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National Data Protection Commission

OPINION/2022/99

I. Order

1. The Directorate General for Consumers (DGC) asked the National Data Protection Commission (CNPD) to issue an opinion on the draft Ordinance aimed at approving the functionalities of the «Platform for the termination of contracts», to which operators are subject of electronic communications, pursuant to paragraphs 5 and 6 of article 138 of Law no. 16/2022, of 16 August.

2. The CNPD issues an opinion within the scope of its attributions and competences, as an independent administrative authority with authoritative powers to control the processing of personal data, conferred by paragraph c) of paragraph 1 of article 57, paragraph b ) of paragraph 3 of article 58 and paragraph 4 of article 36, all of Regulation (EU) 2016/679, of April 27, 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 no. 58/2019, of 8 of August, which implements the GDPR in the internal legal order.

3. Upon request from the CNPD, an impact study on the protection of personal data was sent.

II. Analysis

4. Law No. 16/2022, of August 16, which approved the new Electronic Communications Law, transposing three European Directives into the national legal order, including EU Directive 2018/1972 of the European Parliament and of the Council , of December 11, 2018, which establishes the European Electronic Communications Code (Electronic Communications Law - hereinafter ECL), came, in its Title V, to enshrine, among other aspects, the rights of end users of electronic communications services.

5. Within the scope of the rules for the protection of these users, the forms of termination of contracts on the initiative of end users and consumers are established.

6. Under the terms of paragraph 5 of article 138 of the aforementioned ECL, it is foreseen that consumers can exercise their

rights of termination through an electronic platform created for the purpose and managed by the Directorate-General for Consumers ( DGC) and whose functionalities must be approved by decree of the member of the Government responsible for consumer protection.

7. Thus, with a view to facilitating the termination of contracts and the mobility of consumers and complying with the above-mentioned legal provision, this draft ordinance aims to establish the functionalities of the new platform called «Platform for Termination of Contracts», hereinafter «Platform ».

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8. Under the terms of the Preamble, the Platform will enable consumers to request, via the web, information on the electronic communications contracts they are holders of, as well as submit requests for the termination of these same contracts.

9. The development of the platform will take place in two phases. In the first, the contract termination features will be implemented through denunciation and communication of the death of the contract holder. The second phase will result in the functionality of suspending the contract and ceasing due to expiry or termination.

10. The impact study that the DGC sent to the CNPD concerns only the first phase of implementation.

i. previous note

11. It is important, firstly, to clarify a constant imprecision in the impact study on the protection of personal data, regarding the non-obligation to carry out the assessment, as it does not fit into the situations provided for in article 35 of the RGPD.

12. It should be noted that, in this process, carrying out the impact study is required, not by the GDPR (nor by Regulation No. 798/2018, of November 3, which, curiously, was not mentioned in that study), but by Article 18(4) of Law No. 43/2004, of August 18, amended by Law No. 58/2019, of August 8, which obliges requests for an opinion on provisions laws and regulations in preparation must be sent to the CNPD by the holder of the body with legislating or regulatory power, instructed with the respective impact study on data protection, as the CNPD pointed out to the applicant as soon as it received the

request for an opinion.

ii. Participants in the processing of personal data

13. In the impact study, the DGC, ANACOM as the regulatory and supervisory body and all electronic communications operators in the residential sector are considered to be responsible for the treatment, insofar as they are legally obliged to ensure the exercise of the right to terminate contracts pursuant to paragraphs 5 and 6 of article 138 of the ECL. In the point of the impact study AIPD 3.2.1 "Team and Contacts of data controllers" it is stated that the "referred entities will be responsible to the extent of their intervention" which stems from the respective legal basis. However, in point 3.5 it is mentioned that "After the identification of the joint controllers for the treatment...", raising doubts about whether this is a situation of joint responsibility falling under article 26 of the RGPD.

14. Now, data controller, pursuant to Article 4(7) of the RGPD, is understood to be “the natural or legal person, public authority, agency or other body, which individually or jointly with others determines the purposes and means of processing personal data; whenever 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 laid down by Union or Member State law.”

15. However, as the purpose and means of processing were defined by Law No. 16/2022, of August 16, it is silent as to who is responsible for the treatment, limiting itself to mentioning that the DGC is the entity responsible for managing the Platform.

16. In fact, the processing carried out through the Platform brings together three different types of entities with different functions: the DGC, ANACOM and all electronic communications operators in the residential sector.

17. The DGC, as the entity responsible for the functioning of the Platform, is responsible for the processing of data carried out in this context, being specifically responsible for the security of the platform and the confidentiality and integrity of the information processed therein. And it will also be responsible for processing data resulting from the creation of a database that seems to be implicit in paragraph 2 of article 6 of the draft order (see below).

18. In turn, it appears that ANACOM is only a user of the Platform, who accesses data within the scope of its powers and supervisory powers, and that operators are also users of the Platform, which they access only to process requests that are directed to them.

19. Therefore, both the possible joint responsibility and the qualification of ANACOM and the operators as subcontractors are ruled out.

20. In effect, both ANACOM and each of the operators are, from the point of view of data protection, third parties, within the meaning of paragraph 10) of article 4 of the RGPD.

21. The Ordinance must express this reality, for reasons of certainty and legal certainty, as well as the determination of the specific purposes of accessing the Platform for each type of user

22. It is important here to analyze the intervention of the DGC, not as a controller in managing the Platform, but as a user for statistical purposes. Indeed, in the impact study it is indicated that the personal data provided by the user will be accessible to the DGC, specifying the statistical purpose, an issue that is not regulated in the Ordinance.

23. Regarding the use by the DGC of personal data for statistical purposes, it is only mentioned, again in the impact study, that «they will be anonymized and intend to count only the number of interactions, number of initiated processes, number of canceled processes and number of processes completed». Now, under the terms of



Article 89(1) of the GDPR, the processing of data for statistical purposes is subject to adequate guarantees for the rights and freedoms of data subjects, which ensure the adoption of technical and organizational measures that guarantee, in particular, respect by the principle of data minimization.

24. However, for the analysis of the parameters referred to above, access to personal data is not necessary, but only the creation of an automatism that obtains the values of the desired parameters and makes them available to the DGC.

25. Thus, as neither the ECL nor the draft Ordinance contains any forecast on the use of the Platform for statistical purposes, the CNPD recommends that the Ordinance determine that the values of the parameters related to the number of of

interactions, number of processes started, number of processes canceled and number of processes concluded.

26. If access to personal data proves necessary, which for those purposes is not achieved, the Ordinance must regulate the reuse of personal data for this purpose, explaining the basis for the reuse of such data for this purpose, as well as the process of anonymization that may be carried out, in compliance with paragraph 1 of article 89 of the RGPD.

27. The fact that the DGC is responsible for the processing of personal data carried out on the Platform does not exempt each operator from responsibility for the quality of the data entered on the Platform, i.e., regarding its accuracy and updating.

28. We take this opportunity to recommend that the wording of paragraph 1 of article 6 of the draft ordinance be amended, as the platform is not the legal subject of the obligation to ensure compliance with the RGPD, but rather, as the main , the DGC.

iii. Platform purposes

29. Article 2 of the draft ordinance describes the purposes of the platform, however in terms that cause some perplexity.

30. Firstly, paragraph 4 of article 2 states that «The Platform enables communication with other computerized systems that already exist or that may be created after the entry into force of this ordinance».

31. Taking into account that, for the purposes described, the platform only has to ensure «[...] electronic communications operators access to the respective requests for information and termination of electronic communications contracts, allowing their management and treatment", as provided for in paragraph 3 of the



same article, and also access by ANACOM insofar as this is necessary for the exercise of its powers, it is not seen that other computerized systems that already exist or that will be created are relevant here.

32. In other words, the vague and indeterminate content of this provision is inadmissible, it being essential that the categories of entities that have to access the platform to comply with their legal obligations or exercise their legal powers are identified, which is why it is recommended to amendment of number 4 of article 2, specifying the systems with which the platform communicates.

33. In addition, in paragraph 5 of article 2, there is a reference to the General Secretariat of the Ministry of Economy and the

Sea.

34. Apparently, this entity will be responsible for hosting the platform in the cloud. However, the capacity in which it intervenes is not identified, which can only be that of a subcontractor, pursuant to paragraph 8) of article 4 of the RGPD, and there must be an agreement that regulates this subcontracting relationship, pursuant to article 28. ° of the GDPR.

35. In this regard, it is underlined, because once again the impact study is silent, that, from the perspective of the data protection regime, maximum of articles 44 and following of the RGPD, it is essential to ensure that the servers of the cloud are located in the territory of Member States of the European Union or in a third State that ensures an adequate level of protection of personal data, drawing special attention to the case law of the Court of Justice of the European Union on this matter.

36. A specific technology is prescribed, which poses specific risks, without taking care to regulate the necessary safeguards that must be adopted. It is reaffirmed that this technology was not analyzed in the impact study and for this reason the nature and model of the cloud that will store personal data is unknown.

37. It is always alert to the fact that, in paragraph 4 of article 2, the Resolution of the Council of Ministers is misidentified. In any case, it should be noted that Council of Ministers Resolution No. 41/2018, of March 28, is silent with regard to cloud storage, so it remains to be known what security requirements are observed.

iv. Personal data processed

38. With regard to personal data subject to processing, the Draft Ordinance is silent. Only in the case of requests for contractual information does it refer that the same should be done in (...) a specific form on the Platform, being mandatory to fill in, namely, the fields that identify the consumer and the



electronic communications operator" (cf. paragraph 1 of article 4), with the doubt remaining whether the filling in is mandatory for the form or for the fields for collecting personal data.

39. It is in the impact study that the personal data for applicants for termination of contracts are listed: email address, name, civil identification document number, tax identification number, operator responsible for the contract, number of client and

contract, death certificate, adding that all data is mandatory.

40. It is not understood why the Ordinance is silent on the categories of personal data processed and on the optional or mandatory nature of its completion. Its explicit prediction is recommended. As for the conservation of personal data from requests for contractual information and termination of contracts, paragraph 2 of article 6 of the draft ordinance states that requests for contractual and termination information submitted on the platform are stored for a period of 8 years, explaining in the impact study that this deadline was defined "taking into account the deadlines stipulated for administrative offense proceedings in the General Regime of Offenses".

41. However, the ordinance is silent as to the existence of this database, its purpose and where it resides.

42. On the other hand, if the purpose is to monitor compliance with the obligations provided for in article 138 of the ECL, it is not achieved, which is why the conservation of the respective responses by operators is not also foreseen; unless the only intention is to keep the requests to which there was no response, which would comply with the minimization principle of Article 5(1)(c) of the RGPD and would justify setting a deadline corresponding to the deadline statute of limitations, pursuant to Article 5(1)(e) of the GDPR. However, if that is the case, it is important to delimit the relevant requests in paragraph 2 of article 6 of the Project.

v. Orders and respective processing

43. At the beginning of any procedure on the Platform, the consumer must "(...) indicate and validate his email address, for the purpose of receiving an electronic communication with a link to proceed with the order" (cf. n. 3 of Article 3 of the Project).

44. This initial procedure raises reservations for the CNPD. Although the need to validate the email address is understood, sending a link in an email message to be able to proceed is a bad practice, as it enhances phishing attacks.



45. In fact, good practices for using the Internet recommend not following links, especially coming from addresses that are not part of the contact list and even in this situation there are risks that cannot be

must be neglected.

45. Furthermore, there are alternatives that appear to be safer. By way of example only, it is indicated the sending of a verification code to be inserted on the Platform, thus guaranteeing the consumer's access to the indicated email box and allowing the order to be related to that email. It is also important to limit the time period for inserting the verification code on the Platform.

47. Accordingly, Article 3(3) must be amended accordingly.

48. The impact study refers to this procedure, but it is, and could not be, silent on weighing the associated risk. Additionally, the impact study assumes the obligation, in order to proceed, for the consumer to agree with the so-called Privacy Policy of the site.

49. Now, the Privacy Policy is nothing more than the means through which the controller guarantees the right to information provided for in article 13 of the RGPD and the data subject does not have to agree with it, seeming to want to attribute This agreement has the value of consent, which it does not have. Should this procedure be changed.

50. With regard to contractual information requests, Article 4(2) requires authentication using a mobile digital key. However, the impact study also mentions authentication with the Citizen Card.

51. The CNPD recognizes the adequacy of authentication using these two methods, but considers that there are other commonly used means for identifying citizens before the administration that would allow the universe of people with capacity to use the Platform to be more inclusive, not discriminating against consumers because they do not have a Citizen Card.

52. Indeed, there are several public administration platforms that provide authentication with the credentials of the Tax Authority, also available to citizens who do not have a Citizen Card, but who can certainly have contracts with electronic communications operators.

53. Accordingly, Article 4(2) must reflect the various possibilities for authenticating consumers.

54. It is perplexing to note that authentication is not required for requests to terminate contracts (cf. Article 5 of the Ordinance), although it is referred to in the impact study.

55. Bearing in mind the consequences that contractual termination triggered by third parties may have for the consumer, it is essential that the authentication of the person requesting the amendment or contractual termination is guaranteed.

56. It is also verified that the draft ordinance is silent on the procedures adopted to respond to the rights of data subjects. And not even in the impact study is the flow to respond to the exercise of rights of holders explained, only mentioning that this information is «available for consultation through the area dedicated to the Privacy Policy available on the main page of the platform».

57. It is recommended, therefore, that the project specify, at least, the means for its exercise.

saw. Integration of electronic communications operators in the Platform

58. Despite the heading of article 7 of the Project, it is silent on the requirements and technical procedures for the integration of electronic communications operators in the Platform, the impact study is also silent on this matter, therefore, it is unknown , how communications operators will access requests and how they will provide the respective responses.

59. Thus, it is imperative that the Ordinance defines the procedures for accessing and transmitting data between the Platform and the communications operators, specifying that, in the event that the interaction is through direct access to the Platform, the access credentials are nominal, generic credentials per operator are not admissible. If there is interconnection between the systems, namely through web services, measures must be taken to ensure that only authorized machines can process the requests.

60. In both cases, it is essential, pursuant to the provisions of Article 32 of the R6PD, that there are audit records of all operations carried out.

III. Conclusion

61. Under the terms and on the grounds set out above, the CNPD recommends that in the Ordinance:

The. it is stated that the Directorate-General for Consumers acts as data controller and ANACOM and electronic communications operators act as third parties, also determining the specific purposes of accessing the Platform for each type of user;

B. it is stated that the General Secretariat of the Ministry of Economy and the Sea acts as a subcontractor, pursuant to paragraph 8) of article 4 of the RGPD;

w. it is determined that the values of the parameters related to the number of interactions, number of initiated processes,

number of canceled processes and number of completed processes are automatically produced and made available to the DGC;

d. the wording of paragraph 1 of article 6 is amended, as the platform is not the legal subject of the obligation to ensure compliance with the RGPD, but rather, primarily, the DGC;



It is. if paragraph 4 of article 2 is amended, specifying the systems with which the platform communicates;

f. the safeguards to be adopted for the use of cloud storage are regulated;

g. the categories of personal data processed are explicitly provided for and the optional or mandatory nature of filling them out is clarified;

H. Article 6(2) defines the relevant requests;

i. paragraph 3 of article 3 is amended, in order to consider a safer alternative for validating the email address;

j. Article 4(2) is amended to reflect the various possibilities for authenticating consumers;

k. the authentication of those who request the amendment or contractual termination is guaranteed;

l. specify the means for exercising the rights of the holders of personal data;

m. procedures for accessing and transmitting data between the Platform and communications operators are defined;

n. provision is made for mandatory audit records of all operations carried out.

Approved at the meeting of November 2, 2022

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