

National Commission

of Data Protection

OPINION/2021/98

## I. Order

1. The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees of the Assembly of the Republic asked the National Data Protection Commission (CNPd) to issue an opinion on Draft Law No. 93/XIV/2.3 (GOV), which amends procedures related to the issuance, delivery and use of the citizen's card.

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, subparagraph b) of Article 58(3) and Article 36(4), all of Regulation (EU) 2016/679, of 27 April 2016 - General Data Protection Regulation (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 No. 58/2019, of 8 of August, which implements the GDPR in the domestic legal order.

3. The Draft Law amends, revoking some provisions of Law No. 7/2007, of February 5th, lastly amended by Law No. 32/2017, of June 1st, which creates the citizen's card and governs its issuance and use. The amendments are essentially aimed at simplifying and streamlining the procedures for issuing and changing the citizen's card, also from the citizen's perspective, introducing new operations for the processing of personal data with a significant impact on citizens' rights.

4. The CNPD cannot, however, fail to point out that the fact that this Draft Law is not supported by an impact study on the protection of personal data - which is, remember, mandatory under the terms of no. 4 of article 18 of Law No. 43/2004, of 18 August, introduced by Law No. 58/2018, of 8 August (CNPd Organization and Functioning Law) - compromises a more complete assessment of the likely risks arising from the new processing of personal data provided for in this Proposal and,

above all, it undermines the considered decision of the holders of political-legislative power in a matter in which the understanding of such risks is essential to conclude, at the legislative level, as to the admissibility of the new data treatments.

5. Notwithstanding the absence of such a study, the CNPD will proceed to the analysis of the main innovations, starting by emphasizing that the undeniable advantages resulting from simplification measures in terms of convenience for citizens and the functioning of the services themselves are not indifferent to its appreciation. administrative.

## II. Analysis

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### i. The prediction of facial recognition functionality

6. In fact, the Draft Law, through its article 2, introduces in several articles of Law no. 7/2007 the provision for the processing of biometric personal data using automation technologies, specifically regarding data relating to facial image and fingerprints - cf. Article 18(4), Article 25(4), Article 27(6) (and reference in Article 63(2)(d) to (f)).

7. Simply put, the use of facial recognition technology is now expected to collect and verify personal data when issuing or changing the citizen's card and changing the address, as well as for activating digital certificates for authentication and qualified signature.

8. Such a provision, due to its innovative nature, should be highlighted in the explanatory memorandum of the Draft Law, but, strangely, there is no express mention of this novelty, with the exception of a specific reference to the provision of "[... ] that the associated certificates of authentication and signature can be activated remotely" and a generic introductory and nebulous reference that "[...] the Government intends to harmonize the requirement to collect biometric data for the issuance of

documents in order to that can be reused, relieving citizens of a double collection and relieving the services of duplicate work'.

9. Furthermore, the use of facial recognition technology for collecting and verifying personal data when issuing or changing the citizen's card - and also automated technology for the collection and verification of fingerprints - is not regulated in this Draft Law; all the provisions mentioned above, in point 5, are restricted to providing for this use, referring its regulation to an ordinance of the members of the Government responsible for the areas of justice and administrative modernization, without any guidance and, therefore, in a logic of "check blank" for administrative regulations.

10. In fact, Law no. 7/2007, in accordance with the Proposal, now provides that operations for the collection and verification of data relating to the facial image and fingerprints can be carried out not only in person - in the publics indicated in article 20 of the same diploma - but also in an automated way using a biometric system for comparing face images collected electronically in real time with the facial image contained in the information system responsible for the life cycle of the citizen's card .

11. This change, expressly reflected in paragraph 4 of article 25, means the possibility of remotely, therefore, in an Online procedure, citizens requesting the issuance, renewal (of the card) and change of address (according to the provisions of paragraph 1 of article 24). And, under the terms of Article 18(4), it also implies the

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possibility of activating citizen card certificates (authentication and qualified electronic signature) remotely.

12. The CNPD does not question the reference to the administrative regulation of the definition of technical aspects, but cannot silence its annoyance with the content of a proposed law that does not define any guarantee regarding the processing of personal data that, in accordance with n. 9(1) of the GDPR, are part of the category of special data.

13. It would be unnecessary here to recall the risks associated with the automated processing of biometric data, risks that technological developments have increased and which, precisely, justified the choice of the European Union legislator, in 2016, to integrate "biometric data to identify a person unequivocally" in the category of special or sensitive personal data,

subjecting them to a rule-regime prohibiting their processing. And the relevance that the processing of this data has for the personal identity of citizens, a human dimension that the Constitution of the Portuguese Republic recognizes as a fundamental right - cf. Article 26(1).

14. Bearing this legal framework in mind, the national legislator cannot provide for treatments of this nature without safeguarding, at the same regulatory level, the rights and interests of data subjects - and especially, when such a provision runs the risk of being approved "at the blind", because, strictly speaking, the Parliament cannot understand, because the Proposal does not explain, nor is it accompanied by an impact study that explains, what risks to the rights of the holders that such treatments may imply and if there are measures capable of mitigate them.

15. Thus, the CNPD warns of the indispensability of the Proposal, whenever it provides for the automated processing of biometric data related to the facial image and fingerprints, to be densified, imposing the duty to adopt measures that prevent the risks of impact on the fundamental rights of data subjects, namely the risk of identity theft. In fact, nowadays, and in which so many interactions of a personal, professional, financial and patrimonial nature take place online, the risks of misappropriation of the identity of others must be properly addressed, also taking into account that technological developments bring with it renewed opportunities for such appropriation.

16. Therefore, with regard to paragraph 4 of article 18, paragraph 4 of article 25 and paragraph 6 of article 27, the need to provide, in these legal precepts, is emphasized, the mandatory adoption of measures that prevent risks of impact on personal identity and on other interests (property, financial or personal) associated with personal identity, such as measures that eliminate the rate of false positives in the comparison between the personal data collected and database constants.

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17. And this definition must be expressed at the legislative level (and not merely at the regulatory level), as it is the only solution compatible with the combined reading of Article 9 of the GDPR and the following provisions of the Constitution: no. Article 26 (maximum, the right to personal identity), Article 35 (the right to the protection of personal data) and Article 165(1)(b).

18. But Articles 25 and 27 of Law No. 7/2007, in the proposed wording, still need to be revised due to the various inconsistencies arising from the new wording.

19. Firstly, when it is indicated that the face images collected online («electronically in real time») will be compared with the facial image contained in the information system responsible for the life cycle of the citizen's card, one immediately realizes the impossibility, in accordance with the provisions hereof, for the first request for the issuance of the citizen's card to be made in this way (obviously, because there is no record in the information system responsible for the life cycle of the citizen's card), so that Article 25(4) should be revised to exclude this possibility.

20. Secondly, a careful reading of the provision reveals that it provides for the collection and verification of data relating to the facial image using a biometric system for comparing face images collected online with the facial image contained in that information system, but is silent on the collection and verification of fingerprints. In other words, the collection of fingerprints online is a solution that is not completely regulated in this draft law, which is corroborated by the provisions of article 27 of Law no. with regard to verifying the reliability of the personal data of the interested party (the citizen who will be the holder of the card), Article 27(6) is limited to referring to images of the face.

21. If the legislative intention is to simplify the procedure for the collection and verification of personal data related to the facial image and fingerprints, it is crucial that the law expressly describes the comparison process, in terms parallel to those provided for the image facial - not understanding that an operation is described in the law and another is ignored or referred to the regulatory plan. It is certain that the online collection of fingerprints is difficult to perform, as it depends on specific equipment for the purpose, which is not easily accessible to any citizen, unlike what happens with cameras inserted in smartphones and other electronic devices.

22. If, on the contrary, it is intended to verify the fingerprints by merely reporting the confrontation of the facial images (the one collected online and the one existing in the database of the life cycle of the citizen's card), assuming, without further ado, , as

the existing fingerprints in this database are verified, then it is necessary to change the wording of the precept as the reference to the collection of fingerprints does not make any sense.

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23. In any case, the CNPD warns that this last solution implies a reduction in the guarantees of personal identity: in the name of simplifying the procedure for citizens and administrative services, a lighter regime seems to be defined ( and apparently less secure) for online verification than expected for face-to-face verification.

24. Furthermore, neither article 25 nor article 27 expressly defines whether children under 12 years of age or accompanied adults may use this simplified mechanism for requesting the issuance or renewal of the citizen and change of address. In fact, from reading article 25, it would appear that the Proposal also intends to cover these situations, but the confrontation between the provisions of paragraph 1 and the provisions of paragraph 6 of article 27 .° seems to point to its exclusion, since, in the latter, it does not expressly refer to the verification of the identity of the applicant who exercises parental responsibilities or who represents the adult accompanied. The CNPD recommends clarifying this point in articles 25 and 27.

25. Still with regard to the provision contained in article 27, it is important to note that in subparagraph e) of paragraph 2 of article 63 of Law no. Js cases and terms of the collection of data related to the facial image [...], referred to in paragraph 6 of article 27», when it seems to be intended to refer to the cases and terms of the verification of data related to the facial image . It is therefore recommended to correct this apparent lapse.

ii. Simplifying the citizen card delivery procedure

26. Another aspect of the regime that was amended - but this one deserves explicit mention in the explanatory memorandum - concerns the possibility of delivering the citizen's card by post.

27. Such a solution, of evident convenience for citizens, raises, however, some reservations, at least in the terms in which the hypothesis is regulated in the Draft Law. Let's see.

28. First of all, it is important that, in article 31, it is provided that the delivery by post of the citizen's card does not coincide in time with the delivery of the activation, personal (PIN) and personal unlocking (PUK) codes. This is a first security measure that the law must not fail to expressly provide, not least because of the ease with which the envelope with the citizen's card can be detected and diverted.

29. Furthermore, Article 31(4), as it is worded, appears to be a contradiction: the card must be handed over to one of the services provided for in Article 20(2) or by post. to the address of its holder and add "it can only be done by qualified personnel duly accredited by the IRN, IP [...]". This contradiction is evident when confronted with the wording of Article 36(3). This provision, which also refers to the processing of personal data for the delivery of the citizen's card (cf. subparagraph f) of paragraph 2 of article 36 of Law no. ] collection and processing of data necessary for operations

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referred to in the previous number, with the exception of subparagraph c), can only be carried out by entities or services of the State and Public Administration and respective qualified personnel”.

30. However, since it is not likely that the IRN, IP, will provide a postal service, it is not possible to guarantee the delivery of the card to the respective holder with the security conditions guaranteed by the verification of the holder's identity by qualified personnel of entities or services of the State and Public Administration.

31. In fact, this is a guarantee of security that delivery by post does not comply with, being in clear contradiction with the provisions of Article 36(3).

32. Also with regard to Article 31, it should be noted that paragraph 6 provides for the possibility, by telephone or electronically, to request the issuance of a duplicate of the codes provided for in paragraph 1 of the same article.

33. The CNPD draws attention to the novelty that the request for issuing the codes by telephone or electronic means, as it

does not offer the same guarantees of reliability as to the authorship of the request when made in person.

34. It should be noted that, if the remittance of duplicate codes to the holder's address offers a certain degree of security regarding their effective delivery to the respective card holder, the hypothesis that more vulnerable citizens choose, under the terms now recognized by Article 13(6), indicating an address without a physical postal address may give rise to a greater risk of identity theft.

35. And, from this point of view, the legislator, by maintaining the possibility provided for in paragraph 7 of the same article of, by decree, defining other means of delivering the codes, does not take care of this risk, rather seeming to leave room for the possible potentiation of that risk.

36. But Article 31(6) raises yet another reservation. At issue is the issue of a duplicate of the codes provided for in paragraph

1. In order not to use excessively technical language here, the CNPD limits itself to pointing out that the issuance of new codes (instead of a duplicate of the codes originating) would entail less risk, as it does not admit knowledge of active codes.

iii. The professional attributes

37. It is also important to pay attention to article 18,°-A of Law No. 7/2007, which is the object of a new drafting proposal.

38. The CNPD has insisted on the importance of the legal provision for the use of the citizen's card for electronic signature with certification of a certain professional attribute, requiring the effective freedom of expression of will by the citizen's card holder.

In fact, citizens have the right to use the citizen's card

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only to certify your personal identity and for your identification as a member of our national community, either before public entities or before third parties, as this is, by nature and principle, the function of the citizen card. Hence, the law must eliminate any margin of doubt regarding this right, especially in the context of labor relations, where the fragility of the position of workers is known in the face of certain demands or insistences of the employer.

39. Precisely, it has been reported to the CNPD that there are entities, including public entities, that require or condition their



workers to use the card for this purpose, without, therefore, the act of requesting the cardholder corresponding to a real desire to associate this functionality with the card.

40. The CNPD does not intend here to question the option of associating professional attributes to the citizen's card, it only points out that the holder's manifestation of will must depend on the existence of effective conditions for the freedom of this manifestation; in particular, in the labor context, that possibility must be associated with the imposition on the employer of the duty to create conditions that guarantee the effective freedom of expression of that will. 0, which means the duty of this entity to provide alternative mechanisms for this purpose.

41. Thus, the CNPD suggests that a new wording of Article 18-A(1) be considered, complementing the expression "at the request of the holder" with another that explains the need for an expression of will free to request such certification (e.g., at the request of the holder, freely formulated) and with the requirement of alternative solutions in the context of labor relations.

iv. the repeal norm

42. Article 3 of the Draft Law repeals certain precepts of Law No. 7/2007. The CNPD only focuses here on two articles subject to partial revocation.

43. The first case that matters to consider here concerns the simplification of the procedure for changing the address. In article 8 of Law no. 7/2007, subparagraph b) of paragraph 1 is revoked, thus removing the address from the integrated circuit of the citizen's card. With this, it is possible to update the address, without the need to issue a new card, and this information continues to be included in the IRN, IP database, and to be accessible - admittedly, as it is not specified in the Proposal - by via the information system responsible for the life cycle of the citizen's card.

44. If one understands the intention behind the solution now proposed, one cannot, however, fail to notice the impact that this simplified procedure may have when related to the amendment introduced by the Proposal with regard to the delivery of the citizen's card. In fact, when the simplification scheme

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defined in the Proposal is based on the delivery of the citizen's card to the address of the respective holder, the security anchor becomes the address. And, therefore, such a scheme would require an address change regime that maintains a high degree of security. This is not what seems to happen when the change of address procedure is relieved.

45. The fact that the address is only registered in the information system responsible for the life cycle of the citizen's card (and not in the card's closed circuit) also brings a risk of loss of availability of the given address, for example, due to loss of network (that is, whenever a citizen intends to present or demonstrate his address, before a particular public service or before a third party, and there is a network breakdown).

46. It remains to be explained how the management of the PIN for changing the address is carried out, starting from where it is housed - and the fact that it can be centrally housed (i.e., not being housed on each card) entails increased security risks of information.

47. Therefore, for all these reasons, the revocation of subparagraph b) of paragraph 1 of article 8 of Law no. address of its holder.

48. It is also important to consider the repeal of paragraphs 5 and 6 of article 24 of Law no. 7/2007, concerning protocols to be concluded between administrative entities<sup>1</sup>. The explanation given for its revocation can be found in the explanatory memorandum, which reads: «[...] also eliminating the need for protocols, since the lawful source of data processing is the consent of the respective holder ».

49. At issue is the transmission of personal data or access to documents with personal data between, or by, administrative entities, based on the consent of the holder of the citizen's card. Simply, the revocation operated here is based on a misunderstanding: that the protocols came to supply a possible lack of legal basis for the processing of personal data. This is manifestly not the case.

50. The object or content of the protocols could never be other than the definition of rules regarding the transmission of these personal data or regarding access by third parties; the legitimacy of the transmission or access is, since Law No. 32/2017 provided for this possibility, guaranteed by the authorization of the data subject.

1 It should be noted that the revocation of the duty to communicate protocols to the CNPD, provided for in no. binding legal entities for the administrative entities that celebrate them and with an impact on the legal sphere of citizens, assume the nature of administrative legal norms, subject to prior consultation of the CNPD, in accordance with the norms mentioned above in point 2.

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51. What the protocols must define and which, therefore, must be regulated, are the means to be used to carry out the data subject's wishes, the processing and the measures that must be adopted in this process, so that they comply, not only the information security rules, but also the other rules for the guarantee of personal data. It is therefore not for the reasons set out in the explanatory memorandum that these provisions may be repealed. The CNPD therefore recommends reconsidering that revocation.

### III. Conclusion

52. The proposed Law in question introduces significant changes to the Citizen's Card Law (Law no. , present all the essential elements for an accurate understanding of the corresponding risks to personal data and their impact on citizens' fundamental rights. It should be noted that, for a complete assessment by the CNPD and, above all, for the consideration and eventual approval of such amendments by Parliament, it would have been essential that the Proposal was accompanied by the impact study on the protection of personal data legally required.

53. In fact, the Proposal does not regulate the new processing of personal data, being limited to its provision and the "blank" remission of the respective regime to government decrees, when, because at stake are biometric data and even its automated processing in an online context, it is essential that the law imposes, at least, the duty to adopt measures that safeguard the fundamental rights of citizens.

54. Among the planned changes, the following stand out:

The. The possibility of using facial recognition technology to collect and verify personal data when issuing or changing the citizen card and changing the address, as well as for activating digital certificates for authentication and qualified signature; regarding this data processing, the CNPD:

- i. Alert to the indispensability of densifying Articles 18(4), 25(4) and 27(6) when they provide for the automated processing of biometric data relating to the facial image and fingerprints, imposing the duty to adopt measures that prevent the risks of impact on the fundamental rights of data subjects, namely the risk of identity theft;
- ii. It also recommends that Articles 25, 27 and 63 be revised, in order to fill in the omissions and correct the inconsistencies noted above, in points 19 to 25.

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B. The possibility of delivering the citizen card by post to the address of the respective holder, provided for in article 31, recommending the CNPD:

- i. The express provision that the delivery by post of the citizen's card does not coincide in time with the delivery of the corresponding codes;
- ii. The revision of paragraph 4 of article 31 so that security conditions are safeguarded in verifying the identity of the cardholder upon delivery by post, in accordance with the provisions of paragraph 3 of article 36. °;
- iii. The reconsideration of the solution, provided for in paragraph 6 of article 31, of request by telephone or electronically for the issuance of a duplicate of the codes, in cases where the cardholder may be in a situation of greater vulnerability, for increasing the risk of misuse of the card by third parties (see above, points 33 and 34); and the possible replacement of the forecast for the issuance of the «second copy of codes» by the forecast for the issuance of new codes, to prevent the risk of knowledge of active codes.

55. On the grounds set out above, in paragraphs 38 to 40, the CNPD also recommends that a new wording of paragraph 1 of article 18-A be considered, complementing the expression "at the request of the holder" with a another that explains the need for an expression of free will to request such certification (e.g., at the request of the holder, freely formulated) and with the

demand for alternative solutions in the context of labor relations.

56. Finally, the CNPD recommends:

The. reconsideration of the revocation of subparagraph b) of paragraph 1 of article 8, taking into account the risks associated with simplifying the procedure for changing the address (specified above, in points 45 and 46) and considering that, with the simplification resulting from the delivery by post of the citizen's card to the address of the respective holder, the security anchor becomes precisely the address;

B. reconsideration of the revocation of paragraph 5 of article 24, since the protocols provided for therein were never intended to substantiate the lawfulness of the processing of personal data, but rather to define the means to be used for the execution thereof and to provide adequate measures to comply with information security rules and other rules for the guarantee of personal data.

Lisbon, July 19, 2021