

National Data Protection Commission

OPINION/2022/54

## I. Order

1. The Commission 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. 141/XV/1.3, “which amends the Charter of Fundamental Rights in the Digital Age in order to guarantee compliance with the right to freedom of expression», from the Chega Parliamentary Group.

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 c) 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, RGPD), 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 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, adding a new provision to Article 5 and revoking Article 6, where the right to protection against disinformation is provided.

4. With direct relevance to the protection of fundamental rights in the context of the processing of personal data, the new paragraph 2 of article 5 determines "In no case may the access or use of the internet and the various digital platforms, as well as the ability to disseminate information in digital media, to legally constituted political parties or duly registered media bodies.».

5. The introduction now designed, according to the explanatory memorandum of the Project, results from the recognition of the «importance that the aforementioned institutions [political parties and the media] have for the regular functioning of democracy and due to their intrinsic relationship with freedom of expression'.

6. It is recalled that the current article 5 of Law No. 27/2021, of 17 May, already provides that “[t]he intentional interruption of access to the Internet, whether partial or total, or the limitation of dissemination of information or other content, except in the cases provided for by law.”, in fact, in fulfillment of the fundamental guarantee enshrined in paragraph 6 of article 35 of the Constitution of the Portuguese Republic (CRP).

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7. It is therefore intended, with the introduction of the aforementioned paragraph 2 in article 5, to exclude political parties and the media from any exception, legally defined, to the prohibition of interruption of internet access and limiting the dissemination of information or other content.

8. The CNPD is not indifferent to the special relevance of the activity of political parties and the press in guaranteeing democracy and the democratic rule of law, also recognizing the interdependence link between freedom of expression and freedom of the press, on the one hand, and freedom of expression and pluralism of political expression, on the other hand. It is evident that the Internet is nowadays an essential instrument for accessing information and for achieving freedom of expression, freedom of the press and the activity of political parties.

9. It is noted, however, that the constitutional guarantee of “free access to computer networks for public use, enshrined in paragraph 6 of article 35 of the CRP is already densified in the current article 5 of Law no. 27/2021, when it prohibits the intentional interruption of access to the Internet, whether partial or total, or the limitation of the dissemination of information or other content.

10. The exception to any provision in the law of exceptions to this prohibition, in the final part of article 5, is intended to prevent situations in which the protection of other fundamental rights or constitutionally protected interests may justify, to the extent strictly necessary, such interruption or such limitation on the dissemination of information or other content - referring to the law

the definition of exceptional situations, in order to avoid arbitrary or abusive restrictions on fundamental freedom of expression and information.

11. It is clarified that circumstances that may exceptionally justify an interruption or temporary limitation of freedom of access and use of the Internet, as well as freedom of expression and information, must have a direct and immediate link to the protection of other fundamental dimensions. human being or democratic society.

12. In order to understand the reason for this legal exception, the possible judicial conviction of a legal person, for example, for crimes of discrimination or incitement to hatred, accompanied by a judicial injunction determining the adoption and taking the necessary measures to stop the illegal activity.

13. Or, in the context of processing personal data, consider the hypothesis that, as a result of a security incident, sensitive personal data of citizens are unduly being disclosed online on the website of the entity responsible for processing data: here, the intentional and temporary interruption of the dissemination of such contents may be justified - in the limit, the website being offline - until

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ensure the protection of that information. And this interruption can be determined by a judicial or administrative authority (in the example presented here, by the CNPD itself).

14. However, this type of situation can also occur in relation to the information systems of the media and political parties, which is why, even with regard to these entities, it makes sense to provide legal exceptions to the prohibition of intentional interruption of access to the internet and limiting the dissemination of information or other content. Otherwise, one would be admitting that the media and political parties were above (or outside) the law, which is not compatible with the rule of law principle.

15. Just think of the hypothesis that the website of a political party is, as a result of a security incident, disseminating the relative personal data of all members of that party, with an obvious impact on their privacy, but also on the freedom of their political activity and the democratic functioning of society.

16. In this regard, it is also clarified that the determination of interruption of access to the Internet or the limitation of the

dissemination of information and other content is always subject to judicial protection, including precautionary, which, in a State of Law, guarantees reinforced the weighting of all fundamental rights in tension in a specific case.

17. In these terms, despite the fact that free access to the internet and the free dissemination of information and other content by political parties and the media are especially essential for a democratic society and State, the CNPD understands that the rule introduced in paragraph 2 of article 5 of Law no. 27/2021, by the present Bill, must be reconsidered, as reasons that may, exceptionally, occasionally and temporarily, still justify the restriction of those freedoms to safeguard other fundamental dimensions of the human being and of democratic society.

18. Regarding the projected repeal of article 6 of Law No. 27/2021, from the perspective of the protection of personal data, the CNPD has nothing to report.

### III. Conclusion

19. On the grounds set out above, the CNPD recommends the elimination of paragraph 2 of article 5 of Law no. 27/2021, by the present Bill, as it understands that the current wording of article 5 is sufficient to safeguard all fundamental rights in tension.

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20. In fact, the reasons that may, exceptionally, occasionally and temporarily, justify the restriction of the freedom of access to the internet and the dissemination of information and other content to safeguard other fundamental dimensions of the human being and of democratic society.

Lisbon, June 27, 2022

Filipa Calvão (President, who reported)