

## I. Order

1. The Secretary of State for the Presidency of the Council of Ministers submitted the Draft Decree-Law No. 1049/XXII/2021, which regulates consumer rights in purchase and sale of digital goods, content and services transposing Directive (EU) 2019/771, of the European Parliament and of the Council, of 20 May 2019 and Directive (EU) 2019/770, of 20 of May 2019.
2. The CNPD issues an opinion within the scope of its attributions 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, in conjunction with the subparagraph b) of paragraph 3 of article 58 and paragraph 4 of article 36, all of Regulation (EU) 2016/679, of 27 April 2016 - General Regulation on Data Protection (hereinafter, RGPD), 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 August, which enforces the GDPR (hereinafter, Law of Enforcement) in the domestic legal order.

## II. Analysis

3. Draft Decree-Law No. 1049/XXII/2021 (hereinafter Draft) under analysis, aims to transpose Directive (EU) 2019/771 into the domestic legal order, which regulates certain aspects of purchase and sale of goods and amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC. It also establishes the consumer protection regime in contracts for the supply of digital content or services, transposing Directive (EU) 2019/770 of the European Parliament and of the Council, of 20 May 2019, on certain aspects relating to contracts of provision of digital content and services, enshrining consumer rights in the event of non-provision or non-compliance of digital content or services.
4. The Project also establishes the regime applicable to the purchase and sale of immovable property in the event of non-compliance, the direct liability of the producer in the event of non-compliance of goods, digital content or digital services, the liability of market providers in line and the sanctioning regime applicable to the breach of the professional's duties.
5. Pursuant to the preamble, Directive 2019/771, which is intended to be transposed, aims to contribute to the proper

functioning of the internal market, while ensuring a high level of consumer protection. In this sense, it establishes common rules regarding certain requirements relating to contracts

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of purchase and sale concluded between trader and consumer, in particular rules regarding the conformity of the goods with the contract, the means of compensation in the event of non-compliance, the modalities for the exercise of these means and commercial guarantees, extending these rules to contracts of buying and selling goods with embedded digital elements.

6. Thus, Chapter II of the Project (regime applicable to the purchase and sale of goods) enshrines the principle of conformity of goods with a set of subjective and objective requirements, providing for the professional's responsibility for the lack of conformity of the good that manifests itself in certain deadlines now set.

7. As for consumer rights in the event of non-conformity of the goods, those originally provided for in Decree-Law No. 67/2003, of 8 April, but now subject to different levels of precedence, remain. A new right is established when the lack of conformity is manifested within thirty days from the delivery of the goods.

8. The professional's obligations are established regarding the repair period, the collection and removal of goods for repair and the return of the price paid in the event of termination of the contract.

9. The Project incorporates the provisions of Decree-Law No. 67/2003, of April 8, in its current wording, which is now revoked, relating to consumer rights in the event of non-compliance of immovable property and the voluntary guarantee (now commercial guarantee) with added information obligations.

10. It also establishes the professional's duty to provide spare parts for a period of ten years and an after-sales assistance service in the case of movable goods subject to registration.

11. In turn, Chapter III sets out the regime applicable to the supply of digital content, closely following Directive (EU) 2019/770, of 20 May 2019, which is also intended to be transposed.

12. Thus, the Project sets subjective and objective requirements for compliance of digital content or services and consumer rights in the event of non-compliance.

13. It also provides for the professional's obligations in the event of termination as well as deadlines and modalities for reimbursement by the professional.

14. With regard to line market providers, the conditions are determined so that they can be considered direct contractual partners of the professional who supplies the product, providing, for this purpose, the possibility for consumers to exercise their rights in case of lack of conformity of digital goods, content or services also with these providers.

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15. Finally, the Project establishes a sanctioning regime, according to which the Food and Economic Security Authority and the Instituto dos Mercados Públicos, do Imobiliário e da Construção, I.P., are the competent entities to supervise, instruct the administrative offense processes and apply the respective fines and ancillary sanctions.

16. As the provisions of the Project closely follow the text of the Directives that are intended to be transposed, not raising new questions about the right to protection of personal data, the pronouncement will focus only on some specific provisions in this matter, in particular on Articles 3, 36 and 52.

17. Just a formal note regarding Article 2(n) of the Project which, in addition to defining 'Online Market Provider', also defines the concept of 'Professional'. This concept should be made autonomous in a new paragraph, proceeding with the renumbering of the subsequent paragraphs.

18. Thus, with regard to the right to protection of personal data, b) of paragraph 3 of article 3, regarding the scope of application of the diploma in question, provides that the same is also applicable to contracts for the supply of digital content or services where "the trader provides or undertakes to provide digital content or services to the consumer and the consumer provides or undertakes to provide personal data to the trader, except where the personal data is intended for exclusive processing by the trader for the provision of digital content or services in accordance with this decree-law by the professional of the legal requirements to which he is subject, not processing such data for any other [purposes]".

19. Although the provisions therein correspond to the second part of article 3 of Directive 2019/770, the CNPD warns that the transposition of such a provision must be densified, clearly clarifying that the legislator does not intend to waver in the face of a monetarist conception of data personal data, but only guarantee the right to reimbursement in case of non-compliance of

digital content or services.

20. In fact, such an understanding is reflected in recital (24) of Directive 2019/770: 'Digital content or digital services are often provided in situations where the consumer does not pay a price, but provides data to an operator. These specific business models are already applied in different ways in a considerable part of the market. While fully recognizing that the protection of personal data is a fundamental right and that therefore personal data cannot be considered a commodity, this Directive should ensure that consumers enjoy, in the context of those business models, the right to means of reimbursement under the contract. Therefore, the present

1 Certainly by mistake the article omits the word “purposes” at the end, contrary to the text of the Directive.

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Directive should apply to contracts where the trader provides or undertakes to provide digital content or to provide digital services to the consumer and the consumer provides or undertakes to provide such data'.

21. Thus, the mere literal transposition of the Directive's articles could lead to an interpretation of Article 3 as recognizing the possibility of monetization or commodification of data, which is clearly not the underlying ratio of Article 35 of the Constitution of the Portuguese Republic and Article 8 of the Charter of Fundamental Rights of the European Union, which aim to guarantee and promote the dignity of the human person, given that the right to data protection constitutes a fundamental guarantee of respect for private life, freedom and the free development of the personality, as well as the right to non-discrimination.

22. In turn, Article 36 of the Project establishes the professional's obligations in the event of termination of the contract in the face of lack of conformity of digital content or services, some arising from the personal data protection regime.

23. Thus, paragraph 3 stipulates that the trader refrains from using any content, even if it is not personal data, provided or created by the consumer when using the digital content or services provided by the trader, with the exceptions provided for in

subparagraphs a) to d), under penalty of incurring an administrative offense provided for in subparagraph i) of paragraph 1 of article 48. This provision results from the fact that, in the event of termination of the contract, there is no longer any legal basis for the processing of personal data, as required by subparagraph a) of paragraph 1 of article 5 of the RGPD.

24. It should be noted that paragraphs 4 and 5 of the same article provide that the trader must, at the consumer's request, make available to him any content provided or created during the use of digital content or services, free of charge and within a reasonable period of time in a commonly used data format that can be read. In this way, when personal data are at stake, the exercise of the right to data portability is foreseen under the terms of article 20 of the RGPD.

25. It should be noted that paragraph 7 of this section establishes that the professional, in the event of termination of the contract, must comply with the obligations arising from the GDPR with regard to the consumer's personal data. As the professional is responsible for data processing, under the terms of paragraph 7 of article 4 of the RGPD, he is subject to the obligations of those responsible provided for in the RGPD, so this provision is marked as positive.

26. The CNPD recalls, however, that the RGPD is fully applicable to all processing of personal data arising from contracts covered by the scope of application of the Decree-Law. It is strange, therefore,

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that the national legislator only makes an express reference to the obligations of those responsible, in the event of termination of the contract, without mentioning other key elements of the legal data protection regime, such as the principles relating to the processing of personal data and the rights of data subjects .

27. Therefore, it is suggested to introduce an item that expressly states that all processing of personal data resulting from the application of this Decree-Law respects the principles relating to data processing, as well as the rights of data subjects, in this case the consumers, namely the right to information, access, to withdraw consent for the processing of their personal data, the right to rectification and erasure of data, as well as the remedies provided for in the RGPD.

28. The relevance of this reference is clearly evident in recital (48) of Directive 2019/770, which states that "The facts that give rise to the lack of compliance with the requirements set out in the GDPR, including fundamental principles, such as the

applicable to data minimization by design and data protection by default, may, depending on the specific circumstances of the case, also be considered as a lack of conformity of digital content or services with the subjective or objective requirements of conformity established by this directive....Whenever the facts that lead to non-compliance with the requirements set out in the GDPR also constitute a lack of conformity of digital content or services with the subjective or objective requirements of conformity provided for in this directive, the consumer should be entitled to the remedies applicable in the event of non-compliance provided for in this Directive, unless up to a contract which is already void or voidable under national law'.

### III. Conclusion

29. Based on the above grounds, the CNPD recommends:

The. The reformulation of subparagraph b) of paragraph 3 of article 3, clarifying that it is not a question of a monetarist conception of personal data, but only guaranteeing the right to compensation in case of lack of conformity of digital content or services ; and

B. The introduction of an item that makes an express reference to the application of the RGPD to all the processing of personal data arising from this law.

Approved at the meeting of July 22, 2021

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