National Data Protection Commission

OPINION/2021/53

I. Order

1. The Commission on Economy, Innovation, Public Works and Housing of the Assembly of the Republic asked the National Data Protection Commission (CNPD) to issue an opinion on the Draft Law No. 83/XIV/2.3 (GOV), which «Approves the Electronic Communications Law and transposes Directive (EU) 2018/1972, which establishes the European Electronic Communications Code».

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.

II. Analysis

3. The Draft Law, which aims to define the new regime for electronic communications, in transposition of Directive (EU) 2018/1972 of the Parliament and of the Council, of 11 December 2018, also introduces changes in other legal instruments, highlighting if, due to their direct relevance to the processing of personal data, amendments to Law No. 41/2004, of 18 August, amended by Law No. 46/2012, of 29 August (hereinafter, Privacy Electronic Communications).

4. The present analysis will begin by focusing on these last amendments, and will then focus on the Electronic Communications Law.

i. Amendments to the Electronic Communications Privacy Act

5. With regard to the Law on Privacy in Electronic Communications, article 3 of the Draft Law amends articles 7 and 10. Essentially, the changes relate to the expansion of the universe of organizations to which personal data on the location of emergency communications1 may be communicated, encompassing not only organizations that have the legal competence to

receive such communications but also those competent to treat them. As for this change, the CNPD has no objection, given the adequacy and need for access to such personal data by the universe of organizations typified therein.

1 Strictly speaking, in the Draft Law, the term emergency calls is replaced by emergency communications, an amendment that does not give rise to any reservation from the perspective of the protection of personal data.

6. Note that the name of the personal data processing operation is also changed - now using the concept of availability instead of transmission. The CNPD admits that the proposed amendment aims at more agile ways of accessing information on the location of emergency communications, which is understandable, without prejudice to the fact that its execution must take into account the principles and rules provided for in the RGPD.

7. Just a note regarding the exemplary location data reference. It is not possible that other location data may be at stake other than information on the location of the caller, taking into account the definition contained in the new regime concerning electronic communications introduced by the Draft Law.

8. Indeed, taking into account the definition of information on the location of the caller contained in subparagraph p) of paragraph 1 of article 3 of the proposed Electronic Communications Law, which thus covers the location of those who make emergency communications , whatever the type of communication used (e.g., call, SMS), it is not understood that other location data may be relevant here.

9. Therefore, the CNPD recommends revising the proposed wording for paragraph 2 of article 7 and paragraph 3 of article 10 of the Electronic Communications Privacy Law, in order to eliminate the exemplification of location data or, alternatively, eliminate the reference to location data, keeping the reference only to the information about the location of the caller.

ii. The Electronic Communications Law

10. In general, the proposed new Electronic Communications Law maintains the provisions of the previous law with regard to the processing of personal data. With two relevant exceptions.

11. Let's start with the simplest one, which concerns a terminological change in article 126 of the Law. At issue is the

regulation of the contract prevention mechanism, but, where subscribers previously appeared, the proposed wording refers to end users.

12. Bearing in mind that the concept of end user, defined in subparagraph ggg) of paragraph 1 of article 3, is quite broad2, it remains to be clarified whether the persons whose data appear in the shared database - and which is a database of debtors - are the actual users of electronic communications services, or if they are those who have contracted the services. In concrete terms, it is not clear whether, in the case of services provided to

2 According to Article 3(1)(ggg), the end user is "the user who does not offer public electronic communications networks or publicly available electronic communications services", the user being " the natural or legal person who uses or requests an electronic communications service accessible to the public" (cf. point fff) of paragraph 1 of the same article).

a company, who will integrate the database is the company that contracts the electronic communications services or if it is the workers as effective ("end") users of the services.

13. Considering that at stake is a "negative" database for the persons registered therein, preventing them from entering into new contracts for the provision of communication services, it is important to clarify precisely the universe of those prevented, otherwise there is a risk of discrimination in the access to communications services of a natural person (in the example given above, a worker) who is not attributable to the non-payment of invoices.

14. Interestingly, it is believed that by mistake, the only provision of article 126 in which the reference to subscribers was kept is the one that provides for the right to erase data after payment of the debt (cf. point h) of paragraph 3 of that article).

15. The CNPD therefore recommends specifying in Article 126 the subjective universe of application of this regime regarding the mechanism for preventing contracting, to which, consistently, the respective rights must correspond. But the great novelty of this Draft Law, with regard to the processing of personal data, resides in subparagraph ss) of paragraph 1 of article 3 of the Electronic Communications Law. There, the concept of remuneration is defined as "a consideration for the provision of electronic communications services, which can be provided by the end user or by a third party, covering the payment of a

pecuniary amount, as well as cases in which, as a condition of access to the service, , are requested or provided, directly or indirectly, personal data within the meaning of Regulation (EU) 2016/679, of the European Parliament and of the Council, of 27 April 2016, or in cases where access to other information generated is allowed automatically or the end user is exposed to advertising'.

16. However, by assuming in a legal norm that the remuneration of a service, in the case of electronic communications, may correspond to the provision of personal data, the possibility of monetization or commodification of personal data is recognized, which, in the Portuguese legal system and in the articles of the European Union's legislative acts has never been recognized.

17. In fact, such a legal provision is based on a materialist view of personal data, embedded in the perspective of the protection of personal data as a manifestation of the right to property over the data, which is clearly not the underlying ratio of the Constitution of the Portuguese Republic (CRP) and the Charter of Fundamental Rights of the European Union (hereinafter, the Charter). On the contrary, Article 35 of the CRP and Article 8 of the Charter aim to guarantee and promote the dignity of the human person, with the right to data protection being a fundamental guarantee of respect for private life, freedom and free development. personality, as well as the right to non-discrimination.

18. Precisely because this is the reason for enshrining that fundamental right, the legal regime for the protection of personal data, and specifically the GDPR, recognizes that, in the context of contractual relationships, the contract may justify the collection and subsequent processing of personal data of the co-contractor as long as they prove necessary for its conclusion or execution (cf. point b) of paragraph 1 of article 6 of the GDPR); but not more than this data: the data strictly necessary for the conclusion or performance of the contract to which the data subject is a party.

19. What the aforementioned legal definition of remuneration implies is an alleged legitimation of the processing of personal data not necessary for the performance of the contract based on an implicit contractual clause on the price to be paid for the electronic communications service - and which would cover, not only the personal data actively provided by the data subject, but also those observed (relating to the data subject's interaction in the use of the services, including cookies) during the

performance of the contract.

20. However, this condition of lawfulness or legitimation of the treatment is not supported by the RGPD or the Directive on privacy in electronic communications, transposed into national law by Law No. 41/2004, of 18 August, in the wording given by Law n.° 46/2012, of 29 August, nor in any other rule of European Union law or national law3. In fact, the Directive that is intended to be transposed does not define the concept of remuneration, a concept that, incidentally, was not defined in the previous Electronic Communications Law.

21. It is therefore very strange that the national legislator now chooses to subvert the legal regime for the processing of personal data - too much, in the context of a law that does not have such a regime as its main objective -, changing the data protection paradigm in Portugal and Europe, in gross contradiction with the GDPR and the CRP.

22. Of course, the provisions of recitals 15 (in fine) and 16 of Directive (EU) 2018/1972 will be invoked, which have no effect in the articles of this European law. In fact, recital 16 admits that the remuneration for this type of service may cover personal data provided and observed, but, as it can be read, because '[in the digital economy, market participants increasingly consider that information relating to users have a monetary value'. However, the assumed pressure of the market objectively implies a change in the perspective under which the Law and the Law view citizens: from subjects of Law they become mere tradable goods.

3 In this regard, reference should also be made to the recent jurisprudence of the Court of Justice of the European Union in the judgment of 1 October 2019, in the Planet49 case, which reaffirms the conditions for the validity of consent, in relation to cookies and private information collected and further processed from them, EU:C:2019:801

23. We insist that the perspective explained in the aforementioned recitals is not translated into the text of the Directive that is intended to be transposed here. And it does not, precisely because the provision of a provision defining the concept of remuneration such as that found in this Draft Law would grossly conflict with the provisions of the GDPR, by admitting that the processing of personal data not necessary for the performance of a contract could be consideration for a service provided in

the context of the contractual relationship. Let's see.

24. Article 6(1) of the GDPR provides as a source of lawful processing of personal data - as already done by Directive 95/46/EC and Law No. 67/98, of 26 October, which transposed it - the contract to which the data subject is a party. Only when the controller intends to carry out other processing operations (not necessary for the performance of the contract) can he seek another legal basis among those provided for in the same article. As can easily be concluded from reading such a rule, the relevant basis would be the consent of the data subject to legitimize operations on data not necessary for the performance of the contract, under the terms provided for in subparagraph a) of paragraph 1 of the same article.

25. However, consent, in order to be legally relevant, must be informed and free - under the terms of Article 4(11) of the GDPR (and the general rules of law). However, if the provider of a service requests personal data from the data subject as a condition of providing the service, it is not clear that there is freedom in the action of the data subject who "knowsly provides personal data, [...] directly or indirectly to the provider»4, due to the conditioning resulting from the need to provide the service, which is a direct violation of Article 7(4), In other words, consent (explicit or implicit) is only legally relevant when «the act of giving or refusing consent does not have any negative consequences"5, so that "[consent should not be considered to have been given voluntarily if the data subject does not have a true or free choice or cannot refuse or withdraw consent without be harmed»6.

26. Thus, the GDPR does not provide that the lawfulness of processing personal data (not necessary for the performance of the contract) can be based on the mere consideration of a service, and given that consent is only a reason for lawfulness where there is freedom to issue it, the definition of remuneration contained in subparagraph ss) of paragraph 1 of article 3 of the proposed Electronic Communications Law not only directly violates the rule of paragraph 4 of article 7 of the RGPD, but also is creating a new basis for the lawfulness of treatment, outside the

4 Cf. Recital 16 of Directive (EU) 2018/1972.

5 Cf. GDPR Consent Guidelines, revised and approved on 10 April 2018 by the Article 29 Working Group, and assumed by the European Data Protection Board on 25 May 2018, available at http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=623051

6 Cf. recital 42 of the GDPR, brought up here as it reinforces the provisions of paragraph 1 and paragraph 4 of article 7 of the same diploma.

mandate given by the Union legislator and in clear violation of GDPR rules, in addition to reversing the humanist conception of the right to protection of personal data underlying the CRP and the Charter.

III. Conclusion

27. On the grounds set out above, in relation to the changes introduced by Article 3 of the Draft Law, in the Law on Privacy in Electronic Communications, the CNPD recommends revising the proposed wording for paragraph 2 of Article 7. and paragraph 3 of article 10, eliminating the exemplification of location data or, alternatively, the reference to location data (only keeping the mention of information about the location of the caller).

28. With regard to the proposal for a new Electronic Communications Law, the CNPD recommends revising article 126, in order to specify the universe of people who can integrate the shared database of debtors, since the The expression end-users also seems to allow users of communications services who have not contracted the services and who are not directly responsible for the payment of bills to be included.

29. Finally, the CNPD vehemently rejects the concept of remuneration contained in subparagraph ss) of paragraph 1 of article 3 of the proposed Electronic Communications Law, since it recognizes the possibility of monetization or commodification of personal data , creating a new basis for the lawfulness of processing, outside the mandate given by the Union legislator and in clear violation of the rules of the GDPR, in addition to inverting the humanist conception of the fundamental right to the protection of personal data underlying the CRP and the Charter, forgetting the dignity of the human person as the first and last end of the consecration of rights, freedoms and guarantees.

Approved at the meeting of May 11, 2021

Filipa Calvão (President)