

Having several public entities asked the National Data Protection Commission (CNPd) to waive the imposition of fines for three years, invoking the provisions of paragraph 2 of article 44 and article 59 of Law no. 58/2019, of August 8, without a process of an administrative offense against them taking place, the Commission considered it convenient to adopt and make public the following interpretation of those rules:

1. Taking into account the teachings of the doctrine of Administrative Law, the waiver corresponds to the administrative act through which the Administration removes a special duty, relating to an activity strictly prohibited or imposed by lei, the Administration enjoying for the effect the faculty of, in the face of concrete circumstances, release a subject from the fulfillment of certain special duties that fall upon e/es¹. As, more specifically, Rogério Ehrhardt Soares teaches, dismissal is only possible when the lei provides for it and entrusts the agent [administrative entity] with the task of verifying in a concrete case the inexistence of the public interest that that duty was intended to safeguard².

2. In this way, the CNPD interprets the provisions of paragraph 2 of article 44 of Law no. 58/2019 as giving it a discretionary power to assess, only in the specific case of verification of the practice of unlawful act in violation of the provisions of the GDPR or that law, whether it is justified to depart from the legal rule of application of a pecuniary penalty (fine) to a particular public body, as controller (or processor), taking into account the different interests and rights in presence.

In fact, only in the face of concrete conduct that violates the principles and obligations established in Regulation (EU) 2016/679 of 27 April 2019 (RGPD) and in other national legislative provisions, therefore, in the face of illicit conduct already verified and demonstrated and considering the seriousness of the infringement, it is possible to consider, on the one hand, the rights of data subjects and the public interests that

1 José Eduardo Figueiredo Dias/ Fernanda Paula Oliveira, Fundamental Notions of Administrative Law, Almedina, 2005, pp. 165-166.

2 Lessons in Administrative Law, Coimbra, 1978, pp. 112 and 113.

principles, in particular the principles of proportionality and of equality.

3. Accordingly, the three-year period provided for in article 59 of the same legal instrument has the scope to delimit the period of time during which public entities are entitled to request the exemption and the CNPD is bound to assess and decide on such concretely substantiated requests that are presented to it by public entities within the scope of ongoing proceedings against them.

4. To that extent, the CNPD understands that the exemption provided for in paragraph 2 of article 44 of Law no. 58/2019 can only be requested by public entities and decided upon after notification of the accusation of the practice of an offense , within the scope of a specific process of an administrative offence.

Thus, it resolves that all waiver requests presented outside this context do not justify the opening of a decision-making procedure, under the terms of article 109, paragraph 1, of the Administrative Procedure Code, as the circumstances that allow the exercise of that legally assigned faculty.

Lisbon, September 3, 2019

Filipa Calvão (President)