

Data Protection

OPINION/2023/57

I. Request

1. The Commission for Constitutional Affairs, Rights, Freedoms and Guarantees of the Assembly of the Republic asked the National Commission for Data Protection (CNPd) to issue an opinion on Proposal for Law No. 86/XV/1 (GOV), which implements, in the internal legal order, Regulation (EU) 2021/784, of the Parliament and of the Council, of 29 April 2021, on combating the dissemination of terrorist content online.

2. The CNPD issues an opinion within the scope of its attributions and competences, as an independent administrative authority with authoritative powers to control the processing of personal data, conferred by paragraph c) of paragraph 1 of article 57, paragraph b) of paragraph 3 of article 58 and paragraph 4 of article 36, all of Regulation (EU) 2016/679, of April 27, 2016 - General Regulation on Data Protection (hereinafter GDPR), in conjunction with the provisions of article 3, paragraph 2 of article 4 and paragraph s) of paragraph 1 of article 6, all of Law no. 58/2019, of 8 of August, which implements the RGPD in the internal legal order (hereinafter the Enforcement Law) and, also, as a result of the provisions of paragraph c) of number 1 of article 44 of Law no. 59/2019, of August 8, which approves the rules relating to the processing of personal data for the purposes of preventing, detecting, investigating or repressing criminal offenses or the execution of criminal sanctions, transposing Directive (EU) 2016/680 of the European Parliament and of the Council, of 27 April 2016.

II. Analysis

3. Before starting the analysis of the specific Proposal, the CNPD notes the fact that this Proposal for Law is not supported by an impact study on the protection of personal data - which is, remember, mandatory under the terms of n. 4 of Article 18 of Law No. 43/2004, of August 18 (Law on the Organization and Operation of the CNPD), introduced by Law No. 58/2019, of August 8 - undertakes a more thorough assessment complete as to the likely risks arising from the new processing of personal data provided for in this Proposal and, above all, undermines the considered decision of the holders of political and legislative power in a matter in which the understanding of such risks is essential to conclude, at the legislative level, by the regime of processing of personal data to be carried out.

4. It should also be noted that the Regulation in question was not the subject of an opinion by this Commission in the preparatory and discussion phase of this legal instrument at the level of the Council of the European Union, as a contribution to the position of the Portuguese State.

5. With regard to the assessment of this Proposal, we begin by contextualizing it, noting that Regulation (EU) 2021/784, of the Parliament and of the Council, of April 29, 2021, on combating the dissemination of content

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terrorists online (hereinafter referred to as the Regulation), establishes uniform rules to repress the abusive use of virtual hosting services for the purpose of disseminating terrorist content online to the public.

6. In order to achieve these purposes, that Regulation provides for the establishment of duties for providers of virtual hosting services that provide services in the Union, regardless of the location of their main establishment, provided that they disseminate information to the public. Thus, duties of diligence and the adoption of specific measures to repress the dissemination of terrorist content to the public are imposed on them and the duty to ensure that such content is suppressed or access blocked following an order issued by the competent entity of a Member State, as well as retaining deleted content in case a decision is issued to restore content or unblock access to it. It is also established that service providers create a contact point to facilitate communication with the competent authorities, and this information must be made public.

7. On the other hand, the Regulation provides for a set of actions, to be carried out by one or more competent authorities established by each Member State, pursuant to Article 12, with a view to combating terrorist content online¹: issuing decisions to suppress or block terrorist content; review deletion or blocking decisions issued by competent authorities in other Member States; supervise the specific measures that must be adopted by virtual hosting services and impose sanctions. Pursuant to Article 14, the Regulation also provides for cooperation between the competent authorities in each Member State and between the other Member States and Europol.

8. This Proposal now intends to legislate on what the Regulation relegated to the decision-making sphere of the Member States, that is: the designation of the competent authorities for the purposes of the different attributions described in article 12

of the Regulation; the attribution of the necessary powers and means to the competent authorities to guarantee compliance with the Regulation and the guarantees of their independent action, as provided for in article 13, as well as the establishment of a sanctioning regime for violations of the Regulation, guided by the provisions of the Article 18.

9. In this context, the CNPD will essentially focus on the designation of competent authorities for the purposes described in Article 12(1) of the Regulation, also taking into account the provisions of Articles 13 and 14.

1 The Regulation lists a set of definitions, in Article 2. paragraphs 6) and 7) of the article.

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10. The Proposal under analysis assigns the powers provided for in the Regulation to two different entities: the Judiciary Police (PJ) and the National Communications Authority (ANACOM) (Article 3).

11. Thus, the Judiciary Police are assigned the powers provided for in paragraphs a) and b) of paragraph 1 of article 12 of the Regulation, that is:

The. issue decisions directed at providers of virtual hosting services to remove content or block access to it in all Member States; It is

B. analyze cross-border content deletion decisions concerning a provider of virtual hosting services located on its territory, issued by another Member State.

12. And, to ANACOM, the powers provided for in subparagraphs c) and d) of the same precept:

The. supervise the application of specific measures imposed on service providers to ensure that they, when necessary, adopt the appropriate measures to repress such content, in accordance with the specifics established in article 5 of the Regulation, being able, in the absence of such measures , issue a decision asking service providers to adopt those decisions; It is

B. Impose sanctions when the offenses provided for in article 18 of the Regulation are at stake and to proceed with the investigation of the respective administrative offense proceedings.

13. Under the terms of the Proposal (article 11), ANACOM is also the competent entity for investigating administrative offenses, with the Board of Directors of that entity being responsible for applying the fines and accessory sanctions that the

Proposal also provides for.

14. It also establishes the sanctioning regime, namely replicating the rules of the Regulation which, when infringed, constitute administrative offences, determining their severity and the respective applicable fines (Article 7).

15. In order to fulfill the competences of each of the entities involved, a duty of cooperation is established between them, materialized in the duty to consult, exchange information and cooperate with each other in matters of common interest related to the application of the regime established in the Proposal, with the PJ having to notify ANACOM of all deletion or blocking decisions it takes within the scope of its powers, so that this entity can exercise its duty to monitor compliance with those decisions by providers of virtual hosting services and, where applicable, impose fines or compulsory pecuniary measures.

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16. The solution adopted in the Proposal deserves some observations from the CNPD, especially regarding the choice of the Judiciary Police as the competent national authority to issue decisions to suppress or block online content. This is because the implementation of the Regulation may have an impact on citizens' right to privacy, on the protection of their personal data, in the sense of Articles 7 and 8 of the CFRUE and on the right to freedom of expression and information, in its triple expression of freedom to inform, to be informed and to be informed, as well as freedom of the press.

17. Despite explaining in paragraph (1) of the Preamble that the regime established therein «aims to ensure the proper functioning of the Single Digital Market [...] combating the abusive use of virtual hosting services for terrorist purposes and contributing to the public security throughout the Union» there is no doubt, by reading the article, that what is at stake is, in reality, the detection, prevention and repression of the online dissemination of illicit content related to terrorism, made available by service providers virtual hosting services, which is intended to be achieved through decisions with immediate effect,

addressed to virtual hosting service providers, so that they withdraw certain online content from public access. As explained in article 12 of the Regulation, the competent authority informs the provider of virtual hosting services, at least 12 hours before issuing the deletion or blocking decision, of the procedures to be undertaken after receiving the same, and this decision must be complied with within one hour of the issuance of said decision.

18. However, such deletions or blocking are liable to contend with rights and freedoms guaranteed by domestic and European law, such as freedom of expression and information, as well as the right to protection of personal data, insofar as there is a significant margin of appreciation and discretion as to what may constitute terrorist content, therefore liable to be suppressed or blocked.

19. It should be noted that the need to make such rights compatible is a concern of the Regulation. This is even stated in the Preamble, when it explains that the adopted regime aims to establish «adequate means for the defense of public security, establishing adequate and solid guarantees to ensure the defense of fundamental rights, including the right to respect for private life, the right to protection of personal data, the right to freedom of expression, including the freedom to receive and impart information [...]”(paragraph 10).

20. And it also emphasizes the need to proceed with the practical agreement between rights, by stating that “the present regulation does not have the effect of changing the obligation to respect the rights, freedoms and principles referred to in article 6. of the TEU and applies without prejudice to the fundamental principles regarding freedom of expression and information, including freedom and pluralism of the media», as well as it does not prejudice the application of Directives 2000/31/EC, concerning certain legal aspects of the company's services

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of information and Directive 2010/13/EU on the coordination of certain laws, regulations and administrative provisions relating to the provision of audiovisual media services (paragraph 4 of Article

21), establishing that the latter prevails over the Regulation in question with regard to media services (paragraph 5 of the same article).

21. From the outset, freedom of expression has sufficient latitude to accommodate controversial or controversial expressions of opinion, as well as artistic manifestations, for example humor, which cannot be the object of such decisions, under penalty of violating the core of those rights and that such intervention results in an obstacle to the free expression of thought, which constitutes a matrix foundation of the Democratic States of Law.

22. This weighting is taken into account in the Regulation when determining that «materials disseminated to the public for educational, journalistic, artistic or research purposes, or for the purposes of preventing or combating terrorism, or for the purposes of preventing or combating terrorism, are not considered, including materials that represent the expression of controversial or controversial opinions within the framework of public debate». On the other hand, the very definition of 'terrorist content' is somewhat imprecise and subject to subjective considerations. Otherwise, let's see: materials that incite the commission of terrorist offences, or that induce people to commit or contribute to the commission of such offences, or that induce persons to participate in the activities of a terrorist group, or that constitute a threat of committing some terrorist offences.

23. The conclusion of what are, or are not, materials that fit that normative forecast results, inevitably, from a judgment that must be carried out by the competent authority. In the present case, the Judiciary Police is given the possibility of deciding, in each specific case, what should be considered the exercise of the right to freedom of expression or what should be silenced because it is considered to fall within the concept of terrorist content. .

24. It does not seem legally admissible that such weighting be attributed to a criminal police body, whose legal attributions include the detection, prevention and investigation of criminal offences, but no longer their repression. Signaling the existence of terrorist content online, detected directly by the PJ or referenced by Europol² should, in most cases, give rise to a criminal proceeding, since crimes

² Europol created in July 2015 a unit dedicated to reducing the impact of internet content promoting terrorism and violent extremism - the Internet Referral Unit (EU IRU). This unit, which forms part of the European Counter-Terrorism Center (ECTC), signals terrorist and violent extremism content to online service providers and supports Member States in the context of Internet investigations. With the entry into force of Regulation (EU) 2021/784, Europol has developed a platform (PERCI) through which Member States can demand the removal of content.

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terrorism, public apology for terrorist offenses or incitement to commit offenses are punishable under our legal system (cf. article 4 of Law 52/2003, of 22 August, in its latest version).

25. Admitting that there may be, for compelling, evident and duly justified reasons, the need to remove certain online content very quickly, not compatible with the duration of the entire criminal procedure - a situation that the Regulation intends to respond to -, it is necessary to safeguard the due process at all costs and assign the analysis of the case and the respective decision to suppress or block it to a judge, who is surely in a better position to make the judgment of proportionality that is required in the case and, consequently, , take a decision to remove terrorist content online.

26. It is essential that this be so, given that this is a significant restriction of fundamental rights and freedoms and that the Judiciary Police is a higher body of criminal police whose mission is to assist the judicial authorities in criminal investigation, and which acts in the process under their direction and in their functional dependence (cf. Articles 1 to 3 of Decree-Law 317/2019, of September 13, which approves the new organizational structure of the Judiciary Police).

27. Now, since interference with the rights enshrined in Articles 8. and 11 of the Charter of Fundamental Rights of the European Union (CDFUE) and in article 10 of the European Convention on Human Rights - rights also enshrined in articles 26, 35 and 37 of the Constitution of the Portuguese Republic (CRP) it is imperative to ensure that the restriction of such rights is necessary and appropriate for the fulfillment of such purposes and that it is limited to the essential minimum for the suppression of such content or for blocking access to it, in accordance with the principle of privacy. proportionality enshrined in Article 52 of the CFREU and in Article 18(2) of the Constitution, and it is still necessary to guarantee the fair process provided for in Article 6 of the ECHR.

28. To that extent, that - or any other - Police should not be attributed the competence to decide, by itself, and in that sense to

order, the suppression of online content, or the blocking of its access. Furthermore, in order to comply with the provisions of paragraph 2 of article 13 of the Regulation, the PJ could not receive instructions from any other body, which is not consistent with the national legal framework, in which the PJ's autonomy is technical and tactical in nature.

29. Furthermore, the deletion or blocking decision cannot effectively be disconnected from a specific criminal procedure, either because it was within the scope of an investigation that the reference to terrorist content appeared, or because its prior signaling led to the opening of an inquiry , which is, in Portugal, supervised by the Public Ministry as the holder of the criminal action.

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30. It should also be noted that the Regulation provides for the possibility of not providing information on the decision to suppress or block access to providers of content subject to removal, whenever this is necessary and proportionate for reasons of public security, such as prevention , the investigation, detection and repression of terrorist offences, during the time considered necessary, but not exceeding six weeks from such decision, in which case the service provider does not disclose such information. Therefore, the content provider will not even be able to appeal the deletion or blocking decision to the court.

31. Such a regime makes it even more demanding that the judgment of necessity, adequacy and proportionality of data deletion or access blocking, as well as content replacement and unblocking be issued by a judicial authority, maxime, a judge.

32. If European cooperation between police authorities is an important and essential component in the fight against terrorist content online, at least from the point of view of its referencing, this does not mean that the suppression or blocking decisions are taken by the police authorities.

33. It is the Regulation itself that emphasizes that the measures to be adopted by the States must take into account “compliance with adequate guarantees to defend fundamental rights, in particular freedom of expression and information in an open and democratic society”, and such defense cannot be carried out only a posteriori, namely through the establishment of means of contesting the suppression or blocking decisions, rather care must be taken, under the terms of paragraph 2 of article 18 of the Constitution, that any restriction to rights, freedoms and guarantees - in the case of freedom of expression and

the protection of personal data - results from an early assessment of practical agreement between the rights in question.

34. Thus, Portuguese legislation should ensure that, if after analyzing the contents, the Judiciary Police concluded that it was necessary to suppress or block access to terrorist content, it should ask the competent judicial authority to issue such decisions, thus safeguarding the necessary judicial mediation, in order to obtain prior authorization, assuming that in urgent cases further validation could be considered.

35. It should also be noted that, under the terms of the Regulation (Article 4), if the main establishment or legal representative of the provider of virtual hosting services is not located in the Member State of the competent authority that issued the deletion decision, the latter submits that decision to the Member State in which that establishment is located, or where the legal representative resides, who analyzes it in order to verify whether it seriously or manifestly infringes the Regulation and, if it concludes that such an infringement has occurred, adopts a decision substantiated statement which results in the deletion decision issued by the other Member State no longer having legal effects.

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36. Thus, if the Member State in which the provider of virtual hosting services is located, or in which its legal representative resides, is Portugal and the decision is issued by another Member State, it would have to be a situation in which the Judiciary Police would be responsible for decisions taken, for example, by the Belgian Public Prosecutor's Office or by the courts of Malta³, regarding their observance in compliance with the fundamental freedoms enshrined in the Charter or if, on the contrary, these decisions infringe these Regulations.

Considerations on other aspects of the Bill

37. The Regulation determines that «the provider of virtual hosting services that does not have a main establishment in the Union, designates, in writing, a natural person or a legal person as its legal representative in the Union, for the purposes of reception, fulfillment and enforcement of deletion decisions and decisions issued by the competent authorities' (Article 17(1)). This designation proves to be fundamental for working with those providers of virtual hosting services that, while disseminating content within the Union, do not have their establishment in this territory.

38. Because the representative may, in particular, by his/her decision, not transmit the deletion, blocking or, on the other hand, restoring or unblocking decisions that by his/her route are addressed to the services that he/she represents, the Regulation enshrines the possibility of holding him or her accountable for the infringements established therein, without prejudice to the responsibility of the virtual accommodation service provider or legal actions that may be brought against the local accommodation service provider» (Article 17(3) of the EU Regulation).

39. It appears, however, that by regulating responsibility for administrative offences, the Bill under consideration established, only, the responsibility of providers of virtual hosting services, whether these are natural persons, legal persons or similar (number 1 of article 6) and that, if providers of virtual hosting services are legal persons or similar, "they are responsible for infringements committed in their name and on their behalf by the holders of their governing bodies, by the holders of management and leadership positions and by their workers in the exercise of their functions» and, likewise, are responsible «for infractions committed by their agents and representatives, in acts performed in their name or on their behalf» (n.º 2 of the article 6)

3 According to notifications made to the European Commission under this Regulation, in Belgium, the competent authority to issue deletion or blocking decisions is the Public Prosecutor's Office, while in Malta, decisions to delete online content are the responsibility of the criminal courts.

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40. In addition, the same article (n.º 3) prescribes the exclusion of liability of legal persons or similar when the agent acts against orders or express instructions from the latter». However, nothing is said about the responsibility of the representative, either when acting in agreement with the represented entity or, maxime, when acting against orders and express instructions from those.

41. The CNPD points out that such an omission may, in practice, result in the promotion of irresponsibility in this context, precisely because, as the services are not established in the Union, it will result, in practice, in the practical impossibility of sanctioning non-compliance.

42. Although this is not a matter relating to data protection, the CNPD also intends to note an inaccuracy regarding the transcription of the regime provided for in article 18 of the EU Regulation, the regime provided for in article 9 of the Proposal, in terms of regarding the determination of the applicable fine. In fact, in number 2 of that article it is said that «in the determination of the concrete unlawfulness of the fact and of the fault, the following circumstances, among others, are taken into account: subparagraph b) [the] financial capacity of the provider of accommodation services virtual», (paragraph b) of paragraph 2 of article 9), which, being a circumstance unrelated to the fact, as well as to the implication of the subject in it, cannot be taken into account for that fact. Furthermore, these circumstances may be considered for the decision on the type and level of sanctions to be applied, as provided for in the EU Regulation in Article 18(2).

III. Conclusion

43. In view of the foregoing, the CNPD understands, for the above reasons, that, in order to adequately safeguard the fundamental rights put in crisis with the implementation of the Regulation, the competence to issue decisions to suppress and block content considered terrorist, decisions to reset or unblock access to those contents, to issue substantiated decisions under the terms of article 4 of the Regulation and other competences attributed to the Judiciary Police by the Proposal under analysis, should not be attributed to a Police, but to a judicial magistrate, admitting it if that in case of urgency it could be considered that that Police could issue such decisions, subject to further validation.

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