



## DATA PROTECTION

DECEMBER 2014

# GPS IN THE EMPLOYMENT CONTEXT

*The National Data Protection Commission (“CNPD”), published its Decision no. 7680/2014 of 28 October 2014 on 17 November. The Decision sets out the CNPD’s guidelines on the processing of personal data arising from the use of geolocation technology in the employment context (the “Decision”).*

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There are currently a number of technologies that make it possible to identify the geographic location of an object and/or person with ever greater accuracy. The most prominent of these is GPS (Global Positioning System) technology, which is often used in motor vehicles and mobile devices (portable computers, tablets and mobile phones).

The CNPD believes that this technology should be used with special care in the context of employment. The Commission’s main concern is that the free and excessive use of geolocation devices violates the fundamental rights of employees, particularly their right to a private life.

The Decision makes it clear that geolocation data, despite not being expressly covered by the Data Protection Law (*Lei de Protecção de Dados* – Law no. 67/98), is sensitive data. The practical consequence of this recognition is that the processing of data collected using geolocation devices may only be done under certain conditions and after obtaining prior authorisation from the CNPD.

The Decision is not an administrative or regulatory act. Nevertheless, to the extent that it sets out the requirements that will be imposed by the CNPD when it considers authorisation applications, the Decision is very important for employers in general and, in particular, for companies that have fleet management technology, car rental companies and insurance companies.

The consent of the employee is not an adequate legal basis to allow the processing of personal data, as the CNPD has already made clear on number of occasions. The basis on which such processing may be legal is the law, specifically article 20(29) of the Employment Code, which allows the use of remote surveillance in the workplace in certain circumstances.

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The rules with the greatest practical implications for companies relate to the use of geolocation devices in motor vehicles. The Decision states that this technology may not be used:

- a) To monitor the performance of the employee;
- b) As proof of contractual compliance (proof of time, date and place of delivery of goods, for example);
- c) To check on compliance with road traffic legislation; or
- d) To monitor the use of the vehicle for private purposes.

The CNPD holds that the use of geolocation for the above purposes is excessive and disproportionate.

A delicate point in relation to the use of geolocation technology concerns the investigation of crime and the possible recovery of stolen vehicles. The CNPD holds that it is not necessary for the employer to access the employee's personal data unless the vehicle is stolen. In these cases, the recommendation is that a technical solution should be found for the use of a sealed geolocation device that may only be opened for the purpose of a criminal investigation when the vehicle is stolen.

The CNPD only recognises two purposes as being relevant to authorising the processing data relating to the geolocation of motor vehicles:

1. **Management of an external service fleet:** in the areas of external/home technical assistance, distribution of goods, transport of passengers transport of merchandise and private security; and
2. **Protection of goods:** transport of dangerous materials and transport of high value materials (value in excess of €10,000.00).

In relation to geolocation of mobile phones, tablets or portable computers, as the purpose is usually the protection of the device itself, the CNPD considers the use of this type of technology to be excessive and disproportionate. Therefore, its use is prohibited.

As to the concern about confidential accompany information generally stored in these types of devices, the CNPD's understanding is that such content can be protected by means other than geolocation. Encryption, restricted authentication for access to the equipment and even the installation of MDM (Mobile Device Management) - which makes it possible to eliminate data remotely - are sufficient alternatives to protect the information contained in the equipment.

Finally, it is worth noting that companies that use this type of technology and have still not made an application for authorisation should do so without delay. The CNPD has already announced that it is about to make a specific form available for this type of data processing. The absence of the authorisation amounts to an administrative offence.

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