

On the processing of personal data in the context of smart networks of electricity distribution

I. Introduction

The intelligent electric energy distribution networks are now a reality in Portugal, as well as in the rest of Europe. Provided for and imposed by European legislation – see Directives 2009/72/EC, of 14 August 2009, and 2012/27/EU, of 25 August October 2012, which was transposed into our legal system by Decree-Law 68-A/2015, of 30 April -, they imply the remote transmission of information on the distribution and consumption of electricity, using meters smart devices, corresponding to an 'electronic system that measures energy consumption, providing more information than a conventional accountant, and who is prepared to transmit and receive data via electronic communications'.¹ In fact, they are information collected and transmitted concerning the 'exact actual energy consumption electricity' in relation to each final consumer and respective 'actual period of use'², with an intense frequency (every 15 minutes – see article 7 of Ordinance no. 231/2013, of 22 July, and subparagraph f) of paragraph 1 of the respective Annex I), with the declared objective of promote the rational and efficient production, distribution and supply of energy electric.

In this way, it is concluded that intelligent electric energy distribution networks imply the processing of personal data whenever final consumers are natural persons, as they involve the collection, conservation, communication and analysis of information relating to identified or identifiable individuals – cf. items 1) and 2) of the article 4 of Regulation (EU) 2016/679, of 27 April 2016 (General Regulation on Data Protection, henceforth GDPR).

If, as has been said, these data mainly correspond to the exact energy consumption

electricity, the truth is that the detail and frequency of communication of consumption related to

1 Cf. definition provided for in paragraph 28) of article 2 of Directive 2012/27/EU of 25 October

2012

2 Cf. Article 9(1) of Directive 2012/27/EU.

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Process No. 00000/2018 1v.

(tendentially) all final consumers in Portuguese (and European) territory

also allows to deduce a wide range of information related to them (e.g.,

when they are at home, if there is only one person or more, who

appliances are being used) and the creation and analysis of profiles on all of them

based on the activities they carry out at home, with a significant impact on the

your private life.

In fact, these networks imply the massive collection of detailed personal data, the

which are, by imposition of European and national legislation, kept by

considerable periods of time (consumption data must be kept for two

and three years, pursuant to Article 17(8) of Decree-Law No. 68-A/2015, of 30 December

April, which transposes Directive 2012/27/EU of 25 October 2012). This represents a

high risk for the personal data of end customers, which Decree-Law No. 68-A/2015,

of 30 April, does not prevent, despite the fact that subparagraph a) of paragraph 2 of article 9 of the aforementioned Directive

impose on Member States the obligation to ensure consumer privacy

finals.

The aforementioned impact on the privacy of data subjects is not only reflected in the

marketing adapted to the detailed profile of the customer or the risk of discrimination

(namely, in the price to be charged for the distribution and supply of

energy), as well as the risk of misuse of information, business with the

sale of the information and also the intention to use it for research purposes

criminal³.

In addition, the massive set of information about habits or characteristics

(including health status) of the people that georeferencing and the Internet of

Things allows you to collect potential risk of combination or relationship of the different

types of personal data, making it imperative to adopt measures to mitigate such

impacts.

³ In this sense, v. opinions of the Working Group of Art. 29 (which brought together the commissioners of

data protection of the Member States of the Union) no. 12/2011, of 4.04.2011, and no. 4/2013, of

22.04.2013 (WP205), accessible at [https://ec.europa.eu/justice/article-29/documentation/opinion-](https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp183_en.pdf)

[recommendation/files/2011/wp183_en.pdf](https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp183_en.pdf)

and

in

[https://ec.europa.eu/justice/article-](https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp205_en.pdf)

[29/documentation/opinion-recommendation/files/2013/wp205_en.pdf](https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp205_en.pdf)

Process 2

It is taking into account these risks, and following ERSE Regulation No. 610/2019,

of 2 August, relating to Intelligent Grid Services for Energy Distribution

Electricity, – which already takes care of some aspects of the data protection regime –, that the

CNPD believes that it is opportune to issue a set of guidelines for all those who

intervene in the intelligent electric energy distribution network in the national territory, with

the purpose of ensuring the minimization of the impact of the processing of personal data

on the rights of the data subjects, in particular on fundamental rights

privacy and the protection of personal data.

Thus, as a national supervisory authority with the attribution defined in point d)

of paragraph 1 of article 57 of the GDPR (in conjunction with the provisions of article 3 of Law no.

58/2019, of August 8), the CNPD defines a set of guidelines on the processing of personal data in the context of smart electricity grids.

This guideline is addressed to distribution network operators in low voltage, low voltage suppliers and other entities that access the personal data in the context of smart electricity distribution networks.

1. Verification of the lawfulness of the processing of personal data

Pursuant to Article 5(2) of the GDPR, it falls to the data controller personal data the duty to verify in advance and demonstrate that the treatment that performs respects the provisions of the GDPR.

It is important, from now on, to list the entities that process personal data and who, to that extent, present themselves as responsible for the respective treatments (cf.

Article 4(7) GDPR). Here, operators of

low voltage distribution network and traders. but also assume

this same quality, the logistics operators for switching suppliers, as well as as other entities that are entitled to access consumer data by

will of the data subject himself (third parties, in the terminology used in the ERSE Regulation No. 610/2019, of 2 August).

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Process no. ???/2018 2v.

As responsible, the first obligation that falls on the different subjects

intervening in the intelligent electric energy network is to verify the legality of the treatment and, therefore, if one of the conditions set out in article 6 of the GDPR is fulfilled.

In relation to some of the intervening subjects, as is the case with the traders

in low voltage, the processing of personal consumption data in detail is necessary the conclusion and performance of a service provision contract for the supply of

energy with the data subject concerned (cf. point b) of paragraph 1 of article 6 of the GDPR), or

stems from a legal obligation, developed at the regulatory level, as with the low voltage distribution network operators (cf. subparagraph c) of paragraph 1 of article 6 of the GDPR).

Also the processing of data carried out by the logistic operator of change of trader will find its legitimacy within the scope of the contract with which the holder famous.

However, the other entities, including the installation trader (when not therefore coincides with the supplier of the supply service) as to the data relating to the load diagrams (i.e. information on consumption every 15 minutes), will not be able to access the user's personal consumption data without the consent of this or without a contract concluded with the user for the execution of which access to the data is necessary (cf. points a) and b) of paragraph 1 of article 6 of the GDPR).

In this regard, it is important to point out that consent, in order to be legally relevant as a condition that legitimizes access to personal data by entities third parties, must fulfill the attributes provided for in point 11) of article 4 of the GDPR, i.e., be informed, free, specific and explicit. So the first step you are taking entities have to give, in order to obtain consent, is to provide clear information and rigorous on this data processing, in accordance with Articles 13 and 14 of the GDPR.

For the purpose of verifying the lawfulness of the data processing, those responsible also have to ensure compliance with the principles defined in paragraph 1 of article 5 of the GDPR, having be aware that the purpose for collecting this detailed consumption data is, in cases of treatment by low voltage distribution network operators and by suppliers, based on the law and ERSE Regulation No. 610/2019. In truth, the processing of personal data under the responsibility of network operators

Process 3

distribution and traders are intended to fulfill their

reading, verification and invoicing obligations (cf. paragraph 4 of article 11 of the same ERSE Regulation). Traders may only process the data for other purposes, if they meet the conditions set out in subparagraphs a) or c) of paragraph 1 of article 6 of the GDPR, since the criteria defined in paragraph 4 of that same article do not check *prima facie* in this situation.

With regard to third parties, access will have the purpose or purposes that appear in a contract entered into with the data subject, or in the declaration of consent, remembering here the importance of defining it in clear terms for that this consent can be considered specific, as required by subparagraph 11) of article 4 of the GDPR.

Special attention also deserves the guarantee of the principles of proportionality of the processing and minimization of data enshrined in subparagraph c) of paragraph 1 of article 5. of the GDPR.

As explained below, the verification of whether the processing of personal data, in the context of smart electricity grids, respects these principles will imply the carrying out an impact study on the protection of personal data, under the terms defined in article 35 of the GDPR.

2. Minimization of the Impact on the Protection of Personal Data

In fact, when dealing with personal data in the context of technology that involves the collection and analysis of data of a highly personal nature, particularly concerning privacy, an impact assessment is needed on data protection (cf. Article 35(1) of the GDPR, as well as paragraph 9 of the Regulation of CNPD No. 1/2018, published under No. 798/2018 in the *Diário da República* 2nd Series, of November 304).

It is recalled that the impact study aims to detect risks to human rights of the holders and find the necessary measures to eliminate or minimize each

one of the identified risks. It must therefore begin by identifying the operations of

4 Accessible at https://www.cnpd.pt/bin/decisoos/regulamentos/regulamento_1_2018.pdf

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Process no. ???/2018 3v.

processing for each intended purpose, as well as the categories of data subject to the treatment, to then identify the risks to which such operations are susceptible to represent for the rights of data subjects, evaluating them or ordering them according to criteria of severity and probability of occurrence⁵. This risk analysis should be substantiated in light of the principles of proportionality and data minimization personal.

Only then should measures be defined to prevent or mitigate the risks identified. It is noted in this regard that, as a measure to mitigate the impact on privacy of data subjects caused by the regular and massive collection of data consumption details and for its obligation of conservation for long periods of time, was, on the recommendation of the CNPD, defined in subparagraph b) of no. of ERSE n.º 610/2019 that the identification of consumption (on the electronic availability of the data or in another electronic means) is not made by the name of the final customer, when it is a natural person, but rather by the Point of Delivery.

Considering that the smart grid of electric energy implies carrying out operations processing of personal data by different controllers, it would be advantageous if the impact study was carried out jointly by the various stakeholders or, at the least, by the main stakeholders (operator of distribution network and

traders).

The study must also be accompanied by data protection measures from the design and by default (cf. article 25 of the GDPR).

3. Rights of data subjects, in particular the right to information and the right to access

5 For an example of the equitable risks in this type of treatment, see, in addition to of what is stated in the introduction to this Guideline, pages 11 and 12 of the Opinion of the Art work. 29 No. 4/2013, already cited.

Process 4

Regarding the rights of data subjects, enshrined in articles 12 and following of the GDPR, it is important, from the outset, that each person responsible provides all the information about the processing of data to data subjects, in accordance with Articles 13 and 14 of the GDPR.

Here, we highlight the explanation of the purpose or purposes of the treatment, the categories of specifically processed data and retention periods. In particular, the holder must be informed about the remote data collection procedure and the subsequent circuit of these. The purpose and procedure must also be specifically explained. of profiling, so that the data subject can understand the intended, or simply possible, consequences of its treatment.

With regard to the right of access by the holder to consumer data, this being one of the objectives invoked by the legislation that provides for this intelligent power distribution, it must always be guaranteed. For that reason, in compliance of the obligation that falls on the distribution system operator, defined in article 9, 3 and 4 of ERSE Regulation no. 610/2019, must take into account the provisions of article 15 of the GDPR. Remember that each of the other controllers has also guarantee to the respective holder the right of access to personal data, in the terms of the same standard.

Finally, it is reiterated that it falls on each data controller

the obligation to demonstrate that the processing complies with the provisions of the GDPR.

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