PAR/2021/18

of Data Protection

OPINION/2021/25

I. Order

1. The Committee on Budget and Finance of the Assembly of the Republic asked the National Data Protection Commission (CNPD) to comment on Bill No. 634/XIV/2.3 (PAN Parliamentary Group) - «Approves a legal regime transparency of contracts, agreements and other documents relating to operations that determine the use or availability of public funds in relation to entities belonging to strategic sectors".

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 Bill in question seeks to define the legal framework for the transparency of contracts and agreements entered into by the State or entities that are part of the State Budget perimeter, which determine the use or availability, directly or indirectly, even if temporarily, of public funds to entities in the transport, communications, energy, water, industry or financial sectors, as well as [of] all documents or information associated with these contracts or agreements (cf. article 2 of the Draft of Law).

4. It is intended that the declassification of contracts, agreements and other documents - which are classified as confidential or confidential - can be approved, by a relative majority, by the Plenary of the Assembly of the Republic, through a resolution, which must define the documents that must be made public, as well as the justifications for their declassification and the demonstration of their need under the principle of preponderant interest and the right of taxpayers to information (cf. paragraphs 3 and 4 of article 3 of the Draft of Law).

5. And the effect resulting from this disqualification is, under the terms of paragraph 7 of article 3 of the Bill, that the documentation and information becomes public, can be accessed by anyone and is mandatorily published in the website of the

Assembly of the Republic.

II. Analysis

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6. It is understood that the basis of the solution outlined in this Bill, which aims to subject contracts or agreements that imply public expenditure to public scrutiny, is the principle of public transparency.

7. As for the publication of essential information on contracts involving public expenditure, from the perspective of the protection of personal data, there are no reservations to be made, insofar as such publication is carried out in the same terms as that which is currently provided for public contracts , which already safeguards the principles of minimizing personal data and the need to know, as principles that implement the principle of proportionality (cf. articles 127 and 465 of the Public Contracts Code and article 27 of Law no. 58/2019, of August 8).

i. The publication of personal data contained in contracts, agreements and other documents and information to those inherent

8. A different question arises regarding the documents or information associated with those contracts or agreements. In relation to the set of information and documentation associated with them, it appears that the Project does not reflect an effective balance between the constitutional values at stake, within the framework of the democratic rule of law in which we operate.

9. From the outset, and as far as the CNPD is concerned, it must be noted that this information and documentation may contain information relating to natural persons. And that the provision and publication of these data constitutes a processing of personal data, under the terms of paragraph 2) of article 4 of the GDPR.

10. In addition to the provision in paragraph 2 of article 3 of the Draft Law of disclosure of the name of natural or legal persons

with the identification of the respective partners and members of the respective corporate bodies that exercise executive functions, which have originated losses of greater value [...] at the time or as a result of the measure involving the provision of public funds or that have been eliminated from its balance sheet in the previous 5 years following a pardon, assignment to third parties with a discount or similar measure, as well as the contractual conditions that may exist, safeguarding the address, civil or tax identification numbers, mobile and telephone numbers, and email address».

11. This information may also be covered by bank secrecy, and which article 5 of the Project definitively excludes. It is well known that the banking secrecy regime is also based on the protection of the privacy of banking institutions' customers, it is important to remember here the sensitivity of the information held by these institutions on the private life of customers, considering that banking operations imply the production of information that goes far beyond the one relating to the patrimonial situation of the people

singularities1, also revealing their habits (location) and frequency preferences of types of establishments, etc.

12. To that extent, the online publication of personal data (even with the removal of certain identification and contact data) necessarily implies, not only a restriction of the protection of personal data recognized by the Constitution of the Portuguese Republic (CRP) in article 35. °, as well as the compression of the privacy of the persons covered in this way (even if, above all, in its patrimonial aspect), with the consequent restriction of the fundamental right to respect for private life, enshrined in article 26 of the CRP - being it is certain that such fundamental rights, thus restricted, are also enshrined in the Charter of Fundamental Rights of the European Union (hereinafter the Charter), in Articles 7 and 8.

13. It should be noted, in this regard, that the publication on the Internet of personal data revealing the dimensions of private life is a highly impacting measure in the legal sphere of the respective holders, due to the global nature of the online context, which makes the information reach very in addition to the recipients targeted here (taxpayers in Portugal), and due to the effect of perpetuating the information in the same context and the possibility of its reuse for the most different purposes and that can have a lifetime effect of discrimination on the same holders. When the intended public scrutiny may, if the respective legal requirements are met, be achieved by other means, such as the legal regime for access to administrative documents.

14. It should be noted that the provision of disclosure of the name of natural or legal persons who have caused losses, the use or commitment of public funds, directly or indirectly (provided they exceed a certain amount) obviously has the stigmatizing effect of the same. , an effect, it is reiterated, enhanced by the online context of this disclosure. Added to this is the difficulty of delimiting the universe of people who belong to such a defined category: are they people who have been the subject of final and unappealable judicial decisions in which that fact is clearly demonstrated? It's just that if it hadn't been, and the law would have to

1 On this dimension, see judgment no. 278/95 of the Constitutional Court, which is partially transcribed here: "Taking into account the extent to which the use of bank deposits and current accounts assumes in modern life, it is to be believed that knowledge of their active and passive movements reflects a large part of the particularities of the economic, personal or family life of the respective holders. Through the investigation and analysis of bank accounts, it becomes possible to penetrate the strictest area of private life. It can be said, in fact, that, in modern society, a current account can constitute "the personal biography in numbers". and liabilities registered therein, is part of the scope of protection of the right to privacy of private life condensed in article 26, paragraph 1, of the Constitution, with banking secrecy emerging as an instrument guarantee of this right'.

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to make it explicit so that there is no doubt, the dissemination of this type of information has the effect of promoting popular judgments, obviously inadmissible in a democratic State of Law.

15. Thus, it can only be concluded that the provision of online availability of information with personal data, with the scope declared in paragraph 5 of article 3 of the Project, represents a restrictive legislative measure of the rights, freedoms and

guarantees enshrined in Articles 26 and 35 of the CRP (and Articles 7 and 8 of the Charter) is manifestly unnecessary and excessive, in direct violation of the principle of proportionality (cf. Article 18(2)) of the CRP).

16. Furthermore, the indeterminacy and imprecision in the definition of the information or documents covered ('documents or information associated with those contracts or agreements'; 'natural or legal persons [...] that have caused losses [,..]»2) reinforces the conclusion of the disproportionality of such a provision. The CNPD allows us to recall that, within the scope of restrictions on rights, freedoms and guarantees, it is an inherent requirement of the Rule of Law that legislative measures guarantee their predictability, so the legislator is required to define the precise and exact extent of the law. of the restriction and, of course, of its object, which is clearly not the case here.

17. Also in this regard, it is important to pay attention to the provisions of paragraph 3 of article 3 of the Bill, where it is defined that the declassification resolution must define the content of the documentation or information that must be made public, as well as the justifications, according to the principle of prevailing interest, which takes into account the right of taxpayers to information.

18. The appeal to the principle of the prevailing interest will have its inspiration in the procedural rules relating to decisions to restrict the duties of secrecy, but, strictly speaking, what is at stake, as always happens in the consideration of rights and values constitutionally enshrined , is the application of the principle of proportionality. Furthermore, it should be noted that this rule is not neutral, as it transfers one of the interests to be considered (the alleged right of taxpayers to information) to the legal text, omitting the other relevant interests or constitutionally protected rights.

19. Finally, the CNPD draws attention to the rule on the application of the law in time set out in paragraph 3 of article 2 of the Project. This norm results in the disclosure of personal data contained in contracts and in the documents and information inherent thereto concluded in the fourteen years prior to the publication of this law, therefore, in relation to personal data contained in previously concluded contracts and other documents thus covered.

2 Italics ours.

20. Such a provision seems to promote the retroactive effectiveness of this legislative measure restricting rights, freedoms and guarantees, contrary to the prohibition contained in paragraph 3 of article 18 of the CRP, and therefore must be reconsidered.

ii. The resolution of the Assembly of the Republic

21. It is also important to point out a final aspect directly related to the legal regime for the protection of personal data.

22. At issue is the fact that Article 3(3) of the Project provides for the concrete and individual decision to declassify contracts, agreements and other documents to take the form of a resolution by the Assembly of the Republic, approved in plenary.

23. Without intending to question this solution, the CNPD does not fail to point out that decisions of this nature represent the material exercise of the administrative function and, as materially administrative acts, are subject to the principles and rules provided for in the Code of Administrative Procedure (cf. articles 2 .°, no. 1, and 148.°).

24. Furthermore, the fact that it corresponds to a materially administrative decision concerning personal data subjects that decision directly to the rules of the GDPR, as well as to the control of the competent national authority under Article 55 of the GDPR.

25. In fact, as the Court of Justice of the European Union concluded in its judgment of 9 July 2020 (C-272/19), in a case involving a decision by a parliamentary committee of the German state of Hesse, the activity carried out by the parliamentary committee, although indirectly contributing to the development of the sovereign functions of the Member State, materially corresponds to the administrative function and is not excluded from the scope of application of the GDPR.

26. Thus, under the terms of the regime provided for in the Bill, the Plenary of the Assembly of the Republic would act as responsible for the processing of personal data and, as such, subject to the obligations of the RGPD. Which does not fail to cause perplexity, when considering the principle of separation of powers. In fact, it has a paradoxical result, in the Portuguese constitutional framework, the Plenary of the Assembly of the Republic and the concrete resolutions it takes within the scope of this draft diploma are subject to control by an administrative entity, whatever it may be.

III. Conclusion

27. On the grounds set out above, the CNPD understands that:

The. The publication of essential information on contracts involving public expenditure does not give rise to reservations from the perspective of the protection of personal data, insofar as it occurs under the same terms as that which is currently foreseen for public contracts;

B. The legal provision for the availability and online publication of personal data contained in documents or information associated with those contracts or agreements referred to in article 2 of the Draft Law, as well as «the name of natural or legal persons with identification of the respective partners and members of the respective corporate bodies who exercise executive functions, which have caused losses [...]', constitutes a restriction of the rights, freedoms and guarantees enshrined in articles 26 and 25 of the CRP (rights to reserve private life and to protection of personal data), manifestly disproportionate and excessive, in violation of Article 18(2) of the CRP, and its retroactive effectiveness also appears to violate the prohibition contained in Article 18(3).

28. The CNPD also draws attention to the effects arising from the provision that the declassification of the aforementioned legal acts and other documents, for the purpose of making them available and publicizing online, takes the form of a resolution by the Assembly of the Republic. Such a resolution constitutes a materially administrative decision, which, as it concerns personal data, translates into a processing of personal data, which implies that the Plenary of the Assembly of the Republic assumes the capacity of responsible for such processing and, to that extent, is subject to to the obligations and administrative control provided for in the GDPR. Considering the paradoxical result, in terms of the separation of state powers, of such a forecast, the CNPD recommends reconsidering this solution.

Approved at the February 23, 2021 meeting

Filipa Calvão (President)