

NATIONAL COMMISSION

DF DATA PROTECTION

OPINION/2020/138

I. Order

The Secretary of State for the Presidency of the Council of Ministers requested, by letter dated November 5, 2020, the National Data Protection Commission (hereinafter, CNPD) to comment on the Draft Decree-Law that approves the General Regime of Data Protection. Waste Management, the Legal Regime for Waste Landfill, the Specific Waste Flow Management Regime, transposing Directives (EU) 2018/849, 2018/850, 2018/851, 2018/852 (DL 559/XXI /2020).

The request made and the present opinion fall within the attributions and powers of the CNPD, as the national authority for the control of the processing of personal data, in accordance with the provisions of subparagraph c) of paragraph 1 of article 57 and n. 4 of article 36 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of article 3. , in Article 4(2) and Article 6(1)(a), all of Law No. 58/2019, of August 8 (which aims to ensure the execution , in the domestic legal order, of the GDPR).

In accordance with its attributions and powers, the CNPD pronounces itself on the rules that provide for or imply processing of personal data.

II. appreciation

The Draft Decree-Law in question transposes Directive 94/62/EC of the European Parliament and of the Council, of 20 December 1994, on packaging and packaging waste, into the domestic legal system, in the wording given to it by the Directive (EU) 2018/852, of the European Parliament and of the Council, of 30 May 2018, as well as Directive 1999/31/EC, of the Council, of 26 April 1999, on the disposal of waste in landfills, in the wording given to it by Regulations (EC) No. 1882/2003, of 29 September 2003, and 1137/2008, of 22 October 2008, both of the European Parliament and of the Council, by Directive 2011/97 /EU, of the Council, of 5 December 2011, and by Directive (EU) 2018/850, of the European Parliament and of the Council, of 30 May 2018, and applies Council Decision 2003/33/EC, of December 19, 2002.

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It also aims to ensure the transposition of Directives 2000/53/EC, on end-of-life vehicles, 2006/66/EC, on batteries and accumulators and their waste, and 2012/19/EU, on waste electrical equipment. and electronic devices, as amended by Directive (EU) 2018/849, of the European Parliament and of the Council, as well as Directive 2008/98/EC of the European Parliament and of the Council, of 19 November 2008, on waste, as amended by Commission Regulation (EU) No 1357/2014 of 18 December 2014, by Commission Directive (EU) 2015/1127 of 10 July 2015 and by Directive (EU) 2018/ 851 of the European Parliament and of the Council of 30 May 2018.

In addition to the aforementioned transpositions, the Draft Decree-Law approves the new general regime for waste management, approves the new legal regime for the disposal of waste in landfills, makes the third amendment to Decree-Law No. 152-D/2017 , of 11 December, amended by Laws No. 69/2018, of 26 December, and 41/2019, of 21 June, which unifies the regime for the management of specific waste streams subject to the principle of extended liability of the producer, as well as making the fifth amendment to the legal framework for environmental impact assessment (RJAIA), established by Decree-Law No. 151-B/2013, of 31 October, amended by Decree-Law No. 47/ 2014, of March 24, and 179/2015, of August 27, by Law No. 37/2017, of June 2, and by Decree-Law No. 152-B/2017, of December 11.

Furthermore, the Draft Decree-Law makes the first amendment to Decree-Law No. 42-A/2016, of 12 August.

With emphasis on the protection of personal data, the Draft Decree-Law contemplates, in its article 94, the Integrated Electronic Waste Registration System (hereinafter, SIRER), which works on an electronic platform and allows the registration of entities and persons, the submission of data, as well as the transmission, consultation of information and its availability to the public, regarding the registration of waste, by-products and waste covered by the declassification regimes referred to in Chapter IX of the aforementioned Project.

According to article 95 of the Draft Decree-Law, the person responsible for managing the SIRER will be the National Waste Authority (hereinafter, ANR) - which corresponds to the Portuguese Environment Agency, I.P. -, therefore, being responsible for the treatment, under the terms of point 7) of article 4 of the GDPR.

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Articles 97 and 98 of the Draft Decree-Law, relating to registration with SIRER, specify the universe of natural persons, in

addition to legal persons, who are subject to said registration.

Since the information submitted to SIRER is listed, in a non-exhaustive way, taking into account the adverb, namely, in article 99 of the Draft Decree-Law, which is transcribed:

-“1-0 S/RER adds, namely, the following information to be submitted by the entities referred to in the previous article:

- a) Itemized origins of waste;
- b) Itemized quantity, classification and destination of waste;
- c) Identification of the operations carried out;
- d) Identification of carriers;
- e) Quantity of products and materials resulting from preparation for reuse of waste or recycling or other hazardous waste recovery operations;
- f) Quantity and destination of declassified waste and of products and materials resulting from the application of declassification of waste mechanisms;
- g) Type and quantity of products and/or material and quantity of packaging placed on the national market;
- h) information regarding measures in the scope of waste prevention.

2- The information to be submitted referred to in the previous number may be pre-filled with the data resulting from the use of e-GAR and the S/RER MTR modules, and in this case it must be verified and/or corrected before submission by the entity to eia Thanks.".

Given that article 94 of the Draft Decree-Law provides for an information system that involves various processing operations on personal data (cf. point 2) of article 4 of the RGPD), the first observation of the CNPD reports Article 99, since it does not specify personal data or all categories of personal data of natural persons, first of all those relating to their identification.

Although the information listed in Article 99 of the Draft Law may also, in some cases, constitute personal data (cf. paragraph 1 of Article 4 of the GDPR), Article 99 of the Draft, in order to fulfill its function of legitimizing the processing of personal data, in terms that ensure

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the predictability of the processing must, under the terms of Article 6(3) of the GDPR, be complemented by listing at least all

the categories of personal data being processed.

It should be noted that the omission of the list of categories of personal data being processed in the context of SIRER also jeopardizes the CNPD's assessment of compliance with the principle of data minimization, set out in paragraph 1 c) of article 5.º of the RGPD, in particular, regarding the adequacy, necessity and non-excessiveness of the personal data being processed in relation to the purposes pursued within the scope of SIRER.

The second observation stems from the fact that article 94 of the Draft Decree-Law refers to the transmission of information. In fact, the draft diploma and the rules foreseen therein relating to SIRER presuppose access to it by different legal subjects. Insofar as the transmission and access refer to personal data, personal data processing operations are at stake in relation to which, in this statute, greater regulatory density is justified, otherwise the proposed statute will not be sufficient to legitimize these processing of personal data. Thus, in accordance with the provisions of paragraph 3 of article 6 of the RGPD and the predictability required by the rules relating to the processing of personal data (as they imply the restriction or conditioning of a right, freedom and guarantee), the CNPD recommends that a provision be added identifying the entities or categories of entities that may access SIRER, as well as the entities to whom personal data may be transmitted or communicated, specifying the purpose inherent to such processing operation.

With regard to the principle of conservation limitation, enshrined in subparagraph e) of paragraph 1 of article 5 of the RGPD, the Draft Decree-Law contemplates in article 100, the periods of conservation or, of the chronological record of the data submitted, by the data subject, as well as the conservation by the ANR, for a minimum period of 10 years, as shown in paragraph 3.

However, and as a third observation, the CNPD recommends that, in addition to specifying the minimum period, the maximum period of retention of personal data be signed, in order to ensure compliance with the fundamental principle mentioned above, after which they must be destroyed.

Still on the subject of article 95 of the Draft Decree-Law, it is important to emphasize that any transfer of the management of SIRER to another entity must comply with the provisions of article 28 of the RGPD, as it substantiates, with regard to the treatment of the data

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personnel, a subcontracting. Considering the importance of this new relationship, in the context of the processing of personal data, the CNPD recommends an explicit reference to article 28 of the RGPD in paragraph 3 of article 95 of the Project, since the generic allusion to compliance with the GDPR, pursuant to Article 95(1)(h), does not sufficiently emphasize this aspect of the regime. Finally, it should also be noted that the SIRER operating regulation that may be approved by an order issued by the member of the Government responsible for the environment, in accordance with paragraph 2 of article 95 of the Draft Decree-Law , must be the subject of an opinion by the CNPD, pursuant to Article 36(4) of the GDPR, in conjunction with Article 3, and Article 6(1)(a), both of Law No. 58/2019, of August 8.

III. Conclusion

On the grounds set out above, in particular, considering that the Draft Decree-Law must have a minimum degree of predictability regarding the processing of personal data and considering that, in order to be sufficient as a basis (in itself) for the lawfulness of the processing of data provided for therein, must regulate the main aspects of these treatments, the CNPD recommends that in the Draft Decree-Law:

- Add a paragraph to paragraph 1 of article 99 of the Draft Decree-Law that identifies the types of personal data being processed;
- Add a precept that includes the identification of the persons or entities (or respective categories) that may access SIRER, as well as the recipient entities of communications or data transmissions, as well as the inherent purpose of such processing operation;
- Add in Article 95(2) of the Project an express reference to Article 28 of the GDPR; and,
- Amend number 3 of article 100 of the Draft Decree-Law, in order to define the maximum period for storing data in SIRER, thus ensuring compliance with the principle of limiting retention.

Lisbon, November 19, 2020

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