

National Data Protection Commission

OPINION/2023/40

I. Order

1. The Secretary of State for the Presidency of the Council of Ministers requested the National Data Protection Commission (CNPD) to issue an opinion on the draft Decree-Law No. 126/XXIII/2023, which "regulates Law No. 90/2021, of December 16, which changes the legal regime applicable to surrogacy».

2. The CNPD issues an opinion within the scope of its attributions and powers 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, in conjunction with paragraph b) paragraph 3 of article 58, and with 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, Article 4(2) and Article 6(1)(aj), all of Law No. 58/ 2019, of August 8, which implements the GDPR in the internal legal order.

II. Analysis 3 4 5 6

3. It is important, as a preliminary matter, to point out that this Decree-Law, hereinafter Project, is not supported by an impact study on data protection - which is, remember, mandatory under the terms of paragraph 4 of the Article 18 of Law No. 43/2004, of August 18, last amended by Law No. 58/2019, of August 8. The absence of said study compromises a more complete assessment of the risks arising from the processing of personal data.

4. Analyzing the text, it appears that the project regulates issues related to the rights and duties of the beneficiaries and the surrogate mother, health safety rules, custody and registration of the child in case of withdrawal of consent, as well as the framework of the possible spouse or analogue of the surrogate mother.

5. For this purpose, it regulates in innovative terms the processing of personal data, namely collection, processing and conservation operations (eg subparagraphs a) to c) of paragraph 1 of article 2 and paragraph 2 of article 3. ° of the project).

6. If the categories of personal data now envisaged do not raise any reservations as they are adequate, necessary and not excessive in relation to the purpose pursued by the processing, greater attention

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deserves conservation operation. In effect, and as the CNPD has already mentioned¹, the National Council for Medically Assisted Procreation (CNPMA), which is responsible for processing personal data relating to medically assisted procreation, is not in a position to decide autonomously on the means and requirements for carrying out the treatments of personal data that you are responsible for, in compliance with the obligations set forth in the RGPD. In other words, despite the fact that the law recognizes important powers of authorization and guidance for this independent administrative body, it has not provided it with the essential tools to comply with its legal obligations as responsible for delicate processing of personal data.

7. However, it is up to the CNPD to point out that the collection of personal data and their conservation requires special precautions. At stake are personal data of great sensitivity, especially protected under the terms of paragraph 1 of article 9 of the RGPD, so it is up to the legislator to provide for the need to adopt particularly reinforced security measures².

8. On the other hand, it should be noted that no. 6 of article 2 of the bill determines that the procedures provided for in no. 5 of the same article (submission by CNPMA to the Portuguese Medical Association and the Portuguese Psychologists Association of documentation necessary for them to issue an opinion) must observe the necessary confidentiality guarantees, as well as the provisions of Law No. 58/2019, of August 8.

9. Now, it is not just the procedures for transmitting personal data that are subject to data protection provisions, but all procedures, whether collection, processing, transmission or conservation, are required to comply with data protection legislation. Thus, it is suggested to change the wording of the aforementioned paragraph 6 of article 2 of the project.

10. Still in paragraph 6 of article 2, it should be noted that, surely by mistake, it only refers to the need to comply with Law no. 58/2019, of August 8, forgetting the express reference to RGPD, not least because the principles, rights and most of the obligations provided for in the RGPD apply directly in the legal order before and independently of Law No. 58/2019.

1 Cf. PAR/2021/11 and PAR/2021/13, of January 26, 2021, available at

<https://www.cnpd.pt/decisoos/historico-de-decisoos/?year=2021 &type=4&ent=>

2 It is worth remembering the increase and complexity of cyber-attacks that have occurred in recent years and, therefore, the need to ensure that the identity of participants in medically assisted procreation techniques is, also by this means, protected.

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III. Conclusion

11. Based on the grounds set out above, the CNPD considers that the personal data processing operations provided for by the Bill do not put the legal data protection regime in crisis.

12. However, it is suggested to amend paragraph 6 of article 2 in the terms indicated above in points 9. and 10.13. Lisbon,

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