National Data Protection Commission

OPINION/2022/51

I. Order

1. The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, of the Assembly of the Republic, submitted to the National Data Protection Commission (hereinafter CNPD), for opinion, Bill No. Bill No. 70/XV /1,a, «which makes the second amendment to Law No. 32/2008, of 17 July, which transposes Directive No. 2006/24/EC, of the European Parliament and of the Council, into the domestic legal order, of 15 March, on the conservation of data generated or processed in the context of the provision of publicly available electronic communications services, in accordance with Constitutional Court Judgment no.

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 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.

IL Analysis

3. Understanding the need for access to personal traffic and location data for criminal investigation and prosecution, the CNPD welcomes the intention to strike a balance between, on the one hand, the public interest in public security and peace and, on the other, on the other hand, the fundamental rights to respect for private life, to informational self-determination and to the free development of the personality.

4. In analyzing the balance projected here in relation to the Constitution of the Portuguese Republic (CRP) and the Charter of Fundamental Rights of the European Union (Charter), the CNPD will be guided especially by the arguments, conditions and limits explained by the Constitutional Court (TC) in the judgment 268/2022 of 19 April 20221, as well as in the judgments of the Court of Justice of the European Union (CJEU) Digital Rights Ireland2, Tele

23 and La Quadrature du Net4.

1 Cf. httDs://dre.Dt/dre/detalhe/acordao-tribunal-constitucional/268-2022-184356510

2 Judgment of 8 April 2014, procs. C-293/12 and C-594/12.

3 Judgment of December 21, 2016, procs. C-203/15 and C-698/15.

4 Judgment of October 6, 2020, procs. C-511/18, C-512/18 and 0520/18.

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i. The categories of data processed and the temporal limitation of their conservation

5. Precisely taking into account the TC's declaration of unconstitutionality with general mandatory force of article 4 of Law no. set of personal data provided for in the aforementioned article, the amendment being restricted, in practical terms, to the temporal delimitation of generalized storage of personal data.

6. It is true that the TC declared article 4 in conjunction with article 6 of Law No. 32/2008 to be unconstitutional. However, it is recalled that, in the words of the TC, «[...] as the limits of proportionality are exceeded to the extent monitored with regard to the respective subjective scope, paragraph 2 of article 18 of the Constitution is violated in the restriction of fundamental rights to privacy of private life and self-determination of information (Articles 26, n.°l, and 35.°, n.01, of the Constitution), losing relevance to the question of whether the other elements of on which the proportionality of the measure would depend (adjustment of the storage period to what is strictly necessary for the purposes to be achieved; and the imposition of security conditions for the respective storage) are fulfilled by the supervised regulations'.

1. In other words, the TC considered a disproportionate violation of the fundamental rights enshrined in Articles 35 and 26 of the CRP the widespread retention of '[...] all location and traffic data of all subscribers, covering electronic communications of

almost the entire population, without any differentiation, exception or weighting in view of the objective pursued."

8. The TC continues, "[the] legislator here adopts a much broader scope (either in terms of data categories or in terms of the subjective scope) than the sieve that was followed in other normative environments - cfr. the legislative option in terms of DNA databases, computer crime (quick-freeze), mentioned above - covering the aggression of those fundamental rights in situations that, in a balanced judgment, are not counterbalanced by the positive effects in the fight to criminality".

9. Therefore, the mere temporal delimitation of the storage of personal traffic and location data of almost the entire population, reducing from one year to 12 weeks, in accordance with the new paragraph 2 of article 6 of Law No. 32 /2008 introduced by Article 2 of the Bill, does not go beyond the main reason for the unconstitutionality of Article 4 of Law No. 32/2008: the universe of affected data subjects and, with that, the extent of the restriction of the fundamental rights mentioned above.

10. Here, once again, the words of the TC are recovered: what is at stake is the conservation of personal traffic and location data in relation to the «[...] electronic communications of almost the entire population, without any differentiation, exception or weighting against the objective pursued. [...]».

11. The CNPD, based on the interpretation of the TC, emphasizes that the solution proposed here maintains the result of "[...] an unbalanced legislative solution, as it affects subjects for whom there is no suspicion of criminal activity."

12. It is also true that postponing the screening of the connection of the processing of personal data to the purpose in view here for the moment of access to the data, does not remove the gross disproportionality, due to the risks it implies for citizens, of the conservation of data that are very revealing of dimensions of citizens' private lives, with a high impact on their informational self-determination, on their freedom and on the free development of their personality5.

13. This impact does not only result from the practically continuous knowledge of the location of each citizen, but also from the knowledge (or susceptibility to knowledge) of the identity of the people with whom each citizen interacts through electronic communications (e.g., telephone, mobile phone, e-mail), the moment, duration and frequency of these communications, as well as the Internet pages accessed and the moment, duration and frequency of each access (cf. point 18 of the judgment of

TC No. 268/2022).

14. It is recalled that, no matter how rigorous and up-to-date the security measures adopted, the truth is that the conservation of these personal data always carries the risk of undue access, as recent times have shown, marked by cyber-attacks aimed at information systems also of electronic communications operators, and therefore the risk of using data to the direct detriment of citizens.

15. Even if it is intended to assess the processing of data in the set of operations that comprise it, this risk and this impact cannot be underestimated or ignored, and the national legislator should not build a regulatory framework based on apparently solid pillars (controlled access by the judge), when the processing of data begins earlier and already represents, per se, a serious restriction of the fundamental rights of almost all citizens.

16. As the TC advances, «[...] the definition of the range of subjects in question does not violate the limits of proportionality only insofar as it addresses, directly, the situations in which the aggression to the fundamental rights in question may be considered oriented towards the pursuit of the objectives of the criminal action", either by the delimitation according to a specific investigation in progress, or by the prediction of specific spatially and temporally delimited situations (e.g., State visits, religious, sporting or nature events).

5 The CNPD maintains the understanding, explained in previous opinions on this matter, that access to traffic and location data affects the content of the fundamental right to the inviolability of electronic communications, enshrined in article 34 of the CRP. However, for the sake of clarity of the exposition, in line with the recent TC ruling, the CNPD chooses not to focus, in this opinion, on the restriction of this fundamental right.

festive) - cf. also the judgment in Tele 2, paragraphs 108 and 111, and the judgment in La Quadrature du net, paragraphs 147-148 and 150-151, both from the CJEU.

17. In short, the CNPD considers that the amendment introduced in paragraph 1 of article 6 of Law no. each communication, does not remove the main foundation of the declaration of unconstitutionality of article 4 of that law.

18. Without prejudice to this conclusion, the CNPD continues to analyze the other rules of the Project, underlining that this analysis assumes that personal data are subject to conservation in accordance with the CRP and the Charter,

ii. Data retention location

19. Now considering the other rules of the Project, the Project also introduces an amendment to the preamble of paragraph 1 of article 4 of Law no. Member State of the European Union. The CNPD marks this prediction as positive, as it resolves the first cause of unconstitutionality indicated by the TC in the aforementioned judgment.

20. It is emphasized that the regime of cooperation and coherence between the data protection supervisory authorities of the Member States, provided for in the RGPD, ensures the supervision of the processing of personal data and compliance with the principles and rules of personal data protection whose treatment takes place under that regime.

iii. Transmission of personal data and the right to information of the respective holders

21. With regard to the transmission of personal data, the Project amends article 9 of Law No. 32/2008, providing for a duty to notify the data subject, as well as regulating the international transmission of data.

22. Regarding the guarantee of the rights of data subjects, in particular the right to information that the TC highlighted, in line with the jurisprudence of the CJEU (cf. Judgment Tele 2, point 121) and of the European Court of Human Rights (ECtHR) - in particular, the Big Brother Watch judgment6 - the Project provides for the duty of entities obliged to keep personal data for criminal investigation purposes to notify the data subject of the transmission thereof, from the moment that such communication is not susceptible to jeopardize the criminal investigation or constitute a risk to the life or physical integrity of third parties. Us

6 Judgment of May 25, 2021, complaints No. 58170/13, 62322/14 and 24960/15

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terms of the projected change, it is up to the investigating judge who authorized the transmission of the data to inform the transmitting entity.

23. Assuming that personal data are subject to conservation in accordance with the CRP and the Charter, the CNPD notes that the option of imposing the duty of notification on the entities obliged to preserve personal data is in accordance with the provisions of article 13 of the GDPR; nevertheless, it should be noted that the jurisprudence of the CJEU and the ECtHR points towards such a duty falling on the authorities that access personal data, therefore under the duty imposed by articles 13 and 14 of Law no. 59/2019 - which, strictly speaking, is justified by the fact that such transmission takes place in the name and in the public interest pursued by the authorities responsible for the criminal investigation.

24. The CNPD also notes that, in accordance with the right to provide information on the processing of data recognized by Law No. 59/2019 (cf. Articles 13 and 14, no. 3), extending If this notification is given to the data subjects transmitted, this implies the notification not only to the natural persons subject to the investigation, but also to all the natural persons with whom there has been communication or attempt to communicate, which significantly increases the universe of data subjects. to notify.

25. As regards the international transmission of data, paragraph 9 introduced in Article 6 of Law No 32/2008 prohibits the transmission to third States (in relation to the European Union). Such a ban seems, however, too radical, considering the legal rules of international judicial cooperation. In this regard, reference is made to the solution enshrined in Article 20 of the Cybercrime Law.

26. In fact, if clear rules are defined in national law or, based on this, in international agreements that provide for adequate measures to safeguard the fundamental rights of data subjects in the context of such processing to fulfill the purposes pursued by international judicial cooperation, it is not there appears to be reason to prohibit or limit such transfer (assuming, it is reiterated, that the data retained is in compliance with the CRP and the Charter).

iv. transitional rule

27. Finally, the Draft includes transitional provisions that give rise to the greatest reservations to the CNPD as to its compliance with the CRP and the Charter.

28. In paragraph 1 of article 3 of the Draft it is determined that “[relating to ongoing legal proceedings, the use of data stored by the entities referred to in paragraph 1 of article 4.0 [of Law no. .0 32/2008], as evidence, provided that your request has

already been made by the competent judicial authority, under the terms of the legislation in force and the deadline established therein.»

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29. Although it is possible to understand the intention behind this transitional rule, the wording of it, especially in its final part, makes it very difficult to understand its exact scope. By “under the terms of the legislation in force and established therein” it is intended, perhaps, to refer to Law No. 32/2008, in the wording that was considered and declared unconstitutional with general mandatory force by the TC. But if that were the case, the perplexity caused by such a provision is even greater: it is reinstating the same rule that was declared unconstitutional by the TC into the national legal system. And, apparently, dispensing with the decision of the investigating judge, since the request for data by the judicial authority (which may be the Public Prosecutor's Office) determines the Project that the evidence is, without further ado, lawful.

30. Incidentally, in seeking, for the legal proceedings in progress, to now cover with a basis of ad hoc lawfulness a processing of personal data which, by virtue of the nullity of the rule on which it was based, never had such a transitional provision seems to correspond to a retroactive legal norm with restrictive content of rights, freedoms and guarantees, in violation of the prohibition established in paragraph 3 of article 18 of the CRP.

31. The understandable desire to correct the procedural consequences of the long national legislative inertia, after the first decision of the CJEU in this matter (dated March 2014) and despite the successive warnings, regarding the violation of the fundamental rights of citizens, that this decision and the subsequent decisions of the same court represented and raised, should not lead the national legislator to new or renewed unconstitutionality.

32. The CNPD therefore recommends the elimination of paragraph 1 of article 3 of the Bill.

III. Conclusion

33. On the grounds set out above, in particular considering the content of the judgment of the Constitutional Court No. 262/2022 and the jurisprudence of the Court of Justice of the European Union (CJEU), the CNPD considers that:

i. the bill in question maintains the general obligation to keep personal location and traffic data, that is, data relating to almost the entire population, allowing practically continuous knowledge of the location of each citizen, as well as the identity of people with with whom each citizen interacts through electronic communications (e.g., telephone, mobile phone, e-mail), the moment, duration and frequency of these communications, as well as the Internet pages to which they access and the moment, duration and frequency of

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each access, therefore, also in relation to citizens for whom there is no suspicion of criminal activity;

ii. the amendment introduced, by article 2 of the Bill, in article 6 of Law No. 32/2008, regarding the data retention period, now indicating a period of 12 weeks from the date of communication , does not rule out the main foundation of the declaration of unconstitutionality of article 4 of that law, which maintains the provision for generalized conservation of traffic and location data;

iii. the same judgment of unconstitutionality deserves the provisions of article 3 of the Bill. Although the desire to correct the procedural consequences of the long national legislative inertia is understandable - after the first decision of the CJEU in this matter (dated March 2014) and despite successive warnings regarding the disproportionate violation of citizens' fundamental rights by legal regimes of data retention in electronic communications, which that decision and the subsequent decisions of the same court represented and raised -, this should not lead the national legislator to new or renewed unconstitutionalities.

34. The CNPD therefore recommends reviewing Article 2 of the Bill, in particular with regard to Article 4 of Law No. 32/2008, in order to exclude personal traffic data from this list. and location, as well as the elimination of article 3 of the Bill.

35. Without prejudice to these conclusions, on the assumption that personal data are preserved in accordance with the CRP

and the Charter, the CNPD:

i. points out that, although the option of placing the obligation to notify data subjects of access to data subjects on the entities obliged to store personal data is in accordance with the provisions of Article 13 of the GDPR, the jurisprudence of the CJEU and the ECtHR points towards such duty falls on the authorities that access personal data, therefore under the duty imposed by articles 13 and 14 of Law No. 59/2019 - which, strictly speaking, is justified by such transmission if give in the name and in the public interest pursued by the authorities responsible for criminal investigation;

ii. notes that, in accordance with the right to provide information on the processing of data, this notification being extended to the data subjects transmitted, this implies notification not only to the natural persons subject to the investigation, but also to all natural persons with who has communicated or attempted communication, which significantly increases the universe of data subjects to be notified;

recommends reviewing the provisions of paragraph 9 introduced in article 6 of Law no. 32/2008, regarding the international transmission of data, since the GDPR does not prevent international transfers of personal data within the scope of judicial cooperation international, provided that they occur under clear rules (legal or contained in international agreements) that provide for adequate measures to safeguard the fundamental rights of data subjects in the context of such processing.

Approved at the meeting of June 21, 2022

Filipa Calvão (President)