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/ JL NATIONAL COMMISSION ON DATA PROTECTION

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OPINION/2020/52

I. Order

The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees submitted to the National Data Protection Commission (hereinafter CNPD), for an opinion, Bill No. 230/XIV/1.3 (PS), which establishes the Protection Regime of individuals in the face of abusive practices resulting from extrajudicial recovery of overdue credits.

The CNPD issues an opinion within the scope of its powers 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 subparagraph b) of paragraph 3 of article 58, and with 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. appreciation

The bill under analysis aims to combat unfair or illegitimate conduct on the part of those who, on their own or, above all, on behalf of others, carry out the extrajudicial collection of overdue credits. By way of explanatory memorandum, legislation from other countries (United Kingdom, France, United States of America and Canada) are mentioned where these problems are already regulated, but it should be noted that, at least in European Union countries (France and, as long as it is bound by the GDPR, the United Kingdom), there are no rules similar to those that are now moving to be included in the national legal system in terms of processing of personal data.

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• Processing of personal data

Special attention is given to the matter of unsolicited or consented contacts on the part of the debtor. In this regard, paragraph 1 of article 4 states that “Without the prior consent of the debtor, and without prejudice to the cases provided for in the following paragraph, creditors or their representatives may not communicate for the purpose of interpellation for payment in connection with the collection of any debt, from any person other than the debtor or his attorney.”

In subparagraphs c) and d) 6th paragraph 5 of this same article, it is provided that “The creditor or his representative are obliged to: Refrain from making contacts to the debtor’s workplace, unless expressly authorized by the debtor to the contrary ” and “Safeguard the debtor's privacy and reserve of intimacy, namely refraining from going to his residence between 20:00 and 8:00 the following day”.

Article 5, on the other hand, deals with the “Cessation of contact with the debtor”, prohibiting the contact of the creditor or his representative with the debtor after the latter has refused to pay a debt or stated that he does not want to receive further communications from them, saved “To inform the debtor that the debt collection process is closed; To inform you that you will proceed with the judicial collection, which can only happen once; In cases where such contact derives from the law, namely because it is intended to comply with a legal or judicial determination.”.

In article 7 (titled “Personal Data”), in turn, it is stated that “The processing of data concerning debtors can only take place under the terms and in the cases provided for in the legal data protection regime.”

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Now, if all processing of personal data - and this last word is missing in the current wording - concerning debtors are only admissible (and well) within the framework of the legal data protection regime, then we will have to assess whether, in the first place, , the treatments and provisions that aim to regulate them that the law itself provides are in accordance with this regime. And it doesn't seem right to us that they are, as we will detail below.

• Relationship with the GDPR

Realizing the legislator's desire and desire to create a context of greater protection for consumers, it should, however, be noted that these articles and the sequence they expose seem to put future and eventual national rules in conflict with the current European Union rules1.

It should be noted that the GDPR defines extensively and not exhaustively what personal data are (Article 4(1)) and personal data processing (Article 4(2)), and the first concept includes the contacts of any data subject and the second includes the use of those same contacts for purposes covered by the regulation2. When a creditor or its “representative”, as the project calls it, contact a debtor, they are automatically processing personal data subject to the discipline of this European regulation.

This means that the legality or, under the terms of the RGPD, the lawfulness of these treatments must be verified by reference to the grounds contained therein and which authorize them. In Article 6 of the regulation we find the catalog of grounds for any processing that does not involve special categories of data3.

1 And likewise with those of Law No. 58/2019, of August 8, as will be explained later.

2 Cf. Article 2 of the GDPR.

3 Which are provided for in Article 9(1) and benefit from a more demanding protection framework.

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By adding legal grounds to a regime that only admits it in specific cases4 through this bill, the national legislator may be opposing a regime that, by its nature, overrides its ability to initiate legislation. It should be noted that what is at issue here is not the legitimacy of creditors to contact debtors, but rather the grounds that authorize it.

Secondly, the creditors' representatives, with regard to the terms of the GDPR, constitute themselves as subcontractors, i.e., “a natural or legal person (...) who processes personal data on behalf of the person responsible for processing them”5 . As such, its action always leads back to that of the person responsible, who is the creditor here. In addition to the formal requirements of this relationship, listed in Article 28 of the GDPR, any data processing operation that the processor undertakes may, if unlawful, be punished under the terms of the regulation, implying the potential imposition of fines of up to 20,000,000, 00€ or 4% of your annual turnover.

Regardless of how the RGPD qualifies the relationship between the creditor and its representative, the assessment of the legality of the actions of those responsible and subcontractors, namely regarding the regularity of obtaining consent from the data subjects, is always up to, according to the attributions provided for in Article 57(1)(a) to the competent supervisory authority in Portugal, the CNPD. And this is an aspect to which we will return.

4 What happens, as provided for in paragraph 3 of article 6, in the case of a legal obligation or the exercise of functions in the public interest or the exercise of public authority.

5 Cf. Article 4(8) of the GDPR.

6 And also with regard to sanctioning violations of the GDPR, as is apparent from the provisions of paragraph 2 of article 58, in particular, with regard to consent, in conjunction with subparagraph a) of paragraph 5 of article 83 . of the GDPR.

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• The debtor

The possibility of the debtor being able to consent to third parties to be the subject of communications by the creditor or his responsible for the purpose of interpellation for payment in connection with the collection of any debt of that one, as provided for in paragraph 1 of the Article 4 also poses challenges that must be addressed.

This wording implies that the debtor admits that third parties may become the target of communications that only concern him. This means that it will be up to you to obtain and transfer data from third parties to creditors or their representatives and that they will be able to communicate with these third parties. Again, the existence of processing of personal data that now involves people who initially would not be part of the credit relationship is noted. In this model, the debtor also becomes responsible for the processing of personal data, in this case, the operations of collection and transfer of data from third parties for the purpose of receiving contractual communications, a circumstance that should not be ignored.

• The creditor

Article 4(3) of the draft law is also problematic, as it establishes the possibility for a creditor or his representative to be able to address a third party - within the meaning of article 4(10) of the GDPR - to obtain information about the debtor. However, what the legislator thus allows is for there to be a collection (other processing) of the debtor's data by the creditor or its subcontractor (the representative) from third parties7 - these being, for the purposes of the law, responsible for the collection and transfer of information -, something that would only be allowed within the framework of a judicial process concerning its intervening parties and which can now be done outside that framework, by law. Again, the creation of the legal basis for processing personal data must be

7 The so-called indirect collection of personal data.

carefully evaluated by the national legislator to ensure that there is no contradiction or unauthorized overlap with hierarchically higher instruments, such as European regulations. Without prejudice to this legislative option, the remaining criteria for the legality of the treatments established in the RGPD (such as the transparency and security requirements) cannot fail to be observed by any of the responsible and subcontractors to which the bill refers.

In subparagraph d) of paragraph 5 of article 4, the creditor and his representative are obliged to “Safeguard the debtor's privacy and privacy, namely by refraining from traveling to his residence between the twenty o'clock and eight o'clock the next day. Since this provision goes beyond the aspect relating to the protection of personal data, it does not subtract from it, so, in fact, what is also being addressed is the need, already resulting from the current personal data protection regime, of the person responsible for the treatment and the processor comply with the same regime.

And this aspect refers to the last point that deserves repair, linked precisely to the sanctioning regime specifically created through this project.

• Sanctioning regime

This is because, both paragraph 1 (light offences), and paragraph 2 (serious offences), of article 8 of the project provide specific sanctions for disrespect for paragraphs 1 and 3 and for subparagraphs and) and f) of Article 4(5) and Article 5, as well as Article 4(5)(4) and subparagraphs b) to d). As stated throughout the opinion, there are several notes regarding the discipline of processing of personal data contained in most of these provisions.

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In accordance with the provisions of paragraph 5 of article 8, and as follows: “The investigation of administrative offense proceedings provided for in this law, as well as the application of fines and accessory sanctions, is the responsibility of the Directorate- Consumer General”.

As already mentioned in the point referring to the RGPD, the competence regarding the verification of its compliance and eventual sanction of the conducts that disrespect it is well defined in this regulation. As provided in Article 51 of the GDPR, “Member States shall establish that one or more independent public authorities is responsible for supervising the application of this Regulation, in order to defend the fundamental rights and freedoms of natural persons with regard to the processing and facilitate the free movement of such data within the Union ('the supervisory authority').

In Portugal, Law no. this same jlei”.

Therefore, the result of the combined reading of paragraph 38 and paragraph 5 of article 8, which gives the Directorate-General for Consumers the competence to investigate cases and apply sanctions arising from the GDPR and respective complementary legislation, as it violates the provisions of national law, but also and above all in a European regulation, because such body does not comply with the independence requirements imposed by articles 52 and 53 of the GDPR

It is accepted that this result is not the one intended by the legislator, but the mere reference to the RGPD and complementary legislation, together with the express mention of the competence of the aforementioned Directorate-General to instruct the administrative offense proceedings and apply the fines and ancillary sanctions. provided for in this bill, leaves no room for different interpretation.

8 Which provides the following: “Violation of the rules on the processing of personal data is sanctioned under the terms provided for in the General Data Protection Regulation and in the respective complementary legislation”.

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III. Conclusion

Bill No. 230/XIV/1.a (PS), which establishes the Regime for the protection of individuals against abusive practices resulting from extrajudicial collection of overdue credits, contains elements whose compliance with the legal protection regime of personal data in force in Portugal appears to be problematic.

Without prejudice to the interest and relevance of the regulation in question, the CNPD understands that the following points deserve reflection and review:

• The consecration of additional purposes to those provided for in the RGPD (specifically those contained in its article 6) to authorize data processing - to the creditor - must be carefully considered and their admissibility checked against this European regulation;

• The sanctioning regime foreseen, by removing the CNPD from the control, supervision and sanctioning of personal data protection issues, attributing such competence to the Directorate-General for the Consumer, violates the provisions of articles 51, 52 and 53. of the GDPR, in addition to contravening article 3 of Law No. 58/2019, of 8 August. Such a violation takes the form of the attribution of those powers to an entity that does not comply with the independence requirements set out in that regulation, so it is understood that the wording of article 8 of the project should be reviewed.

Lisbon, May 18, 2020

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