Variola (Proc. n.º 34/73), the same court was also very clear in stating that "the Member States have a duty not to obstruct the direct applicability inherent in the regulations, and strict compliance with this obligation is a condition indispensable for the uniform and simultaneous application of the Regulations throughout the Community";

Considering also that, as the European Commission insists, “[…] the legislator national may not copy the text of the Regulation when this is not necessary in the light of the criteria provided for in jurisprudence, nor interpret it or add conditions additional to the rules directly applicable under the Regulation';

Considering that the principle of loyal cooperation, enshrined in paragraph 3 of article 4 of the Treaty on European Union, there is a duty for all authorities of the States-Members to take the general or special measures capable of ensuring compliance the obligations imposed by Union law;

whereas Union law presupposes that the GDPR is applied in a uniform across the territory of the Member States to ensure the free flow of data, with mechanisms of cooperation and coherence whose effectiveness depends on the unity of legal regime in the context of data processing with an impact on the territory of more than a Member State;

Considering that the national adoption of legal norms in contradiction with the statute in the GDPR not only violates the principle of the primacy of Union law (CJEU Judgment, Simmenthal, Proc. 106/77, § 21), as it seriously impairs the proper functioning of the coherence mechanism, putting the respective national authority at risk of violating one of the norms in antinomy;

Considering also that it follows from the principle of primacy that, in addition to the courts national authorities, administrative bodies are also obliged to disapply the rules

national laws that contravene European Union law, as expressly determined

the CJEU, in the Fratelli Costanzo2 judgment, which binds all the bodies of the

Public Administration to the duty to fully apply Union law, moving away from

2 Judgment of 2 June 1989, Proc. No. 103/88, paragraphs 32-33.

2v.

attention to those provisions which, due to their relevance and frequency of

application, raise the urgency of the formal adoption of such an understanding;

B. That, based on the principle of the primacy of European Union law, and

in the other arguments that follows, it will not apply in future cases that

come to appreciate, regarding data processing and the conduct of the respective

responsible or subcontractors, the following provisions of Law No. 58/2019, of

August 85:

1. Article 2, no. 1 and no. 2

Article 2(1) of Law no. 58/2019 extends the scope of application of the law to all

«[…] processing of personal data carried out in the national territory […], applying

all the exclusions provided for in article 2 of the GDPR", adding paragraph 2 that: "The

this law applies to the processing of personal data carried out outside the territory

national law when: a) They are carried out within the scope of the activity of an establishment

located in the national territory; […]».

However, even admitting that the definition of the territorial scope of application of the law

national legislation follows the criteria defined in article 3 of the GDPR, the truth is that the terms

in which such definition is expressed compromise the application of procedural rules

and the distribution of competence between the national supervisory authorities of the States

Members, whenever cross-border processing is involved6.

In fact, if the person in charge (or the subcontractor) has more than one

establishment in the Union, Article 56(1) of the GDPR determines which authority

competent national authority to direct the procedure and issue the final decision, in order to

ensure the functioning of the one-stop-shop mechanism on which distribution is based

of competences between the supervisory authorities of the Member States of the Union. AND

5 Henceforth, Law No. 58/2019.

6 See definition contained in Article 4(23) of the GDPR.

3v.

subparagraph c) of paragraph 2 of article 2 of Law n.º 58/2019, is incompatible with the GDPR, as it does not

ensure the application of the same in the terms and with the scope imposed by it.

Therefore, in order to ensure the full effectiveness of Union law, in

particular of the provisions of article 56 and paragraph 3 of article 3 of the RGPD, the CNPD will

in future cases that paragraph 1 and paragraph 2 of article 2 of Law no.

for being incompatible with the provisions therein, compromising the useful effect of the GDPR.

2. Article 20, paragraph 1

Article 20, in its paragraph 1, determines that “[t]he rights of information and access to

personal data provided for in articles 13 and 15 of the GDPR cannot be exercised

when the law imposes on the controller or processor a duty of

secrecy that is enforceable against the data subject himself'.

In the analysis of this precept, it is important to differentiate the rights in question.

As for the right to information, and only in the case of indirect data collection

personal data, it is Article 14 of the GDPR itself that defines the cases in which it can be

restricted, specifying, in subparagraph d) of no.

secret. Thus, in this regard, as Article 14(5)(d) of the GDPR already regulates

the restriction of the right to information in the face of a legal duty of secrecy, the norm in

Article 20(1) adds nothing, and therefore has no independent legal relevance in

in relation to the provisions of the GDPR.

As for the right to information within the scope of data collection directly from the

holder and also in relation to the right of access, and since articles 13 and 15 of the
GDPR do not foresee or legitimize any limitations, a restriction thereof can only
take place in accordance with Article 23 of the GDPR.
This last article allows for the possibility for Member States to 'limit by
legislative measure the scope of the obligations and rights provided for in articles 12 to
22, but only provided that such limitation respects the essence of the rights and freedoms
fundamental and constitutes a necessary and proportionate measure in a society
democratic" to ensure a wide range of purposes that are listed in no.
1 of the same article. However, the provisions of paragraph 1 of article 20 of Law n.º 58/2019 do not
4v.
In fact, the GDPR regulates the reuse of personal data for different purposes.
of those that justified its collection in paragraph 4 of article 6, which, despite the insertion
system of the precept, also applies to special data (because only then does it make sense
the reference in point c) to such categories of data). And from this precept it follows, from the outset,
whereas there may be provisions of national or Union law providing for such re-use
data, but only "[…] if they constitute a necessary and proportionate measure
in a democratic society to safeguard the objectives referred to in article 23, paragraph
1 of the GDPR".
However, paragraph 1 of article 23 of Law no. 58/2019 does not specify purposes of interest
public that can justify such reuse, rather extending this possibility to
pursuit of any public interest, contrary to or not fulfilling, in this
measure, the provisions of the first part of paragraph 4 of article 6 of the GDPR. and also not
manages to prove to be a necessary and proportionate measure, because this presupposes a
analysis and weighting for each new purpose (cf. recital 50, 3rd §, of the GDPR).
Not being covered by the first part of paragraph 4 of this article, the national legal norm in
appreciation cannot, under the terms of the GDPR, certify or recognize in the abstract the

incompatibility of purposes (originating and reuse), when the

Union law requires that the controller, in particular, do so

weighting in the light of the criteria set out in subparagraphs a) to e) of the same paragraph 4 of article 6.

It should also be added that this rule, by admitting that personal data can be

treated by public entities for any purpose other than the original, contrary to the

principle of purpose or limitation of purposes, explained in subparagraph b) of paragraph 1 of the

Article 5 of the GDPR – and, from the outset, enshrined in Article 8(2) of the Charter of Rights

Fundamentals of the European Union, as well as in paragraph b) of article 5 of the Convention

108 of the Council of Europe -, for removing the concrete and considered judgment of

purpose compatibility. It should be noted that the requirement of reasoning to which

reported in paragraph 1 of article 23 of the Law is not imputed to such a judge, but seems to refer to

the impossibility of safeguarding the public interest in any other way.

Regarding the references to article 6(1)(e) and to article 9(1)(g)

of the GDPR, they can only be understood in the light of the provisions of recital 50 of the

GDPR, where you can read that: If the treatment is necessary for the performance of functions

5v

Notwithstanding the non-parity nature of the employment relationship, it follows from the principle

the dignity of the human person the need to recognize the individual, even in the

context of legal relationships in which, as a rule, he lacks protection in relation to the

on the other hand, the minimum of free will to enjoy their fundamental right to

informational self-determination – therefore, in the just-fundamental dimension of controlling the

data concerning him –, recognized in article 35 of the CRP and in article 8 of the

Charter of Fundamental Rights of the European Union.

It is in this same vein that the Art. 29 (GT29) and the European Committee

of Data Protection have understood, although refusing as a rule legal relevance to the

consent of workers, that they can only give their consent

freely in exceptional circumstances, when the act of giving or refusing the

consent does not produce any negative consequences10.

However, the provisions of subparagraph a) of paragraph 3 of article 28, when precisely determining the solution

opposite, excessively restricts the relevance of worker consent, thereby

eliminating any margin of free will of workers even when there is

conditions for their manifestation without risk to their rights and interests. In this

measure, this provision represents an unjustified and disproportionate restriction of the

Article 6(1)(a) and Article 9(2)(a) of the GDPR.

Therefore, the CNPD considers that this provision does not correspond to a legislative measure

appropriate national law that safeguards the dignity, fundamental rights and interests

rights of the worker, not fulfilling, therefore, the requirements demanded in subparagraph b) of the

Article 9(2) and Article 88(2) of the GDPR.

In short, for translating an inappropriate, unnecessary and excessive restriction of the

fundamental to informational self-determination or data protection as a right

control of their own data, beyond what is necessary to safeguard the

rights and interests of workers, paragraph a) of paragraph 3 of article 28 of Law no.

58/2019 restricts the scope of application of subparagraph a) of paragraph 1 of article 6 and subparagraph a)

of Article 9(2) of the GDPR. On this basis, the CNPD, in order to ensure the

10 Cf. GDPR Consent Guidelines, revised and approved April 10, 2018, and assumed

by the European Data Protection Board on 25 May 2018, available at

http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=623051

In fact, in subparagraph b) of paragraph 5 of this last article, it is subject to the sanctioning framework

heavier the violation of the rights of data subjects under Articles 12.

to 22nd, not distinguishing, nor leaving space to distinguish, according to the

informational elements omitted12.

Furthermore, the breach provided for in Article 83(5)(b) of the GDPR encompasses all
dimensions of the right to information and not just the non-provision of information. Would you like
that is to say that the equivocal, erroneous, incomplete, dated or out-of-date information
(violating articles 12, 13 and 14) also fits in the hypothesis of that rule of the RGPD,
therefore, the limitation of the sanctionable offense only to the omission of information is
incompatible with the GDPR.
Finally, the provision for the refusal to cooperate with the CNPD, in subparagraph k) of paragraph 1 of the
article 37, as a very serious offence, subject to heavier frames, violates
also the sanctioning framework contained in the GDPR, since such an infraction
is inscribed in Article 83(4)(a) of the GDPR (see also Article 31 of the GDPR).
Thus, as they contradict the exhaustive list of infractions provided for in paragraphs 4 and 5 of the
article 83 of the RGPD and the respective sanctioning framework, the CNPD will not apply,
in its future decisions, subparagraphs a), h) and k) of paragraph 1 of article 37 and subparagraph b) of paragraph
1 of article 38 of Law no. 58/2019.
It should be noted that the CNPD recognizes applying the remaining paragraphs of paragraph 1 of article 37 and
of paragraph 1 of article 38, which correspond to the repetition of infractions foreseen in paragraphs
4 and 5 of article 83 of the GDPR, insofar as they have the useful effect of allowing
correspond each of them to the statute of limitations established by the legislator
national legislation in article 40, a matter that falls under the procedural autonomy of the States-
members.
5.2. Article 37, paragraph 2, and article 38, paragraph 2
12 Moreover, the reference to the delimitation of the offense to cases of non-compliance with the communication of information
relevant information and the delimitation of the information obligation to certain dimensions of this was included in article 79 of
the
proposal for a Regulation initially presented by the European Commission, of 01.25.2012 (2012/0011
COD), but it was definitively eliminated in the legislative procedure, which, as a historic element of

interpretation of the current Union regime, strengthens the view that the Union legislator did not want,

nor does it want the protection of rights in terms of sanctions to be in any way limited.

7v.

Hence, the establishment in abstract, in national law, of maximum limits lower than those foreseen

in paragraphs 4 and 5 of article 83 of the GDPR constitutes a violation thereof. It is

conclusion is supported by the case law of the CJEU, in the judgment in Commission v Republic

Italian (Proc. no. 39/72); referring to the legislation passed in the Italian Republic, the

Court asserts that "any implementing arrangements which

may prevent the direct effect of Community regulations and thus

compromise its simultaneous and uniform application in the community space»15 –

jurisprudence reiterated in the Variola judgment (Proc. no. 34/73).

Furthermore, the principle of the primacy of Union law, reflected in article 288 of the

TFUE, it follows that regulations have mandatory value and are directly applicable

in all Member States, thereby ruling out any possibility of a

«State [...], unilaterally, annul its effects by means of a legislative act

enforceable against Community texts" (cf. the aforementioned judgment of the CJEU Costa/ENEL, Proc.

No. 6/64).

Furthermore, nowhere in Article 83, or in the recitals relating to the

sanctions, space is opened for the autonomous consideration of the size of the company,

therefore the criterion adopted by the national legislator, to distinguish small and medium

companies to reserve the GDPR maximum cash limit for large companies,

constitutes in itself a violation of the GDPR.

In this regard, it is important to remember that the importance recognized in the

of the GDPR to small and medium-sized companies, contrary to what happened in the

initial proposal for regulation, because it was concluded, within the institutions of the Union,

that the impact on personal data resulting from the conduct of those responsible for

processing of personal data (and subcontractors) does not depend on the number of

workers who are part of these organizations, but before the nature of the activity

developed (categories of processed data, volume of processed data, categories of

data subjects being processed, etc.)16. To that extent, the elevation at the discretion

on enforcement of sanctions, available at http://ec.europa.eu/newsroom/article29/item-

detail.cfm?item_id=611237.

15 Judgment Commission/Italian Republic of 7 February 1973, Proc. No. 39/72, paragraph 17.

16 In fact, a demonstration of this evolution is that in only three articles of the version finally approved in the GDPR there are

reference to the size of the companies: articles 30, no. 5, 40, no. 1, and 42, no. 1.

article 38 of Law no. 58/2019, as it contradicts the provisions of paragraphs 4 and 5 of article 83 of the

RGPD, only maintaining its application within the scope of the infractions in these does not

sanctioned (therefore, those provided for in subparagraphs e) and l) of paragraph 1 of article 37 and subparagraphs q)

and r) of paragraph 1 of article 38 of the national law).

5.3. Article 39, paragraphs 1 and 3

Article 39(1) presents three criteria for the concrete determination of the measure

of the fine, in addition to those established in paragraph 2 of article 83 of the GDPR.

As mentioned, the GDPR leaves no room for Member States to come

define other weighting criteria in relation to the infractions provided for in paragraphs 4 and 5 of the

article 83. Only under article 84, therefore for unsanctioned infringements

in the GDPR, is that it will be possible for the national legislator to add criteria, provided that

ensure sanctions that are effective, proportionate and dissuasive. And therefore, how much

to these, the CNPD does not question the application of paragraph 1 of article 39 (i.e., infractions

provided for in lines e) and l) of paragraph 1 of article 37 and paragraphs q) and r) of paragraph 1 of article 38.

of national law).

It is true that Article 83(2)(k) of the GDPR admits the consideration of other

aggravating or mitigating factors applicable to the factual circumstances, such as the
economic benefits obtained or losses avoided as a result of the infringement. but it seems
that the choice of factors must be made only in the specific case, by the entity
(administrative or judicial) that apply the specific rule, and no longer by the legislator
national of each Member State. This even results from the second part of the body of paragraph
2 of article 83 of the GDPR, where the following can be read: “[a]n deciding on the application of
a fine and on the amount of the fine in each individual case, is taken into account
consideration the following:[…]'.
Thus, in order to ensure the application of the provisions of paragraph 2 of article 83 of the GDPR, the
CNPD deactivates paragraph 1 of article 39, only maintaining its application within the scope of the
infringements not sanctioned in paragraphs 4 and 5 of article 83 of the GDPR, and therefore only
acknowledging its application to the offenses provided for in subparagraphs e) and l) of paragraph 1 of article
37 and paragraphs q) and r) of no. 1 of article 38 of Law no. 58/2019.
9v.
prior warning in cases of negligent first infraction and, for the rest, limited to certain
categories of offenders.
In any case, the fact that this provision has been eliminated is yet another argument
in favor of the interpretation that the Union legislator refused to limit or empty, even
that partially, in the abstract, the powers to apply pecuniary sanctions to
offenses provided for therein, so that a national rule providing for such a prior procedure
for any and all negligent infringement with the effect of postponing or precluding the exercise
of sanctioning power recognized by the RGPD voids the useful effect of the Union norm
which provides for such powers, putting in crisis the principle of effectiveness of Union law.
With the aggravating factor that the application by the CNPD of the provisions of paragraph 3 of article 39 of the
Law would undermine the uniform application of the GDPR, preventing the CNPD from applying
directly a sanction in the context of cross-border data processing (cf.

23) of article 4 of the GDPR) in which it acts as the main authority (cf. paragraphs 1 and 2 of article 56 of the GDPR). The application by the CNPD of that provision, in this context, would have surely the consequence of activating the coherence mechanism, foreseen in the article 64 of the GDPR, at the end of which the CNPD would be bound to issue a decision with the content of the decision approved by the European Data Protection Board, in breach of the imposition provided for in that national rule.

Furthermore, even less can the national legislator impose on its supervisory authority the adoption of a corrective measure, determined in subparagraph a) of paragraph 2 of article 58 of the GDPR for cases where a data processing operation is planned (therefore not yet implemented) that is likely to violate the rules of the Regulation, in situations where the presuppositions of this measure are not fulfilled. for others words, if the GDPR defines, in subparagraph a) of paragraph 2 of article 58, the assumptions of warning decision, national law cannot impose the practice of this act when verify a situation that is not subsumed in these presuppositions and fills another legal-type for which the decision provided for in the GDPR is different.

With these arguments, as it is objectively incompatible with paragraph 2 of article 83, as well as with subparagraph a) of paragraph 2 of article 58 of the GDPR, voiding the useful effect of that rule, the CNPD will disapply Article 39(3) of Law No. 58/2019 in situations on which to comment in the future.

consent within the meaning of the GDPR, only regulates the relevance of consent to treatments that are not necessary for the performance of a contract18.

And the reason for this clear distinction in the GDPR has to do with the demand for freedom in expression of consent, imposed by Article 4(11) of the GDPR. If the consent related to the processing of data necessary for the execution of a contract, the conditions of freedom for its issuance were not guaranteed,

conditioning resulting from the need to provide the object of the contract.

It follows that the processing of data necessary for the performance of the contract does not have,

nor can it be based on the consent of the holder. The same is stated in

cited WG29 guidelines (assumed by the European Committee) on consent:

"If the controller intends to process personal data that are effectively

necessary for the performance of the contract, consent is not the legal basis»19.

In fact, this is the same reason that led the national legislator, in subparagraph b) of paragraph 3 of the

article 28, to determine that, in the context of employment contracts, the

consent of the worker when the hypothesis provided for in subparagraph b) is fulfilled

of article 6(1) of the GDPR (i.e. the processing is necessary for the performance of the contract).

What is strange is that, after clearly distinguishing, in this provision of the article

28, the two conditions of legitimation or lawfulness of the treatment in accordance with the

GDPR, the national law will, in article 61.º, confuse them, establishing a relationship of

conditionality between them.

Such conditionality is totally in violation of the GDPR, in particular the provisions of paragraph

11) of article 4 of the GDPR and in recital 42, which reads that "[t]o

consider that consent was given voluntarily if the data subject does not

has a true or free choice or cannot refuse or withdraw the

consent without prejudice".

Thus, the CNPD understands that paragraph 2 of article 61 of Law n.º 58/2019 is incompatible

with paragraph 11) of article 4 and paragraphs a) and b) of paragraph 1 of article 6 of the GDPR, by

that you will use it in situations you come to appreciate.

18 Cf. P. 9 of the document accessible at https://www.cnpd.pt/bin/rgpd/docs/wp259rev0.1_PT.pdf

19 Ibid.

CONCLUSION

On the grounds set out above, in order to ensure the primacy of Union law

European Union and the full effectiveness of the RGPD, the CNPD decides to disapply, in situations of

processing of personal data that it may come to appreciate, the following rules of Law no.

58/2019, of August 8:

i.

ii.

iii.

iv.

v.

saw.

Article 2, paragraphs 1 and 2

Article 20, paragraph 1

Article 23

Article 28(3)(a)

Article 37, no. 1, points a), h) and k), and no. 2

Article 38, no. 1, point b), and no. 2

vii.

Article 39, paragraphs 1 and 3

viii.

Article 61, no. 2

ix.

Article 62, paragraph 2

The CNPD clarifies that it makes this decision public, in order to ensure the

transparency of its future decision-making procedures and to this extent contribute to

legal certainty and certainty.

It also clarifies that the non-application, in future concrete cases, of the legal provisions

listed above results in the direct application of the GDPR rules that

were being by those manifestly restricted, contradicted or compromised

in its useful effect20.

Approved at the meeting of September 3, 2019

20 For a development of the practical consequences of the disapplication by administrative entities of

national rules for violating European Union law, see Patrícia Fragoso Martins,

National Public Administrations and European Union Law – Essential Issues and Jurisprudence,

Lisbon, Universidade Católica Editora, 2018, in particular, pp. 84-85.