National Data Protection Commission

OPINION/2021/150

I. Order

1.0 Secretary of State for the Presidency of the Council of Ministers asked the National Data Protection Commission (CNPD) to issue an opinion on the Draft Decree-Law No. 1197/XXII/2021, “which transposes Directive 2019/ 2161 on consumer protection, instituting an administrative system for the control and prevention of unfair terms”.

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 Decree-Law transposes Directive (EU) 2019/2161 of the Parliament and of the Council of 27 November 2019, which amends several directives on consumer protection, including Directive 2011/83/ The amendments to Decree-Law No. 24/2014, of 14 February, which transposed Directive 2011/83/EU, stand out due to their direct relevance to the processing of personal data.

4. It is important to focus specifically on the new paragraph 2 introduced in article 2 of Decree-Law no. 24/2014, which provides:

«The present decree-law also applies to contracts in which the supplier of goods or service provider provides or undertakes to provide digital content, when they are not delivered in material support, or in which it provides or undertakes to provide a digital service. and the consumer provides or undertakes to provide personal data, except in the following cases:

a) When the personal data provided by the consumer are processed exclusively for the provision of digital content that is not delivered in material support or through a digital service; or

b) When necessary for the provider to comply with the legal requirements to which it is subject and not to process such data

for any other purposes".

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5. This provision reproduces the amendment that Article 4 of Directive 2019/2161 introduces to Article 3 of Directive 2011/83/EU, but must be carefully framed within the set of legal instruments of the European Union, otherwise inconsistency between the provisions herein and the limits defined in the GDPR. Let's see.

i. Directive 2019/2161

6. Recent European directives, in order to strengthen consumer rights, have been referring, in the respective recitals, to the importance of recognizing and regulating, in terms of law, the online supply of digital content and the provision of digital services citizens without being required to pay a price in return, with the provision or collection of citizens' personal data implicitly appearing as consideration for such advantages. Directive 2019/2161 is no exception in this context. Thus, it comes here to recognize the extension of a legal regime designed to protect consumers in contractual relationships that are based on the conclusion of contracts at a distance or outside the commercial establishment, determining its application also "to contracts in which the supplier of goods or service provider services provides or undertakes to provide digital content, when they are not delivered in material support, or in which it provides or undertakes to provide a digital service and the consumer provides or undertakes to provide personal data».

7. Thus, in recital 31 of Directive 2019/2161, it is explained that Directive 2011/83/EU 'only applies to service contracts, including digital service contracts, under which the consumer pays or undertakes to pay a price. Therefore, that directive does not apply to digital service contracts under which the consumer provides personal data to the trader without paying any price. Given the similarities between these services and the interchangeability between digital services for a fee and digital services

provided in exchange for personal data, these services should be subject to the same rules under that directive."

8. Simply, the comparison between contracts for the provision of digital services that presuppose the payment of a price and the same contracts in which the exchange currency is the personal data of the other contractual party - a phenomenon known as monetization of personal data - has consequences in the protection of that same party, regarding fundamental dimensions such as those relating to their private and family life, their freedom and, in general, the free development of their personality (cf. Articles 26 and 35 of the Constitution of the Portuguese Republic, as well as Articles 7 and 8 of the Charter of Fundamental Rights of the European Union).

9. In fact, in this type of contract, it is not just a question of providing information regarding the identification or contacts of the consumer who contracts digital services (or the supply of digital content) - first of all, justified by the need to process it for the celebration and execution

a contract of this type. It is also, and above all, data observed in the context of the use of digital content or digital services, as well as data inferred from them. In other words, it is about collecting information about your online behavior {e.g., digital content you see, hear or access; how long you spend on each page on the Internet; what comments; what marks as liking; how you play a certain game) as well as information regarding your personality, sexual orientation, philosophical, political, religious beliefs, etc. These are the personal data collected and inferred, apparently based on contractual clauses that most subscribers are not aware of having agreed upon, also because in most cases the information regarding the processing of personal data is presented to consumers in a very incomplete way. or obscure, not allowing the common citizen to understand its scope and the consequences for their fundamental rights, as well as the fundamental rights of their family members.

10. For this reason, for the protection of these citizens, the European legislator created a regime for the protection of personal data that safeguards their fundamental rights, a regime that Directive 2019/2161 specifically sets out, by determining at the end of recital 33 that "[q]any processing of personal data must comply with the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council". It should be noted that this is the recital in which it is stated that the "scope of

application of Directive 2011/83/EU should be extended to cover contracts under which the professional provides or undertakes to provide a digital service to the consumer and the consumer provides or undertakes to provide personal data'.

11. From this it follows that Directive 2019/2161 does not intend to create an exceptional or special regime in relation to the GDPR regime, but rather calls for an articulated reading and application of the two pieces of Union law. Otherwise, a provision that aims to strengthen the rights of citizens, in the context of contractual relationships, by extending a legal regime to protect consumers, would be removing them from the protection guaranteed by the GDPR.

12. It is recalled that, in accordance with the GDPR, in the context of a contractual relationship, the processing of personal data is legitimized when these are strictly necessary for the purpose of concluding and executing the contract or if the law imposes their collection and conservation (see Article 6(1)(b) and c) of the GDPR). Even so, these grounds are not sufficient to legitimize the processing of special personal data, which are those listed in Article 9(1) of the GDPR - which includes, among others, data relating to health, sexual orientation, beliefs philosophical, political, religious. Therefore, it can be concluded that for these special personal data, the contract itself is not enough. But also for other personal data,

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not covered by Article 9(1) of the GDPR, the legitimacy of their processing must be found elsewhere1.

13. Therefore, the legal construction of personal data as consideration for a contractual provision soon falls within the aforementioned GDPR precepts. This is reinforced by the provisions of Article 7(4) of the GDPR, as will be explained below. And, therefore, Article 4 of Directive 2019/2161 does not explicitly or expressly enshrine or enshrine the monetization of personal data, it only allows the consumer to provide personal data to the provider of digital content or digital services.

ii. The articulation between Directive 2019/2161 and the GDPR

14. It is therefore important to frame the ratio underlying Directive 2019/2161 in the provisions of the RGPD, to ensure that the purpose pursued by it is still achieved, but without lack of protection for the holders of personal data, especially without lack of protection of decision-making autonomy your personal data (i.e. without unprotecting your fundamental right to informational or informational self-determination).

15. Precisely, based on individual autonomy, the RGPD recognizes that the consent of the data subject legitimizes the processing of their data when they are not necessary for the performance of the contract, also regarding special personal data (cf. point a) of no. Article 6(1) and Article 9(2)(a) GDPR).

16. Therefore, if the personal data that the provider or supplier intends to process within the scope of the contractual relationship are not necessary for the performance of the contract, the provision or collection of such data cannot be part of the contractual clauses2. Depending before a specific consent of the holder of the personal data3.

17. But the GDPR requires a set of conditions or requirements demonstrating the existence of that same individual autonomy. Thus, this expression of will by the holder must comply with certain requirements, under penalty of its legal irrelevance or nullity: it must be an informed, specific, unequivocal and free expression of will (cf. point 11 of article 4 of the GDPR), and must also be explicit when special data are involved.

1 On the legal grounds for processing personal data in the context of online services, see. the European Data Protection Board Guidelines No. 2/2019 v. 2.0, of 8 October 2019, accessible at httDs://edpb.eurooa.eu/our-work-tools/our-documents/Quidelines/auidelines-22019-processina-personal-data-under-artiole-61b en

2 Cf. points 19 to 21 of the European Data Protection Board Directive No. 2/2019.

3 See, in particular, the examples of purposes for the processing of personal data that do not fall within the strict purpose of performing the online service provision contract, maximum in points 48-56, in the Directive of the European Data Protection Committee No. 2/2019.

18. Here, the requirement of freedom of expression of will of the data subject is highlighted.

19. Consent presupposes, therefore, the freedom of this expression of will, requiring, as a rule, that there is an alternative so that this attribute of consent can be affirmed, especially in the context of contractual relationships in which data subjects are in a position of vulnerability - which is typically what happens when providers of digital services or digital content offered on the market do not provide an alternative, or in providing it, this corresponds to the requirement of a manifestly disproportionate price.

20. 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, due to the conditioning resulting from the need to provide the service. In other words, consent is only legally relevant when "the act of giving or refusing consent does not produce any negative consequences"4, so that "[consent should not be considered to have been given voluntarily if the data subject does not has a true or free choice or cannot refuse or withdraw consent without prejudice»5.

21. That is the meaning of Article 7(4) of the GDPR. The possibility for a consumer to consent to the processing of personal data not necessary for the performance of a contract for the provision of digital services or the acquisition of digital content is not denied, but it is required that, "[a]on assessing whether consent is given freely, [it is verified] with the utmost care whether, in particular, the performance of a contract, including the provision of a service, is subject to consent to the processing of personal data that is not necessary for the performance of that contract".

22. It is, therefore, necessary to ensure that consent to the processing of personal data does not correspond to a mere formality empty of content, as, in fact, there is no autonomy left for the consumer but to be subject to the requirement of the service provider (or supplier of digital content) of providing your personal data as a condition for the provision of the service.

23. It is therefore important that the new paragraph 2 of article 2 of Decree-Law No. 24/2014, introduced by the Draft Law, be read in conjunction with the provisions of subparagraph 11) of article 4 0 and paragraph 4 of article 7 of the RGPD, recommending that the CNPD that this new paragraph explicitly states that the provision of personal data

4 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.V/ec.europa.

eu/newsroom/article29/item-detail.cfm?item_id=623051

5 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.

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or the declaration of self-binding to its supply takes place in accordance with (or in compliance with) the GDPR (or the legislation for the protection of personal data).

24. It is reiterated that this is the meaning of the Directive that is intended to be transposed here, as the final part of its recital 33 reveals: the strengthening of consumer protection in an integrated and consistent application of Union law.

25. And this is the only way to guarantee that that rule does not jeopardize Article 35 of the CRP, which enshrines the fundamental right to informational or informational self-determination, aiming, like Article 8 of the Charter, to guarantee and promote the dignity of the human person, insofar as this right serves as a fundamental guarantee of respect for private life, freedom and the free development of the personality, as well as the right to non-discrimination.

III. Conclusion

26. On the grounds set out above, in relation to the changes introduced by Article 10 of the Draft Decree-Law, which introduces the new paragraph 2 of Article 2 in Decree-Law No. 24/2014, the CNPD understands that this precept does not legitimize, per se, the provision of personal data as contractual consideration for the provision of digital content or the provision of digital services.

27. It only recognizes the possibility of the data subject providing or consenting to the provision of personal data not necessary for the performance of the contract (or not required by law), which depends on the concrete verification of the conditions imposed by the RGPD to affirm the relevance of that consent, hence, the freedom of expression of that will.

28. Thus, the new paragraph 2 of article 2 of Decree-Law No. 24/2014, introduced by the Draft Law, must be read in

conjunction with the provisions of subparagraph 11) of article 4. and in paragraph 4 of article 7 of the RGPD, recommending that the CNPD explicitly mentions that the provision of personal data or the declaration of self-binding to its provision takes place under the terms of the RGPD or the legislation for the protection of personal data.

Lisbon, November 23, 2021

Filipa Calvão (President)