PAR Process/2019/44 1 Ã"

NATIONAL DATA PROTECTION COMMISSION

OPINION/2019/52

I. Order

The Regulatory Entity of the Energy Sector (ERSE) sent to the National Data Protection Commission (CNPD), for consideration, the «draft Regulation of Electric Mobility».

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as the national authority for controlling the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and paragraph 4 of article 36 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of article 3 of Law no. 58/2019, of August 8).

The assessment of the CNPD is limited to the rules that provide for or regulate the processing of personal data.

II. appreciation

1. Preliminary point: the rules that make the intervening subjects aware of the legal regime for the protection of personal data

The draft Electric Mobility Regulation is issued under Decree-Law no. 39/2010, of 26 April, last amended by Decree-Law no. defined in Directive 2006/32/EC of 5 April 2006.

And it already takes into account, in its wording, recommendations that the CNPD addressed to another draft regulation for the electricity sector (ERSE Regulation no. Electricity), contributing to the awareness of the different actors in the electric mobility network regarding the obligations and limits of the processing of information regarding users of electric vehicles arising from the RGPD.

From the beginning in Chapter II, referring to the intervening subjects and commercial relationship, there are several provisions that refer the intervening subjects in the mobility network

for the RGPD, thus also underlining that each of them, as responsible for the respective processing of personal data of the "electric vehicle users"1 (hereinafter users), has a set of obligations to fulfill imposed by the RGPD.

This is what happens, for example, with the provisions of paragraph 4 of article 6 (for the holder of registration for the sale of electricity for electric mobility - CEME), with paragraph 3 of article 7 (the charging point operator - OPC) as well as points a) and c) of paragraph 6 of article 9 (for the Electric Mobility Network Management Entity - EGME - and for all those who have access to the consumption data from charging points, therefore also for third parties that access the data).

It is also important to legitimize the processing of personal data by EGME, contained in paragraph 5 of article 9.02, conditioned to the purposes of "reading and invoicing", and the differentiation of the legitimizing condition of access to personal data by third parties (here, only

0 consent by the data subject, issued under the GDPR) - cf. Article 5(2) and Article 9(1)(f) and Article 9(6)(c) of the same article.

The right of access by the data subject to its consumption is also enshrined - cf. Article 5(3).

In particular, the imposition, in subparagraph b) of paragraph 6 of article 9, that, whenever charging data is made available on electronic platforms, information that allows the direct identification of the user is omitted. of the vehicle.

This standard seeks to ensure respect for the principle of minimizing personal data, reducing the impact that the circulation of data and access by different entities can have on the private life of electric vehicle users. At issue is the pseudonymization of data (paragraph 5) of article 4 of the GDPR), which does not allow the immediate identification, by name, of the holder of the information (i.e., the user) - and that, in certain contexts of the

1 Cf. the definition of this category of persons contained in Article 5(1) of the draft Regulation, according to which the User is, in fact, the owner of the vehicle.

2 And which implicitly follows from the provisions of subparagraph c) of paragraph 2 of article 21 of Decree-Law no. (CEME, OPC, etc.) makes it necessary to process data relating to the final consumer.

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commercial services regulated herein is not necessary (for example, for billing purposes between the OPC and CEME), still allowing users to differentiate, and without harming the allocation and billing of electric energy consumption to the vehicle user

(due to the relationship of the information available in the entities to whom he provided his identification). Minimization is relevant here because, in addition to the loading data, information regarding the location of the vehicle user is also known.

It should also be noted that, despite the fact that the user is not directly identified, the availability and access to the information of the loading data still constitutes a processing of personal data, when relating to natural persons, since it is still information related to the person identified or identifiable individual (cf. points 1) and 2) of article 4 of the GDPR).

2. The processing of personal data by EGME

The regulation defines the main elements of the processing of personal data carried out by EGME. In addition to the aforementioned paragraph 5 of article 9, which, in conjunction with paragraph 2 of article 51, legitimizes operations for the collection, conservation and communication of data to other parties involved in the network in order to for the purposes of complying with the reading and billing obligation, articles 51 and following also regulate other aspects of the processing.

Article 55 defines the categories of data processed (active electrical energy consumption and “charging start and end times”), making it clear that reading is carried out daily and every 15 minutes. Considering that the provision of the charging service and the commercialization of energy implies the identification of the charging location, if EGME collects or has access to information regarding the location of the data subject at the time of charging, it must also be specified, in this or another precept , the processing of that personal data.

The CNPD considers that the categories of personal data being processed respect the principles of proportionality and data minimization, enshrined in paragraph c) of no. 0 1 of article 5 of the GDPR, insofar as they are suitable and necessary for the pursuit of the purposes of billing consumption and billing the different services

provided by the various actors in the network. However, it maintains reservations regarding the recording and transmission of the reading every 15 minutes by individual user, already mentioned in connection with ERSE Regulation No. 610/20193, but in this context reinforced by not understanding their relevance for the purpose of efficient distribution, when it seems to result from the underlying logic of the mobility regime that each vehicle does not always carry in the same place.

As for the communication of data to CEME and charging point operators, Articles 55 and 560 define that the purpose of the communication is billing, in the first case the billing to be submitted by the recipient of the data to the data subject (vehicle user

), in the second case, the invoicing by the operator of charging points to CEME.

This also intersects the provisions of subparagraph b) of paragraph 6 of article 9, already analyzed here, which requires that the information be made available, when on electronic platforms, without the immediate identification of the vehicle user being possible.

With regard to access by third parties, it is true that the draft Regulation, from the outset in subparagraph g) of paragraph 1 of article 4, makes access to vehicle loading data subject to the prior consent of the holder of the data or its need for the execution of a contract with the data subject.

In this regard, the CNPD recalls that the location data reveal the user's private life (in fact, the location information concerns not only the vehicle but also, at least at the beginning and end of charging, the respective user). Considering that the data are collected for specific billing purposes and that access to them by third parties is limited to the situations provided for in the regulation, the data subject not having the expectation that they can be used for different purposes, the simple interest (perhaps legitimate) of any third party in accessing these personal location data does not prevail over the fundamental right to privacy (cf. Article 26(1) and 35(3) of the Constitution of the Portuguese Republic and paragraph f) of Article 6(1) of the GDPR). The experience of the CNPD regarding the claim to

3 Cf. CNPD Opinion No. 2019/32, accessible at

https://www.cnpd.pt/bin/decisoes/Par/PAR_2019_32.pdf.

access to location data (for example, concerning Via Verde users) justifies that clarification of this aspect is recommended.

3. Processing of personal data for the purpose of evaluating and demonstrating the quality of the service

Chapter V of the draft Regulation, in order to guarantee the quality of service, imposes a set of duties on the subjects intervening in the network.

One of the duties, provided for in paragraph 3 of article 64, concerns the integral recording of telephone communications between CEME and the user, regardless of who initiated the communication, whenever they aim at or result in the obtaining express authorization from the user to enter into a contract.

In this regard, it is important to note that a regulation cannot exclude the guarantees provided for in Law no. 41/2004, of 18

August, amended by Law no. 3 of its Article 4. In this way, when the communication takes place by telephone, the recording of the same depends on the prior consent of the customer.

As for the period of conservation of recordings, article 64 refers to a lasting period for the maximum period allowed by the CNPD. Since the CNPD, with the new legal regime for data protection, no longer has powers of prior supervision, it is suggested to change this rule in order to define a period of retention time. Here, considering that the recordings are limited to telephone communications destined for or resulting in the conclusion of a contract, the CNPD admits that they can be kept for the duration of the contract and for the fulfillment of all obligations arising therefrom (cf. provided for in paragraph 3 of article 21 of Law no. 58/2019, of 8 August).

As for the obligation to register complaints and responses, provided for in article 69, for the assessment of the quality of service, it seems to be linked, whatever the form of communication adopted, to the period of 5 years of conservation for auditability purposes, in accordance with the provisions of Article 80. Insofar as the retention of personal data is intended to guarantee the audit, the aforementioned period is considered to be adjusted.

III. conclusions

Taking into account that the draft Electric Mobility Regulation takes into account recommendations that the CNPD addressed to another draft regulation for the electricity sector (ERSE Regulation No. 610/2019, of 2 August), the CNPD considers that the diploma is, in essence, in accordance with the legal regime of data protection, limiting itself, therefore, to recommending the following:

i. Insertion in article 55 of the draft of the reference to personal location data, if processed by EGME, to guarantee the transparency of the processing of personal data;

ii. Clarification, perhaps in the draft article itself, with regard to paragraph 3 of article 64, that the duty to record telephone communications does not exempt the need to obtain prior consent from the customer for the purpose of recording calls, under the terms of article 4, no. 3, of Law no. 41/2004, of 18 August, amended by Law no. 46/2012, of 29 August;

iii. Revision of the final part of the same paragraph 3 of article 64, when referring to the «lasting period for the maximum period allowed by the CNPD», in order to establish in the regulation itself the period of conservation that ERSE deems appropriate,

which may correspond to the duration of the contract and the fulfillment of all obligations arising therefrom.

Lisbon, 3 September 2019 Filipa Calvão (Chairman)