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National Data Protection Commission

OPINION/2023/56

I.Order

1. The President of the Commission on Constitutional Affairs, Rights, Freedoms and Guarantees of the Assembly of the Republic asked the National Commission for Data Protection (CNPD) to pronounce on Proposal for Law No. 85/XV/1 (GOV) authorizing the Government to create a database of bans and dismissals and to transpose Directive (EU) 2019/1151

2. The CNPD issues an opinion within the scope of its attributions and competences, as an independent administrative authority with authoritative powers to control the processing of personal data, conferred by paragraph c) of paragraph 1 of article 57, paragraph b) of paragraph 3 of article 58 and paragraph 4 of article 36, all of Regulation (EU) 2016/679, of April 27, 2016 - General Regulation on Data Protection (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 internal legal order.

II. Analysis

3. This bill (hereinafter Proposal) grants the Government legislative authorization to create a database of bans and dismissals, with a view to partially transposing Directive (EU) 2019/1151, which amends Directive (EU) 2017/1132, regarding the use of digital tools and procedures in the field of company law. This proposal is therefore a legislative authorization by the Assembly of the Republic, the content of which, as required by article 165, paragraph 2, of the Constitution of the Portuguese Republic, determines the object (article 1), the meaning and extension (2nd) and duration of authorization (art.3rd) of the authorized legislative act.

4. More specifically, the matter under review and submitted for an opinion is embodied in an Authorized Decree-Law (hereinafter Project), also sent to this Committee, which aims to complete the transposition procedure initiated with Decree-Law no. 109.°-D/2021, of December 9, transposing now to the internal legal order article 13.°-I of Directive (EU) 2017/1132, added by Directive (EU) 2019/1151, creating , with a view to complying with the provisions of that article, a central

file of disqualifications and dismissals, in which information is organized regarding the disqualifications of natural persons from exercising their duties

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commerce, for the occupation of certain positions and for the administration of other people's assets, as well as information regarding the judicial dismissals of members of corporate bodies which have become final and unappealable.

5. To this end, it is intended to create a database of prohibitions and dismissals (BDID), introducing amendments, also, to the Commercial Registry Code (articles 9.°, 48.°, 69.° and 78.°-D), as well as to Decree-Law no. 24/2019 (articles 1 to 5 and 10), adding a new article to the latter diploma (article 6. -A).

6. The Directive that drives this legislative act (Directive [EU] 2019/1151, of June 20, 2019) amended Directive (EU) 2017/1132, of June 14, 2017, which came to codify various aspects with regard to corporate law, namely, the establishment of rules for publicity and interconnection of central, commercial, and company registers in the Member States.

7. Seeking to harmonize the use of digital tools and procedures in economic activity, within the scope of a globalized and digital world, with the creation of guarantee mechanisms against fraud and abuse, the Directive partially amended the regime of the previous one, adding/inserting a set of articles, which contains, for what is mainly important, article 13.°-1, whose transposition has now been made.

8. This article 13.°-I is systematically included in "Section 1 -A", which is entitled "Constitution on line, presentation and dissemination of documents and information on line", which in turn is found in the amended chapter III, now under the heading "Procedures (constitution, registration and presentation of documents and information) online, publicity and records",

9. Establishing the duty of the Member States to have "rules on the disqualification of directors, which should include the

possibility of taking into account the disqualification in force or information relevant to the disqualification in another Member State", as well as the ability to respond, without delay, to requests from other Member States for information relevant to the disqualification of directors under the law of the Member State responding to the request, and may also exchange supplementary information, to be governed by national law.

10. With regard to specific matters concerning personal data, the aforementioned article 13 -1 determines the following:

7. The personal data of the persons referred to in this Article shall be processed in accordance with Regulation (EU) 2016/679 and national law, in order to allow the competent authority, person or body under national law to assess the necessary information related to the inhibition of the person to exercise the position of director, with a view to preventing behaviors

fraudulent or other abusive behavior and ensure the protection of all persons who interact with companies or branches. Member States shall ensure that the registers referred to in Article 16, the authorities, persons or bodies competent under national law to handle any aspect of online procedures, do not retain personal data transmitted for the purposes of this Article by for a period longer than necessary and, under no circumstances, for a period longer than the retention period of any personal data relating to the incorporation of a company, the registration of a branch or the presentation of documents or information by a company or branch."

11. From the excerpt above, it is therefore clear that the purpose of processing the personal data in question is specifically intended, within the disciplinary scope of this directive, to "prevent fraudulent behavior or other abusive behavior and guarantee the protection of all persons that interact with companies or branches", a concern that is certainly paramount for the possibility of carrying out corporate acts of incorporation or others of the same nature online, imposing, in any case, their treatment in compliance with the General Regulation on Data Protection and other legislation national on the matter.

12. The aforementioned Directive -even by its nature- does not determine the specific mechanism to be used by the respective Member States in order to pursue these goals, and there is no direct reference to the creation of a database; there is also no reference, in the article to be transposed, to the judicial dismissal of members of governing bodies, a circumstance that is distinct from prohibitions from a legal perspective, and which will imply, as will be seen, particular observations of this

Commission regarding the conservation and processing of personal data, and that seems to constitute innovation.

13. It is in this context that the Legislator submits the diploma under analysis to this Commission for an opinion, which aims to create a database of prohibitions and dismissals, with it seeking to comply with the said provision,

14. A database to be made up of structured and computerized data relating to: a) Prohibition of natural persons from exercising commerce, from occupying certain positions and from managing other people's assets, definitively decreed; b) Judicial dismissals of members of governing bodies which have become final (article 2, paragraph 1)

15. With this framework in mind, paragraph 2 of article 2 of the Authorized Decree-Law provides that "The BDID may be organized in a centralized, decentralized manner or distributed functionally or geographically".

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16. The possibilities for designing the aforementioned database are designed, therefore, in varied and unspecified terms, allowing for very different organizations. It will be said, in any case, that the Legislator must opt for a concrete form, within the possibilities offered by the legislative authorization, with a view to implementing its regime and which it is now implementing.

17. Now, by not specifying how the database will be organized, or, in other words, in the broad way in which the ontological possibilities of said database are designed, not only is this Commission's ability to judge specifically any technical or organizational solution that can be considered adjusted to the processing of the data that is intended to be carried out, but also, depending on its effective implementation, the impacts that one way or another may cause, directly or indirectly, procedurally or materially, in the exercise of the rights of the respective data holders, as well as the way in which the information will be concatenated, stored, consulted and shared.

18. In any case, generally speaking, this Committee alerts this Committee to the need to respect the matter provided for in

Articles 32 et seq. of the RGPD, also referring to Directive 1/2023 authored by this Committee, particularly as contained in its Point II, recommending the densification/regulation of the technical solution to be adopted, always respecting the principles, techniques and procedures just mentioned.

19. Likewise, the appropriate means and techniques for the protection of data from conception and by default must be considered, in view of the protection of the rights of the holders of the data set out in the RGPD, and their processing, whenever possible , be carried out according to their need for each specific purpose, present in their extension, conservation period and accessibility, and must not be made available without human intervention to an indeterminate number of people. - See Article 25 of the GDPR.

20. In article 3 of the Authorized Decree-Law, the information relating to disqualifications and judicial dismissals is detailed, to be included in the BDID, namely: a) Name, civil identification number, tax identification number, the domicile, nationality, date and place of birth of the disqualified or dismissed person, or equivalent elements in the case of a foreign natural person; b) The type of inhibition; c) The content of the inhibition or dismissal; d) The period of inhibition; e) Identification of the process in which the disqualification or dismissal was decreed; f) The court or administrative entity that decreed the disqualification or dismissal.

21. The processing of personal data must comply with the principles widely recognized in European and national legislation, which include - in addition, naturally, to its lawful, fair, transparent treatment and those of accuracy, integrity and confidentiality -, those of necessity, pertinence and adequacy to the specific purposes that justify the treatment and, in conjunction, the minimization of the data to be processed, in at least

two aspects: the amount and type of data processed, and the extent of the treatments to be carried out, with an impact on limiting their conservation, and which assume particular importance here.

22. That said, in view of the purposes that justify the creation of the BDID, which were set out above, the Commission has

reservations about the data contained in paragraph c), with regard to the "content of the inhibition or dismissal".

23. In fact, it is not understood what the scope of the expression "content" is, which is decisive to implement the data that may be included in this category, and if in such a notion it is possible to understand the decision-making content of the sentence or decision, integral or not - i.e., covering (or not), namely (and to what extent), aspects of the grounds, in fact and/or in law, or just the operative part or injunction-, the intended purposes for this data processing seem to be exceeded .

24. It should not be forgotten that the information to be included in the BDID, articulated with the Directive that gave rise to it, will be limited to allowing consultation of those legal conditions of impediment/disability, or to exchange information under the terms of article 22 of the Directive on disqualifications, always in the sense of avoiding fraudulent acts, and not constituting a generic, archival and comprehensive database of the processes that may have led to that type of sanctions/decisions, even more so if they include judgments of judicial dismissal of holders of governing bodies, which are definitively consolidated at the time of their transit, and whose effects appear to be of a particular nature -intra-corporate or referring to a specific society-, and not more or less transversal impediments to the exercise of certain acts, as is the case of inhibitions, susceptible to temporal alteration.

25. It seems, therefore, that these are different spheres, in a double perspective: one thing will be the aggregation of essential elements oriented to updated knowledge of the existence of inhibitions on certain people in a computerized database and, another, will be the conservation regime administrative documents and/or processes and their file or final destination, such as regulated by Ordinance 368/2013, in particular court proceedings, constituting, in our view, different purposes; and the legislative option of placing judicial dismissals in the DBID also seems to confuse the primary purpose for which it was set out, as it does not share the same ratio that underlies the processing of data regarding disqualifications.

26. Moreover, the presence in the BDID, in a possible meaning of the term, of the entire content of the decision-making compound that caused the inhibition or dismissal, may cause other personal data to appear in the database, of the owner or of third parties , for "drag" and without legal relevance.

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27. In addition, as the European Data Protection Supervisor rightly warned in its consultation regarding the Directive object of this pronouncement1, it should be borne in mind that information related to criminal convictions and offenses in the broad sense, even administrative2 or measures security, provided for in article 10 of the RGPD, is covered by a reinforced specialty character and particular sensitivity, which must be taken care of by the Legislator, and the supervision of such data must only be carried out under the control of a public authority and, as well as , "complete records of criminal convictions are only kept under the control of public authorities", and the Commission's ability to analyze this specific point is impaired, given the lack of information on how the BDID will be designed, and how it will be information will be handled and/or controlled or supervised.

28. Also, information that, even if it may be public or, at least, accessible to the public, in a more or less restricted way, should not be confused with that resulting -in general- from final court decisions or injunctions (some already subject to registration under the terms of article 9 of the Commercial Registry Code) and contained in the records/files of judicial or administrative bodies, issued within the scope of their authorship and competence, with the joint processing of personal data in a computerized database and aggregator of several sources, whose purposes of legitimizing the treatment are circumscribed and with a different purpose, maximum, in view of the exchange of information and/or data consultations between different entities that intervene in corporate acts, national and/or foreign.

29. The Commission therefore believes that under the principle of data minimization and the conforming purposes of the processing set out in the directive and in the explanatory memorandum, these will suffice with the information relating to the identification of the definitively disqualified person (or the removed judicially with a final and unappealable decision, maintaining the legislative option), the type of disqualification that achieves its object (on which the disqualification focuses), as well as its period of validity and the elements referring to the court or administrative entity that decided it and the identification of the process that determined it. To that extent, the item referring to the "content of the inhibition or dismissal", thus considered, must be eliminated or, at least, the information that can be understood therein clarified, in compliance with the principles and guarantees provided for in the RGPD already invoked.

1 We refer to Opinion 6/2018, of July 26, 2018, available in English and/or French at

httDs://edos.europa.eu/sites/default/files/ouhlication/18-07-26 opinion diaital tools companv laws en O.odf

2 As here they also seem to be present, and are reputed for the same effects. By the way, the Judgment of the Court of Justice (Grand Chamber) of 22 June 2021 [C-439/19] can be consulted at:

https.7/curia.europa.eu/juris/document/document.jsf;jsessionid=E6A09FD61AE1 E03C94353DF7ED0B7B1

D?text=&docid=243244&pagel ndex=0&doc!ang=pt&mode=lst&dir=&occ=first&part=1&cid=3208674

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30. Reparations are equally deserved in relation to paragraphs 2 and 3 of the same article 3 of the project. It reproduces:

a) The court or administrative entity that decreed the disqualification or dismissal communicate the information referred to in the previous number electronically and automatically.

b) The exchange of information between the administrative entities provided for in the previous number and the Instituto dos Registos e do Notariado, I.P. (IRN, I.P), is carried out using the Public Administration Interoperability Platform (iAP).

31. The legal text does not determine the concrete form through which the communication will occur, declaring that it will only be electronically and automatically, - even if, with regard to administrative entities, the use of iAP is foreseen-, which is why it is not possible for this Commission to give a particular pronouncement on this matter in strict terms, which should be densified/regulated more carefully.

32. Moreover, if among the administrative entities mention is made, at least, of the resource to be used, as for the courts, also expressly provided for in that number, there is a total omission in relation to its operational form, which should be the object of attention legislation, prescribing the instrument/mechanism to be implemented.

33. This is also why this Committee deserves particular attention to the matter contained in article 4 of the Project under analysis, under the heading "Access to information", particularly its n° 2, subparagraphs b) and c). This is how it is arranged:

2 - The following entities may also access the information contained in the BDID:

b) Judicial magistrates and public prosecutors, for the purpose of criminal investigation, instruction and decision on criminal cases, as well as within the scope of their legally foreseen competences in other cases that fall within the competence of the

judicial courts;

c) Entities that, under the terms of the criminal procedural law, are delegated to carry out investigative acts or that are responsible for cooperating internationally in the prevention and repression of crime, within the scope of these competences.

34. If, on the one hand, it appears that the scope of processing also extends beyond the purposes set out in the Directive and repeated in the "explanatory memorandum", mischaracterizing them, by including purposes of criminal investigation, instruction and decision of criminal proceedings, as well as prevention and repression of criminality, which seems to contradict the object of data processing and purposes that created the BDID, limited to the registration and consultation of information regarding definitive disqualifications (and final dismissals) with a view to to prevent

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fraudulent behavior or other abusive behavior and guarantee the protection of all people who interact with companies or branches (prevent acts by those who are prevented from practicing them),

35. On the other hand, there seems to be an intersection of matters subject to specific legislation, such as those contained in Law No. 59/2019 (Personal Data for the Prevention, Detection, Investigation or Repression of Criminal Offenses), which would always impose the its consideration and suitability by the Legislator in achieving the systematic unity and harmonization of the regimes in force.

36. In reinforcement, nowhere else in the Diploma under analysis is there any reference to these purposes of investigation and repression of criminality in the broadest sense, whether in terms of the legitimizing cause, mode, control, procedure or form, specifying the obligation to consultation of the BDIB, only when the registration of nomination or reappointment to the position

of manager, administrator or other member of a body subject to registration is carried out by the commercial registry services, in order to verify the existence of any impediment, as well as such as the use with a view to using the register interconnection system, already regulated by the DL. No. 24/2019, purposes very different from those, (cf. article 5 of the Project)

37. Also, the second part of the item contained in the same article 4, paragraph 2, subparagraph c) is not understood, when referring to "The entities that, under the terms of the criminal procedural law, receive delegation for the practice of acts of investigation or who are responsible for cooperating internationally in the prevention and repression of criminality, within the scope of these competences/'.

38. The first part of the phrase (up to the expression “ou”) is already addressed, in our view, to the criminal police bodies, so the second segment of the normative passage will have pleonastic content (since no other subjects are foreseen that may fit that definition), which may give rise to diffuse hermeneutics, appearing to be withdrawn, in the name of legislative clarity, that second part of the normative expression, not realizing what distinction is intended to be established there, depending on the announced purposes.

39. With regard to the matter contained in paragraph 3 of the same article 4, the form in which the information contained in the BDIB is searchable must also be specified, in a clear, precise and unambiguous manner, eliminating the expression "at least" and, also, considering, under the principles mentioned above, a difference between the material of personal data that makes up the database and that which is returned when users are consulted, restricting it to the purposes specific that may determine their use, as well as depending on the different subjects and entities, the strict needs of the treatment to be carried out by each one and, also, the categories of data to which they refer.

40. This Commission once again underlines that the absence of defining elements of the way in which data are processed and their concept of aggregation in a searchable data file makes it genetically difficult to pronounce

particular and complete by this Entity, from the outset depending on the specific data that is returned in your query, or the way in which they are stored/preserved. Is that,

41. in article 7 of the Project, under the heading "Conservation and destruction of personal data", it is established that "The

personal data contained in the BDID are kept for a period of 20 years from the date of registration of the dismissal in the BDID, or the end of the period of inhibition, being destroyed after that date. "

42. The Commission notes that Article 5(1)(e) of the GDPR, in general principle, stipulates that personal data are "preserved in a way that allows the identification of data subjects only during the period necessary for the purposes for which they are processed".

43. Directive (EU) 2019/1151 states, in this regard, that "Member States shall ensure that the records referred to in Article 16.", the authorities, persons or bodies competent under national law to process any aspect of the online procedures, do not keep the personal data transmitted for the purposes of this article for a period longer than necessary and, under no circumstances, for a period longer than the retention period of any personal data related to the incorporation of a company, the registration of a branch or the presentation of documents or information by a company or branch."

44. Considering, however, the processing purposes that have been assumed as the main focus in the light of the Directive, it seems that the retention of data regarding the ban for a period of 20 years, counted from the end of the ban, is exaggerated, in the light of the said principle of limitation of conservation, under the terms set out above.

45. In fact, if the essential task is consultation with a view to assessing impediments to the practice of a given act, at a given time, as soon as the inhibition ends - its term -, the data should, in theory, be for that purpose, destroyed, since the purpose that justified its treatment and, as well as the reasons for preventing the practice of acts by inhibited, cease with its term.

46. Although it is understood that cases of judicial dismissal with final and unappealable status have a different nature, since it is not a question of transitory and/or partial impediment, maintaining the legislative option for its inclusion, also the conservation of data relating to them, for the purposes of the BDIDB, must be reduced to the period indispensable for the purposes for which they are specifically processed, bearing in mind such qualitative difference in situations, under penalty of the possibility of processing with purposes other than those that present themselves legally as legitimizers, and, eventually, injure themselves with illicit acts, and consideration should be given to discriminating the regime for each of them, bearing in mind this difference.

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47. With regard to article 6 of the legislative body under analysis, it should be expressly stated that the person responsible for the treatment is the IRN, I.P., and not just the "managing entity", as well as specifying that this Entity should ensure/ guarantee the rights provided for in Articles 15 to 18 of the GDPR, other than those mentioned in Article 6(2).

48. Also, in article 8, under the heading "Audit and Security", the expression "end user" should be used, and not merely "user", in order to allow the individual identification of who, effectively, accesses the specific personal information/data. It is also recommended that, in the -omitted- chapter concerning "Security", it is expressed that in all communications to be carried out with the IRN, I.P. it should be ensured that the appropriate measures and techniques are used to safeguard the rights of data subjects, particularly in the terms already addressed above.

49. Finally, the CNPD underlines that the present legislative project should be accompanied by an impact assessment, in the combined terms of articles 18.° no. 4 of Law 43/2004, 7.° of Law 58/2019, and 35 .° of the GDPR.

50. In fact, number 3 of article 35 of the diploma makes a mandatory reference to impact assessment, namely, in the case of a systematic and complete assessment of personal aspects related to natural persons, based on automated processing, including the definition of profiles , based on which decisions are adopted that produce legal effects in relation to the natural person or that significantly affect them in a similar way, as well as in cases of large-scale processing operations of special categories of data referred to in article 9, paragraph 1, or personal data related to criminal convictions and offenses referred to in article 10, situations applicable to the specific case.

51. Also, the CNPD -under Article 35(5) of the RGPD and Article 7 of Law 58/2019-, in its Regulation No. 1/2018, published other treatments likely to summon the said assessments, with reference to the Guidelines for the Assessment of Impact on Data Protection (AIPD), specifying the following cases: interconnection of personal data or processing that links personal data provided for in paragraph 1 of article 9 or in Article 10 GDPR or data of a highly personal nature; processing of personal data provided for in paragraph 1 of article 9 or in article 10 of the RGPD or data of a highly personal nature based on their indirect

collection, when it is not possible or feasible to ensure the right to information under the terms Article 14(5)(b) of the GDPR;; processing of personal data involving or consisting of profiling on a large scale; processing of data provided for in Article 9(1) or Article 10 of the RGPD or data of a highly personal nature for public interest archival purposes, scientific and historical research or statistical purposes, with the exception of processing foreseen and regulated by law that presents adequate guarantees of the rights of the holders; and processing of personal data provided for in paragraph 1 of

Article 9 or Article 10 of the RGPD or data of a highly personal nature with the use of new technologies or new use of existing technologies. - See Likewise, article 7 of Law 58/2019.

52. Thus, although the present legislative project has its genetic cause in European legislation, in the part not governed by it with regard to the exchange of European information, the option of the national legislator for the creation of the BDID is innovative, giving rise to data processing operations high risk for the rights and freedoms of natural persons, either due to its form or its content, even more so because it is dealing with data processing to be included in article 10 of the RGPD.

III. Conclusion

53. Under the terms and grounds set out above, the CNPD recommends:

a) Regulate, densify, the form of design of the BDID, as well as its implementation, choosing between those contained in the legislative authorization, always in compliance with the principles contained in the RGPD set out above and provided for in article 5 and ss of this Diploma, and the adoption technical and organizational measures also referred to above;

b) The elimination of what is contained in article 3, paragraph 1, point c) of the Authorized Decree-Law, regarding the "content of the inhibition or dismissal", considering the observations made regarding both situations provided for therein , or its non-unitary clarification/reconsideration;

c) Consider that the data to be processed, despite the missing formula, will be subject to the regime provided for in article 10 of the RGPD, with the due implications.

d) The regulation/densification of the form of communication between the administrative entities with access to the data, as

well as the Courts;

e) The reconsideration of the purposes contained in art. 4th no. 2, items b) and c) of the Authorized Decree-Law, or the adequacy with the regimes provided for in Law 59/2019;

f) The elimination of the second part of the normative section (from "ou"), contained in article 4, paragraph 2, item w);

g) The elimination of the expression "at least" and the implementation of the way in which information is searchable, as well as the information to be included in the BDIB and the results obtained by users, depending on their quality and treatment purposes;

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h) The reconsideration of the retention periods of information and the qualitative difference between situations of disqualification and dismissal;

i) The specification of the IRN, I.P. as responsible for the treatment, as well as ensuring, in the diploma, the guarantee of the rights of data subjects contained in articles 15° to 18° of the RGPD, to be included in article 6 of the Authorized Decree-Law;

j) The correction of the expression "user", which should include "end user", as well as the obligation of guarantees of security in the communications to be carried out with the IRN, I.P., to be included in article 8 of the Authorized Decree-Law;

k) The consideration of carrying out a prior impact assessment, pursuant to Articles 18.° No. 4 of Law 43/2004, 7th of Law 58/2019, and 35th of the RGPD.

Approved at the meeting of June 14, 2023