

I. Order

The Energy Services Regulatory Entity (ERSE) submitted to the National Data Protection Commission (hereinafter CNPD), for an opinion, the draft reformulation of the self-consumption regulation - Regulation No. 266/2020, of 20 March.

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 GDPR), 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 LE) in the domestic legal system.

II. appreciation

Decree-Law No. 162/2019, of 25 October, approved the new legal regime applicable to the self-consumption of renewable energy, with the respective operational rules being established by ERSE through the Regulation for Self-Consumption of Electricity (Regulation No. .º 266/2020, of March 20). This reformulation Project establishes provisions applicable to the individual or collective activity of self-consumption of renewable energy, when there is a connection to the Public Service Electricity Grid, as well as to the Renewable Energy Communities that carry out the activity of self-consumption.

The CNPD commented on the proposed Decree-Law in its Opinion No. 49, of August 9, 2019,¹ but was not formally heard on the regulation that is now being reformulated.

¹ Available at https://www.cnpd.pt/liome/decisoos/Par/PAR_2019_49.pdf

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Process PAR/2020/100 j IV.

Thus» the assessment will also focus on some provisions that remain unchanged from the previous regulation and not only on the amendments introduced herein.

The Project for the reformulation of the Self-Consumption Regulation (RAC) includes aspects that complete the possibilities

provided for in the legal regime fully in force from 2021. Among these aspects is the possibility of integrating storage systems (including electric vehicle batteries), the treatment of cases in which self-consumption projects are installed at different voltage levels and the respective consequences on the tariffs for access to the applicable networks and the possibility of having pilot projects to test variations to the approved regulatory model, also includes detailed aspects resulting from the need to clarify the RAC, to make explicit situations omitted in the initial text or to include additional responses to requests sent to ERSE during the period of application of the RAC. Although the changes introduced do not specifically focus on matters related to the protection of personal data, various data processing results from the Project, which is why an analysis of its legal regime is important.

Considering now the articles of the Recast Project, and taking into account the attributions of ERSE, the CNPD understands that the provisions of article 4 are not very clear as to the illegality of the processing of personal data.

It is important, from the outset, to clarify that the processing of personal data provided for in this Proposal, in particular access to energy data, is, in some cases, imposed by law or necessary for the execution of a service provision contract (as with the facilitator market), while in others, access is only legitimate if the third party that intends to access the data demonstrates that the data subject has consented to this effect - since the person responsible for the collection and conservation of personal data is not a party to the contract (see points a), b) and c) of Article 6(1) of the GDPR).

Now, under the terms of paragraph 1 of article 4 of the Proposal, self-consumption management entities, network operators, traders, market facilitators and aggregators have the right to process the data defined in the Regulation, and must comply with data protection rules, namely the General Data Protection Regulation, and good practices in the field of personal data protection, network and information systems security. The wording used is strange, since, as the basis of the illegality of the processing of personal data is at stake, it must be

Process PAR/2020/100 2

NATIONAL DATA PROTECTION COMMISSION

falling under one of the paragraphs of article 6 of the GDPR. If, as it seems, it is intended to include situations in which the processing of data is necessary for the fulfillment of a legal obligation to which the controller is subject (paragraph c)), the controller has a legal obligation to process the data and it is necessary for the framework law to define the essential aspects of the regime. It should be noted that Decree-Law No. 162/2019, of 25 October, does not mention the processing of personal

data arising therefrom, referring to the regulation by ERSE the matters of mediation, reading and availability of data (cf. 16(15)).

In turn, paragraph 2 of the same article establishes that the aforementioned entities "access the data provided for in Article 37, ° and in Article 38.0 (availability of data on an individual self-consumption and collective self-consumption regime respectively /, within the scope of the their business relationship, without the need for express consent by the data subject." However, if the basis for the lawfulness of data processing now resides in the need for the treatment to fulfill the contractual relationship (paragraph b) of paragraph 1 of article 6. ° of the GDPR) the meaning of the norm referring to the consent of the data subject² is not reached. In fact, the consent of the data subject will only be necessary when access to data by third parties is at stake, as provided for in paragraph 3.

Finally, paragraph 4 of the article refers to the Regulation of Services of Smart Grids for Electricity Distribution - Regulation 610/2019 whose proposed regulation was the subject of Opinion No. 32/2019, of June 12, 2019, by the CNPD³ - the procedures applicable to the processing of data and obtaining the express consent of the data subjects.

Not questioning the option presented here, the CNPD recommends, however, that the text expressly enshrines the essential aspects to which the data processing resulting from this Amendment Project must comply. This recommendation results, on the one hand, from the specificities that it presents in relation to the RSRI, such as the existence of a new entity in the commercial relationship, the self-consumption management entity (EGAC), which ensures the commercial relationships related to the activity

two

It should be noted that in terms of public consultation, ERSE states "that it is intended to make explicit the data whose availability is mandatory for certain stakeholders, without the need for express authorization from the customer".

³ Available at https://www.cnpd.pt/liome/decisoos/Par/PAR_2019_32.pdf

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Process PAR/2020/100 2v.

of collective self-consumption and which calls for its own regulation. On the other hand, this recommendation is related to the fact that this legal instrument aims to regulate Decree-Law no. 15 of Article 16) as mentioned above. Now, since the aforementioned Decree-Law does not regulate any of the essential elements of the legal regime for the processing of data that

result from it, it is urgent to define, in terms of regulatory standards, these same elements in order to overcome the incompleteness in the legislative sphere, insofar as the Regulation No. 610/2019 is silent on some of these elements, limiting itself to making a generic reference to the GDPR.

For the reasons mentioned, and in order to find in this normative diploma the legitimate basis of the treatments, the CNPD recommends the densification of article 4 in order to define the essential elements of the processing of personal data covered herein, first of all, the identification of the person responsible for each data processing, the legal basis for the same, the data retention periods and the security measures to be adopted.

It is also important to introduce in the Proposal under analysis a section concerning the rights of data subjects under the terms of articles 12 to 23 of the GDPR, in particular the right to information.

III. Conclusion

Based on the above grounds, the CNPD recommends:

- a) The reformulation of article 4 in order to define the essential elements of the processing of personal data; and
- b) The introduction of an item concerning the rights of data subjects.

Lisbon, December 21, 2020

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