

Opinion of the National Commission for Data Protection relating to

Bill no. 7818 amending the Code of

consumption for the purposes of transposition of 1. Directive (EU) 2019/770

of the European Parliament and of the Council of 20 May 2019 relating to certain

aspects concerning contracts for the supply of digital content

and digital services; 2. Directive (EU) 2019/771 of the Parliament

European Parliament and of the Council of 20 May 2019 relating to certain aspects

concerning contracts for the sale of goods, amending Regulation (EU)

2017/2394 and Directive 2009/22/EC and repealing Directive

1999/44/EC.

Deliberation n°30/AV25/2021 of October 1, 2021

In accordance with article 57, paragraph I, letter (c) of regulation (EU) n°2016/679 of 27 April

2016 on the protection of natural persons with regard to the processing of personal data à

personal character and on the free movement of such data, and repealing Directive 95/46/EC

(General Data Protection Regulation) (hereinafter the “GDPR”), to which refers

Article 7 of the law of August 1, 2018 on the organization of the National Commission for the

data protection and the general data protection regime, the Commission

National Commission for Data Protection (hereinafter referred to as the “National Commission” or the

"CNPD") "advises, in accordance with the law of the Member State, the national parliament, the

government and other institutions and organizations regarding legislative measures and

administrative measures relating to the protection of the rights and freedoms of natural persons with

of treatment”.

By letter dated April 13, 2021, Madam Minister of Consumer Protection

invited the National Commission to give its opinion on draft law no. 7818 amending

of the Consumer Code for the purposes of transposition of 1. Directive (EU) 2019/770 of

European Parliament and of the Council of 20 May 2019 on certain aspects concerning the

contracts for the supply of digital content and digital services; 2. the directive (EU)

2019/771 of the European Parliament and of the Council of 20 May 2019 relating to certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC (hereinafter the "draft law").

According to the authors of the bill, "the main objective of these directives is to promote the creation of a true digital market in the interest of both consumers and businesses by eliminating key contract law barriers that impede the cross-border trade". The authors of the bill indicate that the guidelines "provide maximum harmonization rules". The two directives to be transposed "are based on Article 114 of the Treaty on the Functioning of the European Union, the main objective of which is CNPD

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to improve the establishment and operation of the internal market" and are part of the "[European Union] strategy for a digital single market".

According to the explanatory memorandum, the bill "reforms, on the one hand, in depth the rules relating to the conformity of tangible movable property of the Chapter relating to the legal guarantee of compliance with the Consumer Code" and "includes, on the other hand, the introduction of provisions news regarding contracts for the supply of digital content or services digital". The authors of the bill further explain that the bill introduces "specific provisions for goods with digital elements (the 'smart goods' such as smartphones, connected watches, digital tablets, e-readers etc.) especially with regard to their updates". Then, according to the authors of the bill, the "new provisions concerning contracts for the supply of digital content or digital services [...] respond to the unprecedented particularity that the provision of content

digital or digital service may take place [...] in exchange [...] for the supply by [the

consumer] of personal data". Finally, the bill "puts

subsequently put in place the remedies, and their terms, in the event of failure to supply,

compliance or changes to digital content or digital services".

Insofar as this draft law transposes Directive (EU) 2019/770 into national law

and Directive (EU) 2019/771 mentioned above, the National Commission refers with regard to

the legal framework of this directive in opinion 4/2017 of 14 March 2017 of the European Supervisor of

data protection (hereinafter the "EDPS") on the proposal for a directive concerning certain

aspects of contracts for the supply of digital content' and will limit its comments to

legal provisions concerning the concrete implementation of this directive in national law

having a potential impact on the protection of personal data.

I. Update of "smart goods"

According to the explanatory memorandum, the bill introduces "specific provisions for property

containing digital elements ('smart goods' such as smartphones, watches

connected devices, digital tablets, e-readers, etc.) particularly with regard to their

updates".

Thus, the new article L.212-16, paragraph 2, of the Consumer Code provides that

"[the trader shall ensure that the consumer is informed of updates, including

including security updates, which are necessary to maintain compliance

digital content or digital service, and receives them during the

period [...]

1 https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_en.pdf

See also: Summary of the opinion on the proposal for a directive concerning certain aspects of contracts of

provision of digital content. Official Journal of the European Union, 2017/C 200/07, 23 June 2017.

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Similarly, the new articles L-212-3, first paragraph, letter d), L-212-4, paragraph 3, and L-212-16, paragraph 2, of the Consumer Code provide for obligations and concepts similar regarding updates and security updates.

The CNPD welcomes the introduction of such provisions which allow optimal use of these goods with digital elements. These provisions clarify, independently other rules such as arising in particular from the GDPR, the obligations of the professional in connection with the supply of such a good.

The National Commission wishes, however, to point out that, in addition to this obligation, when the use of the property in question involves the processing of data at personal nature, Article 32 of the GDPR provides for autonomous obligations in terms of security measures, in particular that the "controller and the processor put implement the appropriate technical and organizational measures to guarantee a level of risk-appropriate security. In this regard, it should be noted that recital 30 of Directive 2019/771 ultimately states that "

this Directive should not affect the obligations to provide security updates otherwise provided for in Union law or in national law".

Recital 48 of Directive 2019/770 further explains that

"[...] a breach of the obligations arising from Regulation (EU) 2016/679 could, in same time, render the digital content or digital service unsuitable for the purpose referred to and, consequently, constitute a failure to comply with the objective criterion of compliance which requires that the digital content or digital service be suitable for the purposes for which a digital content or digital service would normally serve of the same type. 1...1

In the same vein, recital 50 of Directive 2019/770 explains that

"When applying the rules of this Directive, traders should

use standards, open technical specifications, best practices and

codes of conduct, including with respect to commonly used data formats

used and machine-readable to extract content other than character data

personal, which was provided or created by the consumer when using the content

digital or digital service, and including those relating to the security of systems

IT and digital environments, whether established at the level

international, Union or sectoral level. »

Thus, in the context of the provision of goods and services involving processing

data, failure to implement adequate security measures (given the state

art) by the data controller or by the subcontractor under their obligations

arising from the GDPR could, where applicable, constitute a lack of compliance with the objective criterion

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of conformity of a good comprising digital elements, even if the contract with the

consumer remains silent on the update of the digital elements.

II. The supply of digital content or digital services in exchange for the

provision of personal data

The authors of the bill specify in the explanatory memorandum that

"The bill introduces new provisions concerning employment contracts.

provision of digital content or digital services. These contracts meet

the unique feature that the supply of digital content or digital service

may take place not only in exchange for the payment of a price by the consumer,

but also of the provision by the latter of personal data”.

Thus, the new article L-212-12, paragraph 1, subparagraph 3 of the Consumer Code provides that :

“This sub-section also applies when the trader provides or undertakes to provide digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the professional, except when the personal data provided by the consumer are exclusively processed by the trader to provide the content digital service or the digital service in accordance with this subsection or to enable the professional to fulfill the legal obligations incumbent on him, to as long as the professional does not process this data for another purpose. »

In the commentary to the articles, the authors present this passage as “[g]reat novelty and unprecedented provision of Directive 2019/770, contracts by which instead of pay a price, the consumer provides personal data falls within the scope application of this subsection. »

Nevertheless, the new article L.212-12, paragraph 8 of the Consumer Code indicates that:

"European Union law on the protection of personal data personal data applies to all personal data processed in connection with the contracts referred to in subsection (1).

In particular, this subsection is without prejudice to the [GDPR] and the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. In the event of a conflict between the provisions of the this subsection and those of Union law on data protection of a personal nature, the latter prevail. »

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With particular regard to the provision of digital content or services digital, the authors of the bill specify in the explanatory memorandum that “this variety of contracts is reflected in particular by a notable novelty of the text which is intended to take into consideration as non-monetary consideration for the supply of the digital content or service, the provision by the consumer of data to personal character. The directive thus attempts to strike a balance between the protection of personal data which is a fundamental right and the need to protect the consumer in transactions within a commercial model based on the resale of personal data”.

Based on European standards on the fundamental right to respect for life privacy and the fundamental right to the protection of personal data, the EDPS notes that it is "very possible that there is a market for personal data [...] but that does not mean that we can or should give this market the anointing of the law". So, he is regrettable that Directive 2017/770, and hence the draft law, suggests that the provision of personal data can constitute real consideration for a service services or property, in particular a digital content or service. Indeed, as it follows moreover explicitly from the new article L.212-12, paragraph 8 of the Consumer Code aforementioned, the processing of the consumer's personal data by the professional must comply in all respects with the rules arising from the GDPR and the legislation relating to the privacy and electronic communications, in particular the rights of individuals concerned such as the right to erasure and the right to object. In this respect, the CNPD joins in the opinion of the EDPS who considers in his opinion that "personal data cannot be compared to a price or to money" and "that the term 'data as consideration' should be avoided" to avoid confusion with the obligations arising in

particular GDPR.

In this regard, it should be noted that recital 38 of Directive 2019/770 specifies that “this Directive should not regulate the conditions applicable to the processing lawful personal data, this matter being regulated, in particular, by the [GDPR]. Therefore, processing of personal data in connection with a contract falling within the scope of this Directive is lawful only if it is in accordance with the provisions of the [GDPR] concerning the legal bases for processing personal data”.

In any case, the CNPD nevertheless welcomes the fact that the consumer can benefit the same guarantees provided for by the Consumer Code in relation to contracts that are called "free", that is to say without monetary compensation, relating to goods and services digital media, including the provision of digital content.

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III. Means of appeal

According to the explanatory memorandum, the bill "subsequently puts in place the remedies, and their terms, in the event of a lack of supply, non-compliance or even changes to the digital content or digital services”.

Thus, the new article L. 212-6, paragraph 1, of the Consumer Code provides that:

"In the event of a lack of conformity, the consumer has the right, under the conditions laid down to this article, to the bringing into conformity of the goods, to a proportional reduction of the price, or at the termination of the contract. »

The new article L. 212-21, paragraph 1, of the Consumer Code provides for a provision

similar for contracts for the supply of digital content or a digital service.

The authors of the bill specify in the commentary to this article that "when the content or the digital service was provided in exchange for the data consumer supplying of a personal nature, the consumer has the right to rescind the contract (he cannot sufficiently logically benefit from a price reduction).

As mentioned above, recital 48 of Directive 2019/770 explains that:

"[...] a breach of the obligations arising from Regulation (EU) 2016/679 could, in same time, render the digital content or digital service unsuitable for the purpose referred to and, consequently, constitute a failure to comply with the objective criterion of compliance which requires that the digital content or digital service be suitable for the purposes for which a digital content or digital service would normally serve of the same type.

This would be the case, for example, if the data encryption software professional does not did not implement the appropriate measures required by Regulation (EU) 2016/679 to ensure that personal data by design is not disclosed to unauthorized recipients, which would render the encryption software unsuitable for its purpose, namely the secure transfer of data by the consumer to their intended recipients. Finally, there could be cases where failure by the professional, of the obligations incumbent upon him under Regulation (EU) 2016/679 may also constitute a lack of conformity of the digital content or service digital to the objective criterion of conformity which requires that the digital content or the digital service has the characteristics that are normal for content digital or digital services of the same type and to which the consumer can reasonably be expected. For example, if a professional offering a online sales application does not take the measures provided for by Regulation (EU) 2016/679 to ensure the secure processing of the personal data of the

consumer and that, therefore, the information related to the credit card of the

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consumer are exposed to malware or spyware, which

failure could also constitute a lack of conformity of the content

digital or digital service within the meaning of this Directive, given that the

consumer could reasonably expect that an application of this type

normally has characteristics preventing the disclosure of its contact details

banking. »

The facts which lead to non-compliance with the requirements laid down in Regulation (EU)

2016/679, including its basic principles such as the requirements for

data minimization, data protection by design and protection

default data, may also, depending on the circumstances, be considered

as failures of conformity of the digital content or the digital service with the

subjective or objective conformity criteria provided for in this Directive. An example

could be that of a professional who makes an explicit commitment in the contract to

fulfill an obligation, or where the contract can be interpreted as such, and where this

obligation is also linked to the obligations of the professional provided for by the regulation

(EU) 2016/679. In this case, such a contractual commitment may become an integral part

subjective conformity criteria.

[...] When the facts at the origin of the non-compliance with the requirements provided for by the regulation

(EU) 2016/679 also constitute a lack of conformity of the digital content or

of the digital service to the subjective or objective conformity criteria as they are

provided for in this Directive, the consumer should be entitled to remedies for

lack of conformity provided for in this Directive, unless the contract is already

void or voidable under national law. »

It is thus to be welcomed that, for violations of the GDPR in connection with the provision of content

digital, a digital service or a good comprising digital elements, the

consumer benefits from the aforementioned remedies, in addition to the remedies normally

available for breaches of data protection regulations ä

personal nature and invasions of privacy, in particular Article 82 of the GDPR. In this regard,

it is worth recalling recital 48 of Directive 2019/770 which specifies that "Do not settle

(EU) 2016/679 or any other provision of Union data protection law

should fully apply to the processing of personal data in connection with any

contract falling within the scope of this Directive. In addition, this directive

should apply without prejudice to non-contractual rights, obligations and remedies

provided for in Regulation (EU) 2016/679".

However, it is not easy to determine on the basis of which elements the consumer will be able

effectively prove the non-conformity of the contract on the basis of a violation of the provisions

applicable to data protection. On the one hand, the mere allegation of such

violation brought against a professional does not seem sufficient to demonstrate a

such non-compliance. On the other hand, the requirement for the consumer of a final decision to

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against the controller or a processor on the part of the supervisory authority

(in this case the CNPD) or in the context of a judicial appeal seems to place a charge

excessive evidence on the consumer, in particular by conditioning the exercise of his

recourse — in particular the termination of a contract — to potentially long and

possibly depending on a margin of appreciation of an authority having the opportunity of action. Thus, the CNPD wonders if it would not be useful to detail how the consumer can provide proof of such non-compliance.

Beyond the civil law remedies available to the consumer, there is the question of the implementation of the professional's liability, in particular when the termination of the contract arises from a failure to meet subjective or objective criteria based on a breach of obligations arising from the GDPR. Although the right to a class action is not covered by the two directives, the CNPD is taking advantage of this opinion to support the introduction of such a system in Luxembourg law. Thus, it had already called for the introduction of a provision providing for this possibility of collective redress or "class action" for questions of data protection, in the law of August 1, 2018 on the organization of the Commission national data protection system and the general data protection regime.

Article 80, paragraph (2) of the GDPR moreover explicitly indicates that the Member States may provide for this possibility in accordance with their national law, which is however not the cases to date in Luxembourg. Such a possibility could still be introduced if necessary.

through Bill No. 7650 introducing collective redress in the law of the consumption, including compensation for damage resulting from an infringement of the protection personal or privacy data.

Thus decided in Belvaux on October 1 and 2021.

The National Data Protection Commission

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