

J NATIONAL COMMISSION ON DATA PROTECTION

OPINION/2019/51

I. Order

The Office of the Minister of Labour, Solidarity and Social Security sent the National Data Protection Commission (CNPd), for consideration, the draft Decree-Law on the regulation of foster care.

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as an independent administrative entity with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and by the Article 36(4) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April of 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of article 3 and paragraph a) of paragraph 1 of article 6 of Law No. 58/2019, of 8 of August.

The assessment of the CNPD is limited to the rules that provide for or regulate the processing of personal data.

II. appreciation

This draft Decree-Law establishes the implementation regime for family care, a measure to promote the rights and protection of children and young people in danger provided for in subparagraph e) of paragraph 1 of article 35 and in article 46. ° of the Law for the Protection of Children and Young People in Danger (LPCJP), approved by Law No. 147/99, of 1 September, in its current wording. It also amends Decree-Law no. 12/2008, of 17 January, which regulates the regime for implementing measures to promote and protect children and young people in danger.

Family care emerges as an integrated system, ensured and managed by the competent social security bodies, which guarantee awareness campaigns, information and capture of foster families, an initial training plan that enables them to perform this social role and manage the vacancies in host families.

With the new regime, host families receive cash support

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specific, being granted by the child or young person being welcomed, with the host family benefiting from social benefits for parenting, as well as being able to request the health, education and social support to which the child or young person is entitled.

With regard to the sheltered child or young person, their rights are extended, namely with regard to access to health services, reception, whenever possible, in a foster family close to their family and social context of origin, as well as the support, pensions and social benefits to which the child or young person is entitled.

In turn, families of origin benefit from a technical intervention that provides the repair of weaknesses and consolidation of the family system, and may also benefit from economic support for travel to exercise the right of visit.

In terms of operationalization of the family care measure, it is established that the Commissions for the Protection of Children and Young People (CPCJ) or the court apply the family care measure and monitor its execution under the terms defined in the promotion and protection agreement. The management of the family care system is the responsibility of the Social Security Institute, IP, and the Santa Casa de Misericórdia de Lisboa, in collaboration with the framing institutions, which are responsible for defining and implementing the intervention plan. The management of the promotion and protection process is ensured by 2 technicians appointed under the terms of article 82-A of the LPCJP, in close coordination with the team of the framing institution and with the technician responsible for monitoring the family of origin. Under the terms of this article, for each promotion and protection process, the CPCJ or the court designates who is responsible for managing the process. The process manager technician prepares the promotion and protection project that serves as the basis for the intervention plan, which is prepared by the team of the framework institution in conjunction with the process manager.

It should be noted that the preparation for the reception implies the exchange of relevant information between the entity that applied the measure, the managing entity and the framing institutions. Finally, the monitoring of the family reception is carried out by the technical team of the framing institution in articulation with the manager

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of the process and implies the establishment of contacts with other community institutions with a view to the continuous evaluation of their performance.

Before analyzing the specific issues that arise in terms of the protection of personal data, it is important to address, as a preliminary issue, the form of the diploma under analysis.

The right to the protection of personal data respects the matter of rights, freedoms and guarantees, so the restriction of this right must be expressly stated in the law and limited to what is necessary to safeguard other constitutionally protected rights or interests, under the terms of article 18. ° of the Constitution of the Portuguese Republic (CRP).

The draft Decree-Law, when including matters that constitute a relative reserve of competence of the Assembly of the Republic, will have to comply with the form of the Law of the Assembly of the Republic or of Decree-Law authorized by it, in view of the provisions of articles 18 and 165(1)(b) of the CRP.

We therefore understand that the present diploma does not have the legal force constitutionally required to restrict rights, freedoms and guarantees, and must take the form of an authorized Law or Decree-Law, as required by the aforementioned constitutional precepts.

Without prejudice, we proceed to analyze the provisions of the draft Decree-Law in the light of the integrative principles of the protection of personal data.

1 - Pursuant to article 6 of the draft Decree-law, the management of the family care system is the responsibility of the Social Security Institute, I.P., (ISS, i.P.) and Santa Casa Misericórdia de Lisboa (SGML), taking into account their attributions and competences, in collaboration with the framework institutions. The aforementioned managing entities are responsible for managing vacancies in family care, registering the foster families on a stock exchange, and the framing institutions are responsible for the permanent communication of the host families they fit (cfr article 9). It should be noted that under the terms of paragraph 2 of article 9, this grant «... is embodied through a single database shared between the managing entities, in strict compliance with the General Data Protection Regulation."

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In turn, article 36 of the draft Decree-Law establishes that the processing of personal data carried out under this diploma is regulated by the legislation on the protection of personal data, namely the RGPD.

The diploma under analysis is therefore limited to referring the processing of personal data provided for therein to the legislation on the protection of personal data without, however, regulating its essential aspects, in clear violation of the GDPR. Indeed, pursuant to Article 6(1)(c) of the GDPR, the processing of personal data is lawful if it is necessary to comply with a legal obligation to which the controller is subject. However, the data processing provided for in the draft Decree-Law will necessarily affect, although perhaps not in relation to all data subjects (i.e., even if it does not occur in relation to every child or young person covered by the regime) , on the health data of children and young people, provided for in article 9 of the GDPR and, perhaps, with regard to family members, on data relating to criminal convictions provided for in article 10 of the same legal instrument.

Thus, a piece of legislation providing for the processing of data is not enough, especially when it concerns particularly vulnerable people, covering special data in Article 9 and Article 10 of the GDPR, as well as very personal data, or that is, data relating to sensitive dimensions of the private life of that universe of people and taking into account that the treatment is centralized and articulated in the context of an information sharing platform.

It is therefore necessary, under Article 9(2)(b) of the GDPR, that the diploma defines the essential aspects of data processing and that it defines the adequate guarantees of fundamental rights and the interests of the data subject. of the data.

For this purpose, it seems essential that the diploma be preceded by the impact study on data protection, under the terms required by paragraph 1 and paragraph b) of paragraph 3 of article 35 of the RGPD, an obligation that is reinforced in paragraph 4 of article 18 of Law no. 43/2004, of 18 August, in the wording introduced by Law no. 58/2019, of 8 August.

Only after carrying out the aforementioned impact study, after identifying and evaluating the risk that the treatment entails for the rights of children and young people, will the

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national legislator able to determine which categories of personal data can be processed and under what conditions, in order to mitigate that risk. Also only later can it be determined which entities and under what assumptions access the information in question.

Only then, and taking into account the conclusions of the impact study, can the specifications regarding the procedures for collecting, storing and accessing data, as well as the appropriate security measures to guarantee their protection, be defined in the regulatory plan.

It appears, therefore, that although the draft Decree-Law under analysis assigns the responsibility for the management of the family care system jointly to the Social Security Institute, IP, and to Santa Casa da Misericórdia, under the terms of article 26 of the RGPD, refuses to regulate the essential aspects of the aforementioned data processing and to provide adequate guarantees of fundamental rights and the interests of data subjects.

It should be noted that article 7 of the draft Decree-Law refers to the application, selection, training, evaluation, and recognition of host families for future regulation by decree of the member of the Government responsible for the area of solidarity and social security. the responsibility of the framing institutions as well as the terms and conditions of action of the framing institutions within the scope of the implementation of the family fostering measure.

2 - Under the terms of article 10 of the draft Decree-Law, the implementation of the family fostering measure implies the elaboration of a promotion and protection project prepared by the technician managing the process with the participation of the minor and the family of origin, which contains the diagnosis of the situation of the child or young person'. This project includes, namely, the areas of individual development, well-being, health, education, family, socialization and community integration, and should serve as a basis for the

Pursuant to article 82/-A of Law n.º 147/99, of 1 September, in its current wording « For each process of promotion and protection, the commission for the protection of children and young people or the tribunal. The competent authorities appoint a

process manager technician, who is responsible for mobilizing the actors and available resources to ensure, in a global, coordinated and systemic way, all the support, services and follow-up that the child or young person and their family need, providing information on the set of intervention developed.

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It should be noted that article 11 states that "Under the terms of the legislation in force, the intervention plan is of restricted access, is part of the individual file of the child or young person and is permanently updated, and it is up to the framing institution to file it in conditions of security and confidentiality'.

Since the draft Decree-Law under analysis aims to regulate the implementation regime of the family fostering measure, under the terms of paragraph 4 of article 35 of Law 147/99, of 1 September, in the current wording, it can be deduced that article 11 alludes to the provisions of article 88 of this legal diploma.²

However, given the special sensitivity of data relating to children and young people to which the GDPR pays special attention, it is urgent to clarify this legal provision. Therefore, attention is drawn to the need to harmonize the terminology used in the two diplomas: Law no. and protection" and the present draft Decree-Law refers to the intervention plan that integrates the "individual process of the child or young person". It is therefore recommended to reformulate article 11 in order to implement the legal provision in force and to harmonize the terminology between the two legal instruments.

lii. conclusions

Based on the above grounds, the CNPD recommends:

1 - Carrying out the impact study on data protection, under the terms required by paragraph 1 and subparagraph b) of paragraph 3 of article 35 of the GDPR and in paragraph 4 of article 18. of Law No. 43/2004, of 18 August, in the wording introduced by Law No. 58/2019, of 8 August.

2 Article 88 of the LPCJP refers to the reserved nature of the promotion and protection process, defining who can access it and how it can be consulted. Paragraph 6 of this article requires that the processes of the protection commissions are destroyed when the child or young person reaches the age of majority or. in the case of subparagraph d) of paragraph 1 of article 63, at the age of 21. or in the case of information referred to in paragraph 1 of article 13.º~A, it is destroyed as soon as the process under which it was collected is filed, due to the fact that the danger situation is not proven or no longer subsist.

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2 - The introduction of a rule that expressly regulates the essential aspects of the processing of personal data carried out within the scope of this statute;

3 - The reformulation of paragraph 2 of article 9, specifying who can access the database of host families, what are the forms of access and what security measures are necessary;

4-The clarification of article 11, given the special sensitivity of the information in question, in order to expressly mention the applicable legislation and the harmonization of the terminology used with that of the Law for the Protection of Children and Young People in Danger, approved by Law no. 147/99, of 1 September, in its current wording or, alternatively, the densification of paragraph 2 of article 11 in order to define who has access to the minor's intervention plan and to guarantee the duty of secrecy.

Lisbon, August 13, 2019

Maria Cândida Guedes de Oliveira (Member, who reported)

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