

National Commission

Data Protection

OPINION/2023/1

## I. Order

1. The Director of International Relations and Communication Services requested, on December 15, 2023, the National Data Protection Commission (CNPD) to issue an opinion on the Proposal for a Regulation of the European Parliament and of the Council that establishes a common framework for services media in the internal market (Freedom of the Media Regulation) and amending Directive 2010/13/EU.

2. The CNPD issues an opinion within the scope of its attributions and competences as an independent administrative authority with authoritative powers for the control of the processing of personal data, conferred by articles 57, paragraph 1, point v); 58, paragraph 3, subparagraph b); both of Regulation (EU) 2016/679, of April 27, 2016 - General Regulation on Data Protection (hereinafter RGPD), in conjunction with the provisions of articles

3. °; 4th No. 2; 6, n.° 1, letter a), all of Law n.° 58/2019, of August 8, which implements the GDPR in the internal legal order (hereinafter LERGD).

## II. Analysis

3. Its explanatory memorandum states that "the proposal seeks to resolve a series of problems that affect the functioning of the internal market for media services, as well as that of media service providers", essentially in two vectors: i) different national rules and procedures relating to media freedom and pluralism; ii) fragmentation of the internal market, affecting legal certainty for media market players and generating additional costs for those wishing to operate cross-border (§ 3).

4. The explanatory statement further states that "The situation is further complicated by insufficient cooperation between national media authorities and regulators" (§ 4).

5. For this purpose and further motivating the purposes of this legislative initiative, the following specific objectives are set out: i) to promote cross-border activity and investment in media services; (ii) increasing regulatory cooperation and convergence through cross-border coordination tools and EU-wide opinions and guidelines; iii) facilitate the provision of quality media

services, mitigating the risk of undue interference in editorial freedom, whether by public or private entities; iv) ensure a transparent and equitable allocation of economic resources in the internal media market, reinforcing transparency and equity in the measurement of audiences and the allocation of state advertising (§ 9).

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PAR/2022/92

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6. The same explanatory memorandum, in order to implement the objectives outlined, also points out that "The legislative proposal is accompanied by a recommendation, which provides a catalog of good voluntary practices for media companies, in order to promote independence editorial, as well as recommendations addressed to media companies and Member States, with the aim of increasing the transparency of media ownership. The recommendation will help to mitigate the risks of unjustified interference in individual editorial decisions and to improve the access to information about the ownership of the media" (§ 10).

7. The legal basis invoked in exposing the proposal is Article 114 of the Treaty on the Functioning of the European Union (TFEU), which provides for the adoption of measures relating to the approximation of the laws, regulations and administrative provisions of the Member States , having as their object the establishment and functioning of the internal market.

8. To this end, it is considered, and we quote, that "The initiative is based on existing legal frameworks and will only focus on areas where additional EU action appears necessary for the proper functioning of the internal market for media, including to ensure a level playing field and the independent functioning of media players across the EU".

9. The explanatory memorandum states, under the heading "Impact assessment", that "In line with its 'Better Regulation' policy, the Commission carried out an impact assessment of the present proposal, which was analyzed by the Regulation (CCR) of the Commission", where the following strategic options were analysed: 1) Recommendation on the pluralism and

independence of the media; 2) Legislative proposal and recommendation on media independence; 3) Reinforced legislative proposal to promote the availability of quality media services and a transparent and equitable allocation of economic resources in the media market.

10. These statements in the explanatory memorandum are reflected in the proposal's recitals (eg 1, 2, 4, 6, 13, 14, 15, 19, 20, 47).

11. As can be seen, the fundamental rights of the European Union essentially implied in this proposal relate to freedom of expression and information (Article 11 of the Charter of Fundamental Rights of the European Union - CDFUE), as well as freedom of business and the right to property (articles 16 and 17 of the CDFUE), only occasionally involving the right to privacy and the right to protection of personal data (articles 7 and 8 of the CDFUE).

PAR/2022/92

two

National Data Protection Commission

12. In the legal design of the Proposal for Regulation in question and with possible implications in this last aspect of privacy and data protection, we can essentially refer to three norms: paragraph c) of paragraph 2 of article 4, paragraph 1. Article 6(1) and Article 23(1) and 23(2).

13. Starting by considering paragraph c) of no. 2 of article 4 of the Proposal for a Regulation, the starting point is the prohibition of installation by Member States of "spy software" on a device or machine used by providers of media or, if applicable, by their family members, or by their employees or their family members, to then admit such installation if, "[...] after examining the specific case, this is justified on grounds of national security and is in accordance with Article 52(1) of the Charter and other Union law, or if installation takes place in the course of investigations into serious crimes committed against one of the above-mentioned persons, is provided for by national law and in pursuant to Article 52(1) of the Charter and other Union law, and the measures taken pursuant to subparagraph (b) are inappropriate and insufficient to obtain the information sought".

14. Now, admission of provision in a legal norm, albeit on an exceptional and case-by-case basis, for the installation of spy software for discreet surveillance in a context of exercising freedom of the press and the right to information, only with the generic safeguards of proportionality in the restriction of these rights opens the door for the national law of Member States to

legitimize the discreet surveillance of journalistic activity, with a very high risk of violation, not only of the fundamental rights provided for in articles 7 and 8 of the Charter, but also the essential content of the fundamental rights to freedom of the press and freedom of expression and information, enshrined in Article 11 of the Charter, as well as the fundamental guarantee of confidentiality of sources.

15. To that extent, the CNPD recommends reconsidering Article 4(2)(c); If this intention is to be maintained, it is recommended that the Regulation itself provide for adequate measures to protect the fundamental rights to freedom of the press and the right to information, as well as the secrecy of sources, thus requiring the prior authorization of a judge.

16. In relation to the provisions of paragraph 1 of article 6 of the Proposed Regulation, in particular in paragraphs b) and c), where it is provided that "[t]he providers of social communication services that make available news content and relating to current affairs must provide the recipients of their services with easy and direct access" the names of their direct or indirect owners whose holdings allow them to exert influence on the operation and strategic decision-making and names of their beneficial owners within the meaning of article 3. °, point 6, of Directive (EU) 2015/849 of the European Parliament and of the Council, it should be remembered that the Court of Justice of the European Union (CJEU), in the judgment of 22 December 2022, Luxembourg Business

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PAR/2022/92

2v.

Registers (Cases C-37/20 and C-601/20), came to declare invalid the provision of Directive (EU) 2015/849, introduced by Directive (EU) 2018/843, in the part in which it admits the availability to the public in information regarding beneficial ownership.

17. Despite the differences between that rule and the provisions of paragraph 1 of article 6 - here delimiting the personal data to be disclosed (name) and not expressly providing for disclosure to the general public, but rather to recipients of media services that make news and current affairs content available - and that the Court recognized that making it available to the general public represents a considerably more serious violation of the fundamental rights guaranteed in articles 7 and 8 of the CFRUE than the previous regime (which provided, in addition to the access of the competent authorities and certain entities,

the access of any persons or organizations that could prove to have a legitimate interest), even so, we warn of the need to consider this jurisprudence in the context of this project of Regulation.

18. In effect, Article 6(1) establishes an irrebuttable presumption that the recipients of those services have a legitimate interest in accessing that information, exempting them from the need to demonstrate that. But the provision of the obligation to ensure easy and direct access to this information to any and all recipients corresponds, in practical terms, to the disclosure of such data to any and all members of the general public.

19. The CNPD therefore recommends reconsidering the provisions of paragraph 1 of article 6, in light of the recent case law of the CJEU.

20. With regard to the regulation of the measurement of audiences provided for in article 23, it is noted here the need to safeguard in more densified terms the fundamental rights to respect for private life and the protection of personal data, enshrined in articles 7 and 8 of the CDFUE, since the mere statement that the provision of paragraph 2 does not affect Union rules on data protection and privacy is insufficient.

21. In fact, such a statement, in itself, seems to indicate that no personal data is, in this context, subject to transmission by providers of proprietary systems for measuring audiences to providers of social communication services and advertisers, as well and to third parties authorized by media service providers and advertisers. But, as the wording has yet another meaning, the simple statement that the transmission of information cannot affect data protection rules does not offer the necessary guarantees for the protection of those fundamental rights.

22. To that extent, the CNPD recommends clarifying the wording of paragraph 2 of article 23 and, if the meaning of the rule is to admit the transmission of personal data, require the adoption of appropriate measures to comply with the protection regime of personal data.

PAR/2022/92

3

National Commission

Data Protection

23. And, since only paragraph 1 of article 23 regulates audience measurement systems and methodologies, taking into account the extremely high degree of intrusion into private life that such systems may have, it is important to safeguard in the

even paragraph 1 the legal regime for the protection of personal data and privacy.

### III. Conclusion

24. Based on the reasons set out above, the CNPD recommends:

The. The reconsideration of subparagraph c) of paragraph 2 of article 4, regarding the possibility of exceptionally foreseeing the installation of "spy software" on a device or machine used by providers of social communication services (or, if applicable, by their family members, or by their employees or their family members); if this intention is to be maintained, it recommends that the Regulation itself provide for adequate measures to protect the fundamental rights to freedom of the press and freedom of expression and information, as well as the secrecy of sources;

B. The reconsideration of the provisions of subparagraphs b) and c) of paragraph 1 of article 6, in the light of the recent case law of the CJEU on the inadmissibility of personal data relating to beneficial owners being accessible to the general public;

w. The amendment of article 23, in order to safeguard, in paragraph 1, the legal regime for the protection of personal data and clarify the meaning of the provision in paragraph 2 and, if the meaning is to admit the transmission of personal data , to impose the adoption of appropriate measures to comply with the personal data protection regime.

Lisbon, January 6, 2022

Filipa Calvao

(Chairman, who reported)

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PAR/2022/92

1

National Commission

Data Protection

## RECTIFICATION

1. In Opinion/2023/1 of the National Data Protection Commission (CNPd), issued on January 6, 2023 under process PAR/2022/92, two manifest material errors were detected in the indication of dates and an inaccuracy in the identification of the applicant body.

2. For this reason, and pursuant to article 174 of the Code of Administrative Procedure, Opinion/2023/1 is rectified, in the following terms:

The. On page 1, point 1, where it reads "The Director of International Relations and Communication Services requested on December 15, 2023 to [...]" it should read "The Director of International Relations and Communication Services of the Secretariat -General of the Presidency of the Council of Ministers requested, on December 15, 2022, to [...]";

B. On page 3, in fine, where it reads "Lisboa, 6 de janeiro de 2022" should read "Lisboa, 6 de janeiro de 2023".

3. This rectification is published on the institutional website of the CNPD.

Lisbon, January 20, 2023

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