

CNPD

National Data Protection Commission

OPINION/2021/91

I. Order

1.0 The Office of the Secretary of State for Justice asked the National Data Protection Commission (CNPD) to issue an opinion on the draft Decree-Law No. , authentic deeds, terms of authentication of private documents and acknowledgments.

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, in conjunction with subparagraph b) of paragraph 3 of article 58, and with paragraph 4 of article 36, all of Regulation (EU) 2016/679, of 27 April 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 n° 58 /2019, of 8 August, which enforces the GDPR in the domestic legal order.

3. The CNPD's opinion is limited to the protection of personal data.

II. Analysis

4. The draft decree-law under analysis aims to establish the legal regime applicable to the performance, through videoconference, of authentic documents, terms of authentication of documents, individuals and recognitions that require the presence of intervening parties before the professionals who draw them.

5. It is intended that only some authentic acts or terms of authentication can be carried out via videoconference, therefore, in article 1, the acts that can be carried out by videoconference are determined. Thus, with regard to facts subject to land registration, only authentic documents and terms of authentication of private documents provided for in paragraph 2 are covered.

6. As for the authentic acts to be carried out by Portuguese notaries and consular agents, paragraph 3 establishes that “wills and acts relating thereto are also excluded from this decree-law. This wording needs clarification. In fact, a since, neither paragraph 1, which defines the object of the decree-law, nor paragraph 2 refer to acts that should be excluded from the

present regime, the use of the expression "equally excluded", liable to generate doubts as to the interpretation of the precepts and, therefore, as to the scope of application of the regime that it now creates.

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7. Finally, paragraph 4 delimits the universe of authentic acts to be carried out by registrars and registry officers, who are appointed by order of the chairman of the board of directors of the Institute of Registries and Notaries, I.P. (Article 3(4)).

8. In order to carry out the acts provided for in the draft decree-law, the creation of a computer platform by the Ministry of Justice, accessible from the digital justice platform and managed by the Institute of Financial Management and Justice Equipment, I.P. (IGFEJ, I.P.), in conjunction with the Instituto dos Registos e do Notariado, I.P., in which two reserved areas will be created, one for stakeholders and another for professionals.

9. It is established that the IGFEJ, I.P. is the entity responsible for processing personal data, with the exception of processing operations carried out by professionals. However, Article 4(11) of the GDPR defines data controller as "the natural or legal person, public authority, agency or other body that, individually or jointly with others, determines the purposes and means of processing personal data". Thus, if by "entity responsible for data processing operations" it was intended to state that IGFEJ, I.P. this does not correspond to reality, as it does not fit the definition transcribed. Even if the intention was different, in any case, the wording of article 11 of the draft should be clarified, in order to clarify that those responsible for the processing are the entities that determine its purposes, that is, the same entities responsible for the treatment when the acts are carried out in person. Regarding the terminology used, the CNPD would like to underline that the use of the concepts of "interventors" and "professionals", without any prior conceptual definition, is liable to introduce legal uncertainty regarding the interpretation of the duties of each of the subjects involved, by that the CNPD recommends that, before explaining the regime, those concepts should be defined.

10. To access the respective reserved area, the user must authenticate himself using a citizen's card or digital mobile key. Notaries, lawyers or solicitors may also authenticate themselves through their professional certificate. In the case of participants from another Member State of the European Union, in addition to the digital mobile key, they may also identify themselves by other means of electronic identification issued in other Member States recognized for this purpose, pursuant to Article 6 of the Regulation. (EU) No 910/201 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market.

11. Intervening parties may, through their reserved area, among others, submit and access the instructional documents, access the documents to be drawn up and sign them by means of a qualified electronic signature, access the videoconference sessions and express their compliance with the document to be mined. He can,

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also, provide consent for the audiovisual recording. Nothing is said about the way in which the request for the performance of acts is made through videoconference, presuming that it is also made through the platform.

12. It is up to the professional, through his reserved area, to schedule the performance of the acts to be carried out by videoconference. After scheduling, to which a unique identification number is assigned, the professional sends a message to the intervener, through the email address indicated by him, containing, among other information, the hyperlink to the reserved area of the computer platform that will allow access to videoconferencing on the scheduled day, as well as the conditions for holding videoconference sessions, upon authentication.

13. Pursuant to paragraph 2 of article 6, "videoconferencing sessions only start after the participants in the session have given their consent for the collection, by the computer platform, of the identification elements associated with their card of citizen". In order for the sessions to take place, the participant must also give their consent for the audiovisual recording of the videoconference.

14. The wording regarding the consent to be given for the purposes of processing data for identification, when combined with other rules, raises doubts that must be clarified in the text of the decree-law.

15. Thus, it is said that the professional, through its reserved area, collects data on the identification of the participants inserted

when authenticating on the platform, for the purpose of verifying the identity (paragraph c) of paragraph 2 of art. 3), on the other hand, that the collection is carried out by the computer platform (Article 6(2)). Thus, the doubt persists as to which elements are inserted by the intervener and which are the result of reading the identification card.

16. Furthermore, the expression "identification elements associated with your citizen's card" needs to be densified. In fact, out of respect for the principles of purpose and proportionality, in terms of necessity, it must be clearly defined which elements are necessary for that identification, in order to prevent the collection of data contained in the citizen's card that are unnecessary for the purpose in question. View. Nothing is said about the identification elements to be collected in the case of a citizen of another Member State, who identifies himself by one of the means provided for in Regulation (EU) No 910/201 of the European Parliament and of the Council.

17. Now, regarding the necessary identification data, it is stated in article 5 that, for scheduling, the parties are identified by the professional only through their full name, email address and civil identification number, being national, or passport, in the case of foreign citizens.

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18. Also, verification of the identity of the participants is carried out, in the videoconference, by comparing the identification elements associated with the card and contained in the system, with the person's facial image (in this case, it seems that the only possible comparison is with the photograph of the citizen's card or other document) and with the answers placed at the beginning of the session by the professional in order to confirm their identity and which are not specified (Article 6(5)).

19. Alternatively, that identification can be done using a biometric system for comparing face images collected electronically, in real time, with the face image contained in the information system responsible for the life cycle of the citizen's card, in cases

and terms to be defined by ordinance. However, biometric data are sensitive data, which, as they are special categories of data, deserve reinforced protection under the terms of paragraph 1 of article 9 of the RGPD, for which reason that ordinance should additionally enshrine guarantees for the defense of the rights of its holders. Ordinance that must also be submitted to the CNPD for appreciation.

20. The need to give consent for the purposes of audiovisual recording of the videoconference also deserves reservations, since the same article establishes that the acts carried out under this decree-law and, therefore, by videoconference, "are subject to audiovisual recording (n.º1) and that the act will be interrupted and will not be concluded if any of the interveners disables the capture of image and sound1 (n.º8).

21. If so, the need for consent is not understood. In fact, consent should only be required as a legal basis when there is no other basis and there is an alternative. Which is not the case. Thus, there is no need to request consent, but inform the intervener that the performance of the acts in this way is conditioned to the recording of the videoconference.

22. Such information must be provided at the beginning of the procedure, in order to allow the data subject to make an informed decision on how he intends to carry out the act, whether remotely, with videoconference recording, or in person.

23. As for electronic communications and presentation of instructional documents carried out by professionals, article 3 establishes that these are carried out through the electronic address provided by the IRN, I.P, the Ministry of Foreign Affairs or by the respective orders as the case may be,

1 It is believed that the use of the copulative conjunction constitutes a mistake in writing, since the resulting solution guarantees the intended purpose since, by interpretation a contrario, the act would not be interrupted if only the image were deactivated, or only the sound , which may, therefore, be left to guarantee that the intervener is being subjected to pressure from third parties.

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respectively, from registrars or registrars, Portuguese consular agents or lawyers, solicitors or notaries.

24. After reading and explaining the document to be drawn up, the stakeholders affix their qualified electronic signature to it, submitting it to the digital platform. After checking the quality of the recording of the session, the document is signed by the

professional who submits it on the digital platform.

25. The period of conservation of the instructional documents presented through the platform, as well as the sessions of videoconference recordings, has been established, which is 20 years, which can only be made available to the interveners through a judicial decision (No. 1 and 4 of Article 9).

26. It is expected that documents that must be filed by virtue of a legal provision will be kept electronically, being filed by the professional who drew them up, in the case of a notary, or, in the case of documents drawn up by registrars or registrars, as well as by the Portuguese consular agents, by the managing entity of the IT platform in conjunction with the IRN, I.P. and with the Ministry of Foreign Affairs, for the same period legally imposed for the conservation of paper documents (Article 9(2)).

27. It is established that access to the electronic platform, by stakeholders and professionals, be subject to electronic registration, for audit purposes (art. 10). This information must be made available to all users of the platform, at the beginning of the data processing process.

28. Nothing is said about the rights of data subjects, the project being limited to referring, in general terms, to the applicability of the RGPD and Law No. 58/2019, of 8 August. Thus, it must be ensured that data subjects are provided with the information contained in article 13, and in particular, the contact details of the data protection officer. III.

III. Conclusion

29. With the above arguments, the CNPD:

The. It recommends defining the concepts of actors and professionals.

B. Alert to the need for the decree-law to expressly mention which data from the citizen card will be collected and processed, according to the purposes of the treatment and the need for its use.

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ç. It underlines the need to establish a safeguard regime for the biometric identification system that is to be envisaged.

d. And to amend article 11, concerning the identification of the data controller.

and. Furthermore, the CNPD believes that the rights of data subjects must be consecrated, namely the right to information on the processing of data and, in particular, the way in which they can be exercised, and the requirement for consent is also reviewed.

Lisbon, July 5, 2021

Ana Paula Lourenço (Reporting Member)