

National Data Protection Commission

OPINION/2022/56

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.

180/XV/1, a, which "simplifies the protection regime against disinformation, ensuring its articulation with the European Action Plan against Disinformation, proceeding with the 1 , amendment to Law No. 27/2021, of 17 de Maio, which approves the Portuguese Charter of Human Rights in the Digital Era», by the Parliamentary Group of the Socialist Party.

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 cj 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, 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 n° 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 paragraphs 2 to 6 of article 6, concerning the right to protection from 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), come here

1 Accessible at <https://www.cnpd.pt/decisoes/historico-de-decisoes/?veam2020&tvpe=4&ent=&pod=l>

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recall that, in another context (which is the political campaign), the European Union provided for a sanctioning regime only when the disinformation process is based on, or takes advantage of, the violation of personal data protection rules - cf. Article 10a of Regulation (EU/Euratom) 1141/2014 of the European Parliament and of the Council of 22 October 2014, last amended by Regulation (EU/Euratom) 2019/493 of the European Parliament and of the Council, of March 25, 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 perspective 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 that nothing has to oppose the repeal of legal norms providing for indeterminate (or inaccurate) public administrative intervention in this matter.

9. In addition, it still does not appear that a provision such as that of paragraph 1 of article 6 in the version designed here (same as the one still in force, only eliminating the reference at the end to the provision in the following paragraph of the same article) has Correspondence with the title of the article. In fact, paragraph 1 of article 6 does not seem to provide for a right to protection against disinformation, being limited to programmatically affirming the State's compliance in Portugal with the European Action Plan against Disinformation, specifying that

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this is intended to protect society against disinformation actions by natural or legal persons.

10. In any case, what is stated in the explanatory memorandum about the European Commission's negotiation “[...] with the major digital platforms [of] drastic measures to combat the various types of disinformation in terms that do not have given rise to disagreement and do not require duplication as they are applied by operators across the Union’. The CNPD points out, in this regard, that some of the measures to combat the various types of disinformation that have been framed by the self-regulation instrument known as the Code of Practice on Disinformation raise concern, due to the risk of censorship and online discrimination with a direct restrictive impact on freedom of expression and opinion. The fact that the control over statements, dissemination of information and expressions of opinion in the digital environment is being assumed by private entities - those responsible for making digital platforms available - does not reduce that risk, as there is, strictly speaking, no objective system. and independent control of such protection against disinformation.

III. Conclusion

11. On the grounds set out above, the CNPD, from the perspective of the protection of personal data, has nothing to oppose

the repeal of paragraphs 2 to 6 of article 6 of Law No. 27/2021, of 17 May, noting, however, that the provisions of paragraph 1 of article 6, in the projected version, do not appear to be consistent with the title of the article.

Lisbon, June 28, 2022

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