National Data Protection Commission

OPINION/2021/76

I. Order

1. The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees of the Assembly of the Republic asked the National Data Protection Commission (CNPD) to issue an opinion on the Draft Law 91/XIV/2.3 (GOV), which transposes the Directive (EU) 2019/1937 on the protection of persons who report violations of Union law.

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, subparagraph b) of Article 58(3) and Article 36(4), all of Regulation (EU) 2016/679, of 27 April 2016 - General Data Protection Regulation (hereinafter GDPR) , 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 of August, which implements the GDPR in the domestic legal order.

3. The Draft Law provides for or presupposes various processing of personal data, in the context of reporting violations of Union law, in transposition of Directive (EU) 2019/1937.

4. Due to the direct relevance it has to the data protection legal regime, the express reference, in article 2 of the Proposal, to the denunciation of acts or omissions that violate the rules contained in the acts of the Union referring to the areas listed in subparagraph a), which also includes the protection of privacy and personal data and security of the network and information systems.

5. First of all, it should be noted that the European Union's legislative option to define a legal regime for the protection of whistleblowers, in the broad terms set out in the Directive, which covers the denunciation of infringements of the European legal regime in the field of protection privacy and personal data and the security of the network and information systems, including offenses committed, in progress or whose committing can reasonably be foreseen, based on information obtained in the context of the whistleblower's professional activity, is liable to harm the relationship of trust that the RGPD wanted to ensure between the data protection officer (DPD) and the public and private organizations where he works.

6. In fact, during the procedure for drafting and approving the RGPD, the hypothesis that the EPD can or should report any infringements within its organization to the supervisory authority was considered, but soon ruled out, in order to ensure that all processing of personal data are made known to the EPD and

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submitted to its analysis and monitoring, without reservations - cf. Article 38(5) of the GDPR and Article 10(1) of Law No. 58/2019 of 8 August.

7. The truth is that similar relationships of trust are ensured, under the terms of paragraph b) of paragraph 2 of article 3 of the draft law, within the scope of paragraphs b) and d) of article 3 of the Directive (EU) 2019/1937, which is why the extension of the same regime to the professional secrecy of the EPD deserves to be considered.

8. Considering now, specifically, the various processing of personal data that compliance with the rules provided for in the Draft Law requires or implies, we highlight the collection, analysis, conservation and eventual communication or transmission of personal data for the treatment of complaints, both by public or private organizations, in the case of internal complaints, and by the competent public authorities on the matter, in the case of external complaints.

9. It is certain that article 18 of the Proposal determines compliance with the provisions of the RGPD, in Law no. 58/2019 and also in Law no. 2 of that article practically reproduces the second paragraph of article 17 of Directive (EU) 2019/1937, the CNPD points out that the prohibition on the collection of personal data that were clearly not relevant to the processing of the complaint may not be enforceable depending on the whistleblowing channel that is used. In fact, there will be collection whenever the complaint is presented in writing, or verbally by means of recorded telephone communication, so, strictly, the rule should state that such data cannot be kept, and those that have been collected must be deleted without delay. . And even

so, it is difficult to perform the duty of erasure in the case of recorded telephone communication, without jeopardizing the integrity and reliability of the recording.

10. For the above reasons, the CNPD suggests revising the wording of paragraph 2 of article 18 of the Draft Law, in order to provide that data that is manifestly irrelevant to the treatment of the complaint should not be collected and, taking into account account the whistleblower channel used, when this is not possible, must be deleted without delay and cannot be considered.

11. Special attention should also be given to the processing of personal data in cases of sharing resources for the purpose of collecting and analyzing internal complaints - paragraphs 2 and 7 of article 8 of the draft law - as well as any subcontracting in terms of reporting channels, referred to in paragraph 3 of article 9 of the Proposal. Please note that, in the case of resource sharing, the terms of joint responsibility for processing will have to be defined, in accordance with Article 26 of the GDPR.

12. As regards, in particular, external complaints, the CNPD limits itself to pointing out that Article 14(4) does not accurately reproduce the text of Article 11(3) of the Directive. . Specifically, it only admits the preliminary filing of the complaint when the infringement is "manifestly irrelevant", while the Directive

provides as a presupposition that 'an infringement is manifestly minor'. It is true that the Directive recognizes the autonomy of the Member States to provide for the preconditions for archiving a preliminary injunction, and that the solution found by the national legislator may be linked to the difficulty of reconciling the principle of legality with a discretionary power of the administrative authorities to decide on the archiving of complaints of (minor) violations of legal rules. In any case, the CNPD points out the divergence between the two rules, for possible reconsideration.

III. Conclusion

13. On the above grounds, the CNPD recommends:

The. The consideration of the extension to professional secrecy of the Data Protection Officer of the professional secrecy protection regime provided for in subparagraph b) of paragraph 2 of article 3 of the Draft Law, for reasons related to the relevance of maintaining of a relationship of trust between the latter and the organization where he performs duties;

B. The revision of the wording of paragraph 2 of article 18 - taking into account the factual impossibility, in the context of certain whistleblowing channels, of complying with the prohibition on the collection of personal data that were clearly not relevant to the handling of the complaint, suggesting to provide that data that is manifestly irrelevant to the handling of the complaint should not be collected and, taking into account the reporting channel used, when this is not possible, they should be erased without delay and cannot be considered;

ç. The possible reconsideration of the formulation of the first presupposition of preliminary filing of the external complaint, in subparagraph a) of paragraph 4 of article 14 of the Draft Law, for its adjustment to the solution provided for in paragraph 3 of article 11,° of the Directive.

Lisbon, June 9, 2021

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