiaries of the TSI, would imply access to personal data for the first time, in order to fulfill the duty to provide information. , which access would then be repeated to confirm the eligibility of those who had expressed an interest in benefiting from the TSI. The provisions of Article 11, if interpreted in this way, renders the entire procedure described in Article 9 of the same statute useless.



cool. Strictly speaking, the prior consultation provided for in paragraph 3 of article 11 would be sufficient to automatically trigger the attribution of the TSI, dispensing with the expression of interest of the data subject and the other steps described in the protocol drafts.

28. However, it is precisely the solution found in Article 9 of the Decree-Law which, in order to give the procedure provided for therein effective effect, obliges to interpret the rule of Article 11(2) in the sense that at stake is only a general duty of information.

29. Also because paragraph 3 of article 11, read without considering the provisions of article 9, would imply the creation of a database at ANACOM of all persons or families who are in a situation of social vulnerability , economic and financial, which is unnecessary for the purpose of attributing the TSI, in view of the procedure provided for in article 9 and in the draft protocols, and appears to be manifestly excessive for the purpose of disseminating information on the TSI, which , under the terms of the same article 11, is already generally made known to customers and potential customers of companies providing this service.

30. It should be noted that Article 11(2) (if read in isolation) also implies that ANACOM provides information to all potential beneficiaries that it identifies, if or when they are informed in the pursuant to paragraph 1 of the referred article, come to ask ANACOM for clarification.

31. In fact, even if it is understood the intention that specific information be provided to each person who fulfills the conditions for eligibility to be a beneficiary of the TSI, the regime provided for in paragraph 3 of article 11 contradicts the underlying logic to article 9 - it being certain that that better intention would be carried out if such information accompanied, for example, the administrative decision on the allocation of social support referred to in article 4 of Decree-Law No. 66/2021, of July 30, with much less impact from the point of view of protection of personal data and the privacy of citizens.

32. Thus, the CNPD now explains its understanding that the provision in paragraph 3 of article 11 of Decree-Law no. 66/2021, of 30 July, is excessive for the fulfillment of the purpose of information on the IST, and that the provisions of paragraph 2 of the same article must be interpreted as providing for a general duty of information, in accordance with the principles of proportionality, in the aspect of necessity, and the minimization of personal data and to provide useful sense to the provisions of article 9 of the same diploma.

III. Conclusion

33. Based on the above grounds, regarding the Draft protocol for access to personal data in Social Security information systems, the CNPD recommends:

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The. the deletion, in paragraph 1 of clause 7.a, of the term "express" referring to prior consent;

B. the elimination of item iii) and the provision of a substantially shorter term in item i), item e) of clause 11.a;

ç. the elimination of subparagraph g) of clause 11,a;

d. the forecast period for the retention of personal data;

and. the densification, in clause 14.a, of the measures to be adopted.

34. Regarding the Draft protocol for access to personal data in the information systems of the Tax and Customs Authority, the CNPD also recommends the corrections suggested above, in points 22 and 23.

35. Finally, the CNPD explains its understanding that the provision in paragraph 3 of article 11 of Decree-Law no. 66/2021, of 30 July, is excessive for the fulfillment of the purpose of information on the IST, and that the provisions of paragraph 2 of the same article must be interpreted as providing for a general duty to provide information, in accordance with the principles of proportionality, in terms of necessity, and the minimization of personal data and to give meaning useful provided for in article 9

of the same diploma

Lisbon, December 30, 2021

Filipa Calvão (President, who reported)