

CIMPÉ

National Data Protection Commission

OPINION/2022/52

I. Order

1. The Commission 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. 100/XV /1 ,a, «.which amends Law No. 32/2008, of 17 July, on the retention of data generated or processed in the context of the provision of electronic communications services», of the Parliamentary Group of the Portuguese Communist Party.

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.

II. 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 judgment 268/2022 of 19 April 2022', as well as in the judgments of the Court of Justice of the European Union (CJEU) Digital Rights Ireland¹ 2, Tele 23 4 and La Quadrature du Net^T

1 Cf. <https://dre.pt/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 C-520/18.

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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 the 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 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 the 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 and location data of almost the entire population, reducing from one year to 90 days, according to the amendment introduced in 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, once again, the words of the TC are recovered: what is at stake is the conservation of personal traffic and location data regarding the «[...] electronic communications of almost the entire population, without any differentiation, exception or weighting against the objective pursued. [...]».

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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 results not only from the practically continuous knowledge of the location of each citizen, but also 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 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 ongoing investigation, or by the prediction of specific situations delimited in space and time (e.g., State visits, religious, sporting or other events of a

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 Article 6 of Law No. 32/2008, regarding the period of data retention, now indicating the period of 90 days from each communication, does not remove the main basis for 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. Also regarding the amendment of article 6 of Law no. 32/2008, and specifically regarding the provision for the retention of personal data in Portugal, the CNPD recalls that one of the objectives (if not the main) of the legal framework of European Union data protection is the free movement of personal data within the European Union, as highlighted in Article 1 of the GDPR. To that extent, the option for the imposition, proposed here, of the conservation of personal data in Portugal seems to contradict that objective and principle.

20. It should be noted that, as defined in the RGPD, the regime of cooperation and coherence between the data protection control authorities of the Member States, the supervision of the processing of personal data and compliance with the principles and rules are ensured. protection of personal data whose processing is carried out under that regime.

21. It is therefore recommended that this amendment be re-weighted.

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

22. With regard to the transmission of personal data, the Project introduces a new paragraph 7 in article 9 of Law n° 32/2008, regulating the international transmission of data, and introduces a new article (article 9 .°-A) to provide for the notification of the transmission to the data subjects.

23. As for the international transfer of data, the provision that the transmission to third States can only be carried out in accordance with the legal rules of international judicial cooperation does not, in itself, raise any objection on the part of the CNPD, naturally provided that the data to be transmitted are preserved in accordance with the CRP and the Charter. In fact, if clear rules are defined in national law or, based on this, in international agreements that safeguard the fundamental rights of the holders

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of data in the context of such processing to fulfill the purposes pursued by international judicial cooperation, there is no reason to prohibit or limit such transmission.

24. 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, Big Brother Watch judgment⁶ - the Project introduces a new article in Law No. 32/2008, providing for the duty of the investigating judge who authorizes the transmission, in the context of a criminal proceeding, to notify the data subject of this transmission from the moment you consider that such communication is not likely to compromise the criminal investigation or pose a risk to the life or physical integrity of third parties.

25. The CNPD points out 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 to if such notification 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 be notify.

III. Conclusion

26. 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 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 period of data retention, now indicating the period of 90 days from the date of communication , does not remove the main foundation of the declaration of unconstitutionality of article

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

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4 of that law, which maintains the provision for generalized conservation of traffic and location data.

27. 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.

28. Without prejudice to these conclusions, on the assumption that personal data are preserved in accordance with the CRP and the Charter, the CNPD:

- i. recommends reconsidering the amendment introduced in article 6 of Law No. 32/2008 regarding the provision for the retention of personal data in Portugal, as this option appears to be contrary to the objective and principle of the free movement of personal data in the European Union , pursuant to Article 1 of the GDPR;
- 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, as provided for in article 9-A introduced by the Draft Law, this implies the notification not only to natural persons subject to investigation, but also to all natural persons 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

Filipa Calvão (President)