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PAR/2022/40

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National Data Protection Commission

OPINION/2022/49

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 an opinion, Bill No. 79/XV/1 -a, « amending Law No. 32/2008, of 17 July, in order to harmonize it with the constitutional precepts in force», by the Enough Parliamentary Group.

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.

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 judgment no. 268/2022 of 19 April 2025, as well as in the judgments of the Court of Justice of the European Union (CJEU) Digital Rights Ireland1 2, Tele 23 and La Quadratura du Net4.

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

5. Precisely taking into account the declaration of unconstitutionality with general mandatory force of article 4 of Law no.

1 Cf. https://dre.pt/dre/detalhe/acordao-tribunai-constitucjonal/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 C-520/18.

II. Analysis

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option to keep the set of personal data provided for in that article practically unchanged (with the exception of location data, initially provided for in paragraph 1 f) of article 4, which is revoked in the Project under analysis), restricting amendments are made to the temporal delimitation of the general storage of personal identification and traffic data, as well as the definition of a specific regime for the collection and conservation of location 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 the privacy of private life and informational self-determination (articles 26, no. that 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'.

7. 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 conservation of personal traffic data of almost the entire population, reducing from one year to six months, as amended in paragraph 2 of article 6 of Law No. 32/2008 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 fundamental rights above listed.

10. Here, again, the words of the TC are used: the conservation of personal traffic data in relation to «[...] electronic communications of almost the entire population, without any differentiation, exception or weighting in relation to the pursued objective [...]».

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 result only from the practically continuous knowledge of the location of each citizen, but especially from the knowledge (or the 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 time, duration and frequency of these communications, as well as the Internet pages accessed and the time, 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 targeted does not violate the limits of proportionality insofar as it addresses, directly, the situations in which the aggression to the fundamental rights in question may to be oriented towards the pursuit of the objectives of the penah action, either by the delimitation according to a specific investigation in progress, or by the forecast of specific spatially and temporally delimited situations {e.g., State visits, religious, sporting or other events

5 The CNPD maintains the understanding, as 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.

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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. Notwithstanding 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.

19. As far as data relating to the location of mobile equipment is concerned, the Project introduces a new regime in paragraph 7 of article 4, prohibiting its general conservation and making it depend on "[...] judge's statement, relating to a specific person and with effects for the future'. This provision does not give rise to reservations to the CNPD, as it delimits the subjective universe of the processing of personal location data and with effects for the future. It is only recommended that a maximum time limit be defined for such conservation, in terms possibly similar to those provided for the data preservation order under the Cybercrime Law.

20. What cannot fail to be noted, it is insisted, is the absence of provision for a similar regime for traffic data, as explained above, taking into account the extent and intensity of the dimensions of privacy that they reveal. .

ii. Data retention location

21. Now considering the other rules of the Project, as mentioned above, on the assumption that the personal data that are to be preserved are so in compliance with the CRP and the Charter, it is noted that the Project also introduces an amendment to the proem of n. 1 of article 4 of Law no. 32/2008, providing that the storage of data takes place in the territory of the European Union. In paragraph 2 of article 6 of the same Law, the Project also provides that "[the] data must be stored in a place compatible with the exercise of constitutional guarantees of protection and with the intervention of the CNPD".

22. In this regard, it is important to note that this second provision is imprecise, in a matter that requires regulatory precision and clarity, as the TC and the ECtHR have underlined.

23. In order to resolve the first cause of unconstitutionality indicated by the TC in the aforementioned judgment, the imposition of storage in the territory of the Portuguese State or any other Member State of the

European Union is sufficient and appears to be adequate to safeguard the objective of free movement of personal data within

the Union. The requirement specified in paragraph 2 of article 6 seems, but - it is insisted - is not clear, to seek to impose the retention of data in the national territory, contrary to the provisions of the proposed wording for paragraph 1 of article 4 .°

24. In any case, the data protection principles and rules that guarantee the fundamental rights restricted herein can still be ensured by applying the cooperation and coherence regime between the data protection supervisory authorities of the Member States, provided for in GDPR, which ensures the supervision of the processing of personal data and compliance with the principles and rules of protection of personal data whose processing is carried out under that regime.

25. Therefore, whether to avoid the repetition of the rule contained in the preamble of paragraph 1 of article 4 of Law no. 2 of article 6 of the aforementioned law as designed here.

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

26. With regard to the transmission of personal data, the Project amends article 9 of Law No. 32/2008, reinforcing the requirement of proportionality, in the aspect of necessity, of this operation and providing for a duty to notify the data subject of the data object of access.

27. 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 Bill provides, in paragraph 7 of article 9, the duty of competent authorities to inform the data subjects to which they have accessed, «from the moment that such communication does not likely to jeopardize the investigations carried out by those authorities."

28. On the assumption that personal data are preserved in accordance with the CRP and the Charter, the CNPD 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, paragraph 3), as this notification extends 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 number of data subjects to be notified.

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

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iv. transitional rule

29. Finally, Article 3 of the Draft provides for transitional provisions that give rise to the CNPD's greatest reservations as to its compliance with the CRP and the Charter.

30. No. 1 of article 3 of the Bill of Law determines the immediate application of the diploma, «also to the members who, at the time of its entry into force, are being kept by the entities referred to in no. of article 4 [of Law No. 32/2008]'.

31. Bearing in mind that between the presentation of the Project and the issuance of this opinion, the judgment of the TC that declared the unconstitutionality of article 4 with general mandatory force was published in the Diário da República, this declaration became effective, as well as definitively removing from the national legal order the legal norm that would support the conservation of said data. For this reason, the CNPD determined their elimination, through deliberations taken on June 7, 2022.

32. In any case, the provisions of this precept would always have to be considered unconstitutional, as it reintegrates into the national legal order a provision with a similar scope to the rule that was declared unconstitutional by the TC.

33. In fact, it is intended to legitimize the generalized conservation of personal traffic and location data for the purpose of criminal investigation and, therefore, for possible incrimination, when, according to the judgment of the TC, this conservation with such a subjective scope represents a disproportionate restriction of the fundamental rights listed above.

34. The same applies, mutatis mutandis, to the provisions of paragraph 2 of the aforementioned article 3 of the Project.

35. With regard to pending legal proceedings, it is not clear how the legislator can now legitimize the use of traffic and location data as evidence to incriminate the respective data subjects, when it is certain that the rule that supposedly served of support for the collection and conservation of such personal data for the purposes of investigation and criminal prosecution is null ipso iure, and therefore it is considered not provided for in the national legal order from the beginning of its entry into force. And with

the only exception, expressly recognized by the CRP, of safeguarding final and unappealable judicial decisions.

35. To that extent, the transitional rule contradicts the erga omnes effectiveness of the TC's declaration of unconstitutionality, suffering, moreover, from a constitutionality defect similar to that identified by the TC.

37. In fact, this provision intends, for the legal proceedings in progress, to cover now, with a basis of ad hoc lawfulness, a processing of personal data which, by virtue of the nullity of the rule in which

the same was supported, it never was, such a transitional provision seems to correspond to a retroactive legal norm with a restrictive content of rights, freedoms and guarantees, in violation of the prohibition established in paragraph 3 of article 18 of the CRP.

38. The understandable desire to correct the procedural consequences of the long national legislative inertia, after the CJEU's first decision on this matter (dated March 2014) and despite successive warnings, regarding the violation of citizens' fundamental rights, 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.

39. The CNPD therefore recommends the elimination of article 3 of the Bill.

40. As regards Article 3(2), the scope of the full application of Article 9 to ongoing legal proceedings is not clear. First of all, by safeguarding the provisions of the previous number, which determines the lawfulness of the use of the data requested by the judicial authority, this provision seems to exclude the judge's order. And, therefore, the usefulness of this second transitional provision would be limited to the duty to inform data subjects about access.

41. The CNPD admits that the objective is to guarantee the fulfillment of this duty in relation to accesses prior to the entry into force of the projected change, but it remains doubtful whether this guarantee is only intended for the cases provided for in paragraph 1 of the same article or whether it is a retroactively imposed duty in all cases where there was access to such personal data under Law No. 32/2008.

42. The CNPD therefore recommends clarifying the meaning of the provisions of paragraph 2 of article 3 of the Project; and, if its scope of application is limited to the situations provided for in paragraph 1, it recommends the elimination of that paragraph

2 given the manifest unconstitutionality of the provisions of paragraph 1.

III. Conclusion

43. On the grounds set out above, in particular considering the content of the judgment of the Constitutional Court No. 268/2022 and the jurisprudence of the Court of Justice of the European Union (CJEU), the CNPD considers that:

i. The Bill in question maintains the obligation of generalized conservation of personal traffic data, that is, data related to almost the entire population, allowing the knowledge of the identity of the people with whom each citizen relates through

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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 it accesses and the moment, duration and frequency of 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 of generalized conservation of traffic 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 gave rise to should not lead the national legislator to new or renewed unconstitutionality.

44. 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. of electronic communications, as well as the elimination of paragraph 1 of article 3 of the Bill.

45. As regards Article 4(7), which prohibits the general storage of personal data relating to the location of mobile equipment and makes the storage conditional on '[...] a reasoned order of a judge, concerning a specific person and with effect for the future", the CNPD recommends that a maximum time limit be defined for such conservation, in terms that may be similar to those provided for the data preservation order under the Cybercrime Law, and is surprised by the lack of provision for a similar regime for the traffic data.

46. Without prejudice to these conclusions, on the assumption that personal data are preserved in accordance with the CRP and the Charter, the CNPD also recommends, on the grounds set out above:

i. the elimination of paragraph 2 of article 6 of Law no. 32/2008, either to avoid the repetition of the rule contained in the preamble of paragraph 1 of article 4 of that law, or to avoid any possible contradiction normative in the same diploma;

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ii. clarification of the meaning of paragraph 2 of article 3 of the Project; and, if its scope of application is limited to the situations provided for in paragraph 1 of the same article, it recommends the elimination of that paragraph 2, given the manifest unconstitutionality of the provisions of paragraph 1.

47. The CNPD also points out that, in accordance with the right to provide information on the processing of data recognized by Law no. individuals under investigation, but also to all individuals with whom there has been communication or attempted communication, which significantly increases the universe of data subjects to be notified.

Approved at the meeting of June 21, 2022

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