

NATIONAL DATA PROTECTION COMMISSION

OPINION/2020/120

The Culture and Communication Commission of the Assembly of the Republic asked the National Data Protection Commission (CNPd) to comment on the proposed amendments made by various parliamentary groups to the Draft Law No. for the domestic legal order, Directive (EU) 2018/1808, of the European Parliament and of the Council, of 14 November 2018, concerning the provision of audiovisual media services¹.

The CNPD issues an opinion within the scope of its attributions and powers 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 and paragraph 4 of the article 36 of Regulation (EU) 2016/679, of 27 April 2016 - General Data Protection Regulation (GDPR), in conjunction with the provisions of article 3, paragraph 2 of article 4 .° and in paragraph a) of no. 1 of article 6, all of Law no. 58/2019, of August 8 (LERGPD).

The amendments proposed by the following parliamentary groups were submitted for pronouncement: Bloco de Esquerda (BE), CDS- Popular Party (CDS-PP), Portuguese Communist Party (PCP), Socialist Party (PS) and Social Democratic Party (PSD).

The CNPD had already commented on Draft Law No. 44/XIV/1a, in its Opinion/2020/81, of July 21, 2020. From the analysis carried out there, it concluded that there was only one rule in the draft law relevant to the protection of personal data. This is Article 93-B, introduced in Law No. 27/2007, of 30 July, which approves the Television Law, concerning the processing of data on minors.

Therefore, the present opinion only deals with the proposed amendments by the parliamentary groups to the proposed law that may affect article 93-B of Law no. 27/2007.

This article provides that "[t]he personal data of minors collected or generated by the operators of television program services, by the operators of audiovisual services on demand or by the providers or providers of video sharing platforms (...) cannot be processed for commercial purposes, such as direct marketing, profiling or behavior-oriented advertising'.

¹ Amends Directive 2010/13/EU (Audiovisual Communication Services Directive).

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The CDS-PP and PS parliamentary groups did not make any proposal to amend Article 93-B. The BE and PSD parliamentary groups proposed replacing, in the body of the article, the term «minors» by «children and young people», and the PSD also proposes to extend this change of designation to the title of the article.

The PCP makes a proposal to amend this article, identical to that made by the PSD and indicated above, regarding the change of terminology in the body of the article and in its title, but also adding the following sentence at the end of the text: «(…) respecting the provisions of the General Data Protection Regulation in conjunction with the Law for the Protection of Children and Young People in Danger, namely with regard to the eventual obtaining of consent by those who exercise parental responsibilities.».

In Opinion/2020/81, the CNPD considered that the content of article 93-B inserted in the Draft Law no. in subparagraphs f) and h) of paragraph 3 of article 28-B of the 'Audiovisual Media Services' Directive, in its current wording, "in fact offers increased protection to the personal data of minors, preventing the realization of consumption profiles and other behavioral aspects', meaning that it is a 'significant guarantee for the protection of children's private and family life'.

The CNPD understood that this rule constituted a “safeguard measure, the scope of the prohibition of the possible reuse of personal data collected or generated to comply with legal obligations contained in the new legal framework being evident”.

The proposed amendment to the PCP brings the rule back to compliance with the GDPR and obtaining consent from those who have parental responsibilities. However, this addition to the sentence calls into question the prohibition of processing these data, insofar as it admits that this can be overcome by consent.

In fact, article 93-B, as it appears in the draft law and the corresponding article of the Directive, sets up a special rule in relation to the general regime of the GDPR, a regime that does not contain absolute prohibitions on the processing of data on minors. .

The article in question, in line with the ratio of the Directive, aims to ensure greater protection for minors in this very particular context in which service providers will be required to adopt technical measures to protect children, and these measures will involve the processing of personal data.

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It is therefore quite understandable that the European legislator has, on the other hand, introduced safeguards so that the desired protection of minors does not end up unprotected them on another level (cf. Recital 21 of the Directive being

transposed).

In this sense, the PCP proposal reduces, in practice, the ban on processing personal data, by leaving room for this data processing to still be possible based on consent.

Although Member States have room for maneuver in transposing directives into their national law, the scope of national measures cannot restrict the scope of protection afforded by Union law in terms of rights, freedoms and guarantees, which would happen in this case. case.

Therefore, the CNPD understands that article 93-B, in the wording presented in the Draft Law No. 44/XIV/13, complies with the data protection regime and that the specific changes now planned may harm its useful effect.

Finally, the CNPD would also like to emphasize that the adoption of the term "children and young people" instead of "minors", proposed by three parliamentary groups, would lack a conceptual definition under penalty of legal uncertainty of the norm, since the concept of minors is legally delimited, unlike, in particular, the expression 'young people'. This precision is all the more important when considering that the delimitation of the universe of data subjects is at stake, whose protection is reinforced here, and at the same time, the determination of the scope of the obligation imposed on companies.

In conclusion, the CNPD recommends maintaining the wording of article 93-B, as it appears in the Draft Law, with the adjustment of the terminology to "children and young people", preceded by the definition of the concept in article 2 of the Law No. 27/2007, of July 30th.

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