

NATIONAL DATA PROTECTION COMMISSION

Opinion/2019/4

I. Order

The Ministry of Foreign Affairs, through the Directorate-General for European Affairs, submitted to the National Data Protection Commission (CNPd) for an opinion the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) no. 1141/2014 on the statute and funding of European political parties and European political foundations (hereinafter "Proposal").

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 article 36 of Regulation (EU) 2016/679, IT of 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).

Regulation (EU, Euratom) No 1141/2014 of the European Parliament and of the Council of 22 October 2014<sup>1</sup> establishes a special statute for European political parties and European political foundations and provides for their funding from the general budget of the European Union. It also establishes an "Authority" that monitors the application of this Regulation.

The proposed amendment under consideration here aims to protect the integrity of the European democratic process, taking into account the potential risks that could arise for electoral processes and democracy from the illegal use of personal data, as recently demonstrated.

<sup>1</sup> JOL 317.4:11.2014, p. 1

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In this way, the Union legislator intends to provide for the application of financial sanctions in situations where European political parties or European political foundations benefit from breaches of the data protection regime in order to influence the outcome of the European Parliament elections.

For this purpose, a verification procedure is established in which the “Authority”, after consulting a committee composed of independent personalities (provided for in Article 11 of Regulation (EU, Euratom) No 1141/2014), and if the latter concludes that there has been a deliberate influence or an attempt to influence the electoral results based on breaches of data protection rules, it imposes financial sanctions (cf. Article 10-A of the Proposal).

As proposed, this verification procedure will be triggered if, and when, the “Authority” is informed of a decision by a national data protection authority, within the meaning of Article 4(21) of the Regulation (EU) 2016/679 (GDPR), which concludes that there has been a breach of legal data protection provisions, and if that decision results, or at least there is reasonable ground to believe, that the breach is related to political activities in the context of elections to the European Parliament (see new Article 10a(2)).

It is also foreseen that the “Authority” may maintain contact, if necessary, with the national data protection authority that took the decision in question, as well as the obligation of data protection authorities to cooperate with the committee of personalities. 'in accordance with applicable law', as part of the process of issuing the opinion of that committee to the 'Authority'.

Finally, the Proposal determines that if the decision of the data protection authority is reversed, after all national remedies have been exhausted, the “Authority” must review its sanctioning decision at the request of the European political party or political foundation. European Union subject to the sanction.

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II. appreciation

The Proposal under analysis does not raise special comments from the CNPD, as it will only have a practical impact on the level of the institutional relationship between the data protection authorities and the “Authority” and Committee provided for in Regulation (EU, Euratom) no. 1141/2014, and not in the application of the personal data protection regime.

However, it is understood that there are two aspects that deserve reflection. First, the Proposal does not establish the mechanism by which the “Authority” is informed of a decision by the data protection authority that is relevant to its competence in this context, and does not establish any obligation for the data protection authority to communicate or report decisions issued in violation of the data protection regime and which may relate to the exercise of influence on electoral results.

As the CNPD has followed the discussions that have taken place in the Council on this Proposal, it knows that it was intended to avoid imposing additional obligations on data protection authorities. However, it seems ineffective for the intended purpose that the start of a verification procedure and possible sanction is left to chance, a knowledge that may, strictly speaking, never happen, especially if one takes into account that many processes of infringement are not public knowledge, even after a final decision.

On the other hand, contrary to this logic, the data protection authorities' obligation to cooperate with the committee is created in a very undefined way, as it refers to the applicable legislation. It is assumed here that it may be that of the Member State and that it may contain rules restricting the provision of information to third parties, generated in the context of administrative offences. It would be preferable for this to be expressly assumed by referring to “applicable national legislation”.

Secondly, and even if there is no obligation to report decisions on the part of national data protection authorities, in the event that they want to take the initiative, they would certainly have great difficulty in identifying cases in which data protection infringements would have deliberately allowed to influence the results

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elections, unless there was a cyber-attack situation where the vote count had been tampered with.

Indeed, the Proposal does not specify what is meant by 'influencing electoral results' (cf. Article 10a(1)). Influence can be exerted in many ways and by different means. Starting from an infringement of data protection rules is an objective action, but the possibilities of benefiting from it in an electoral context are numerous and it is not at all defined what can be considered an illegitimate influence.

The recently reported cases (eg Cambridge Analytica), which form the basis of this legislative proposal, are concrete and can be evaluated; what this Proposal brings is a legally uncertain legislative framework, in addition to a sanctioning context, and which, for this very reason, could be legally challenged in the event of sanctions being applied.

Finally, just a note for the versions of the text of the Proposal, as a result of the trilogue negotiations, to mention that the wording resulting from the technical meeting is, in the opinion of the CNPD, the most appropriate from a formal point of view.

### III. Conclusion

Considering the above, the CNPD has no objections to the Proposal for a Regulation, insofar as it has no effective impact on the personal data protection regime, and the position of the national data protection authorities is safeguarded.

Lisbon, February 5, 2019 <

Filipa Calvão (President)