

I. Order

The Secretary of State for Justice asked the National Data Protection Commission (CNPd) to comment on the Draft Decree-Law amending Decree-Law No. legal regime of criminal identification,

The CNPD issues an opinion within the scope of its attributions and powers 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 and paragraph 4 of the article 36 of Regulation (EU) 2016/679, of 27 April 2016 - General Data Protection Regulation (RGPD), in conjunction with the provisions of paragraph 1 of article 22 and paragraph 1 of article 23, both of Law No. 67/98, of 26 October, amended by Law No. 103/2015, of 24 August (Personal Data Protection Law - LPDP).

The purpose of this amendment is to introduce the possibility of making information from the criminal record and the record of contumacy available, permanently updated, by consulting an access code valid for a variable period according to the applicant's own choice.

In the preamble of the Draft Decree-Law (hereinafter the "Preliminary Draft"), it is stated that this is a measure to improve the form of access to registered information by citizens and companies, within the scope of the modernization of criminal identification services. and the consolidation of the Online Criminal Record Portal.

The legal regime of criminal identification covers natural and legal persons. The CNPD limits its pronouncement to the rules affecting natural persons, as personal data are at stake, within the meaning of Article 4(1) of the GDPR.

The amendments recommended in this Draft refer mainly to the necessary adjustments of the diploma to the new modality of access to information, both in the criminal record and in the record of contumacy, through the request for an access code that allows successive certificates to be obtained, within a determined period of time. by the applicant, or allow the

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consultation by third parties who hold this access code during its term. The holder of the information can request the cancellation of the access code at any time (cf. addition of a new article 25a).

According to the draft text, the access code to the criminal record and to the record of defaults can be requested directly by the data subject, in person or through an online electronic platform, or by a representative with legitimacy for the purpose under the terms criminal identification law (e.g. ascendants of a minor holder or guardian or curator of an incapable holder); as well as by any third party expressly authorized in writing for this act by the holder (cf. paragraph 1 of article 22 of the Preliminary Project).

When requesting the access code, the purpose of the access must be indicated. An updated certificate is issued when an access code is requested by the holder (or his representative) and whenever there is access to information by the person who holds the access code to the registration and uses it during the respective period of validity. .

Pursuant to paragraph 4 of article 19 of the Draft Bill, the access code is provided in a certificate from the criminal record or the record of contumacy, issued upon request. Paragraph 7 of the same article provides that the holder can provide the access code to the entity that has requested the presentation of a certificate of the registration in question, which fulfills, for all legal purposes, the legal requirement! of presentation of the certificate.

## II. appreciation

The Draft Draft makes the third amendment to Decree-Law 171/2015, in order to enshrine this new concept of access code to the criminal record and to the registration of contumacy and to introduce the necessary adaptations (...) in this new stage of its modernization , which derives from a measure inserted in the Simplex Program - as can be read in the preamble of the Preliminary Project.

In this regard, and because the legislative procedure that will make it possible to legitimize changes in access to the criminal record and to the record of offenders is still in progress, the CNPD cannot fail to express its surprise at the fact that, at this very moment, it is already possible to obtain a criminal record certificate by means of an access code, as shown in information provided on the Ministry of Justice website:

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«The certificate can be consulted online, by anyone, through an access code that can be found on the certificate itself»<sup>1</sup>.

Indeed, by entering a 16-character access code, it is now possible to consult a criminal record certificate<sup>2</sup>, contrary to the current legal regime for criminal identification.

Despite the evident consummation of the fact, let us return to the text of the Draft Bill to analyze the scope of the proposed changes.

Basically, it is intended to facilitate access to the information contained in the criminal record and the record of contumacy, transposing to this context a practice already popularized in other types of records (cf. legal persons). The justification is related to the ease that it can represent for the citizen or the company to provide an access code to those who require the presentation of a registration certificate on successive occasions in compliance with a legal obligation.

In fact, no distinction is made in this aspect between the citizen and the company, when, in fact, access to information from individuals can have a real impact on the rights, freedoms and guarantees of individuals.

Although the situations in which the presentation of a certificate of criminal record of a natural person is required are legally defined, there is a huge appetite for this type of information in various professional contexts, which can imply a certain coercion on the citizen, worker or candidate for employment or the provision of any service.

It should be noted that the absence of a criminal record, that is, a criminal record certificate “without a record” constitutes in itself personal information, which is often required under conditions not provided for by law and in which there is a clear imbalance between the parties concerned, which may result in a real obstacle to the freedom to refuse such a subpoena.

The fact that the data subject is entitled to provide an access code that will allow any third party to access, without any further requirement, to their criminal record, at any time, and may even share this code with others (for example, with companies in the same business group or partner companies) without control or knowledge on the part of

<sup>1</sup> <https://justica.gov.pt/Servicos/Pedir-e-consultar-registo-criminal-de-pessoas>

<sup>2</sup> <https://registocriminal.justica.gov.pt/consulta-de-certificado-do-registo-criminal>

of the data subject, represents an inappropriate and disproportionate access to personal data, in violation of Article 5(1)(c) of the GDPR.

Limiting access to the period of validity of the access code does not in itself constitute a restriction on access to information.

Firstly, the Draft Bill requires the data subject to define the duration of the access code, but does not regulate any maximum or minimum period. As a new registration certificate is issued for each access, updated at the time of access, the question of the validity of 3 months of the criminal record certificate itself is no longer raised, which means that an access code can be valid for several years, allowing multiple accesses, even if there is not, in the specific case, compliance with a legal obligation. This is not scrutinable, either by the Criminal Identification Services or by the owner himself.

On the other hand, the legal requirement to indicate the purpose of the access, when requesting the code, and all subsequent accesses to the information being redirected to the purpose initially declared by the data holder applicant, although positive, is not sufficiently limiting of abusive use. information relating to the criminal record, since the purposes are descriptive and do not follow a pre-defined list that is limited to legally admissible situations.

It is hereby fully reproduced what has already been stated by the CNPD, in point II.4, of its Opinion 58/2015, of July 14, on the draft diploma that came to regulate the legal regime of criminal identification, through the Decree -Law No. 171/2015, which is now amended: «(...) it would be advantageous, for reasons of clarity and evidence, to express the list of purposes for which the various registration certificates are requested and issued (...)».

This insufficiency remains in the current legal framework and does not, therefore, unequivocally restrict the purposes of access to information in the records, opening the door to a use of the data for purposes other than those legally admitted, in disagreement with paragraph b) of the Article 5(1) of the GDPR.

For all the reasons explained above, it is not possible to agree with the added possibility of a third party requesting an access code, even if authorized by the data subject with mention of the purpose of access (cf. no. article 22 of the Preliminary Draft).

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First of all, it is not foreseen that the data subject will also authorize the period of validity of the access code, thus leaving it to the discretion of that third party to define the duration of the access code.

In fact, the *raison d'être* of this rule is not justified and nothing is regulated about who receives the access code in these circumstances, whether the third party applicant, whether the holder of the information, presuming that the answer is returned to the person who presents the application. This legal provision is considered to be too open, further removing the holder's control over their personal information.

This new concept of access code may perhaps be justified in the case of companies, but its need has not been demonstrated at all in the case of citizens.

Article 10 of the GDPR recognizes the special sensitivity of this type of personal data and, therefore, gives it enhanced protection in terms of the lawfulness of its processing and requires adequate guarantees for the rights and freedoms of the data subjects.

Now, this proposal results in a trivialization of access to personal information from the criminal record and the record of contumacious, which jeopardizes the legally established guidelines on the legitimacy of access, lending itself to excessive consultations, potentially forcing the free will of the holder and difficult to verify. by the holder and by criminal identification services.

Thus, to alleviate this situation, the Draft Project should at least provide that the data subject could know, upon request (including Online), the identity of who accessed, and when, their registration using an access code. That information is apparently kept<sup>3</sup>, in accordance with the wording proposed for paragraphs 3 and 4 of Article 30, for a period of six months after the expiry of the access code that allowed the certificate to be issued.

Any benevolence in developing a modern and simplifying system for citizens' lives must take due account of the risks of converting it into an instrument of abusive and discriminatory use by third parties, with clear prejudice to the rights, freedoms and guarantees of these same citizens.

J If the source of access means that it is possible to identify the person who accessed the register with an access code.

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### III. Conclusion

On the grounds set out above, the CNPD considers that the Preliminary Draft Decree-Law amending the legal regime for criminal identification should be reviewed with regard to its applicability to individuals, in the following aspects:

1. The dissemination of the practice of the access code to the register as a means of accessing information from the criminal record and the record of contumacy in the specific case of natural persons should be seriously considered, given the potential negative impact that this may have on rights, liberties and guarantees of citizens;

2. If this type of access is still chosen, the national legislator must, in accordance with the requirements of the GDPR, adopt the appropriate guarantees to minimize the risks that this type of data processing entails, namely:

The. Imposing a maximum period, not too long, for the validity of the access code, to ensure greater controllability of access to information by the holder;

B. The data subject should be able to know, upon request made to the criminal identification services (including online), the identity of the person who accessed it and regarding the information concerning him/her concerning the criminal record certificates or the record of contumacy, by means of a access code;

ç. It should not be possible for a third party, even if authorized by the data subject, to request an access code;

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d. However, in that event, the data subject should be able to define, in the prior authorization given, both the purpose of access and the term of validity of the access code;

and. Also, in this case, the access code should only be provided to its holder and not to the third party applicant.

Lisbon, July 2, 2019

The president,

Filipa Calvão

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