NATIONAL COMMISSION

■ DATA PROTECTION

OPINION/2020/75

I. Order

The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees asked the National Data Protection Commission (CNPD) to issue an opinion on Bill No. 73/XIV/1,a, on the “Regulation of lobbying”.

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as the national authority for controlling the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and paragraph 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, no. Article 4(2) and Article 6(1)(a), all from Law No. 58/2019, of 8 August.

The assessment of the CNPD is limited to the rules that provide for or regulate the processing of personal data.

II. appreciation

The Bill in question establishes the rules of transparency applicable to the interaction between public entities and private entities that intend to ensure legitimate representation of interests and proceeds to the creation of a «Register of Transparency of Representation of Interests» to work with the Assembly of the Republic.

As it contains a set of provisions similar to those provided for in Bill No. 30/XIV/1,a, as well as in Bill No. 181/XIV/1.3, on which the CNPD has already issued opinions, with the No. 2019/831 and No. 2020/222, respectively, the reservations and recommendations contained therein will be reiterated.

Article 2 of the Project specifies that "activities representing interests or lobbies" are "all those carried out in compliance with the iei, by natural or legal persons, with the aim of influencing, directly or indirectly, the preparation or implementation of policies

1 Accessible at https://www.cnpd.pt/bin/decisoes/Par/PAR_2019_83.pdf

2 Accessible at https://www.cnpd.pt/home/decisoes/Par/PAR_2020_22.pdf

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public authorities, legislative and regulatory acts, administrative acts or public contracts, as well as the decision-making processes of public authorities, on their own behalf, of specific groups or third parties".

1. It should first of all be noted that in paragraph 3 of article 2, categories of entities are excluded from the scope of application of this Bill, in which public entities and bodies which, by determination of the law, do not appear or are subsumed. have to be consulted within the framework of legislative procedures and who have the power and duty to issue opinions to national legislative bodies.

Among such public entities and bodies are the National Data Protection Commission, as well as the Commission for Access to Administrative Documents, in relation to which rules of Union law or national law recognize the power to issue such opinions regardless of invitation or compliance with the legal duty of consultation on the part of Organs legislative bodies (cf. subparagraph b)óno.3 of article 58 of the GDPR and subparagraph f) of paragraph 1 of article 30 of Law No. 26/ 2016, of August 22).

Bearing in mind that at stake is a power-duty assigned by law for the protection of fundamental rights and values that each of the entities in question pursues, the same reason that justifies the exclusion of activities in response to invitations to participate in the work of preparation of legislation requires the exclusion of those entities (cf. subparagraph b) 6, paragraph 3 of article 2 of the Project). Indeed, such intervention corresponds to the fulfillment of a legal duty to pursue the mission of public interest that has been assigned to those public entities, so their inscription in a register alongside representatives of interest groups or iobbies seems unjustified and mischaracterizing. the nature of the activity carried out by them.

The CNPD recommends, therefore, that a new paragraph be added to paragraph 3 of article 2, which excludes from the scope of application of the Project opinions or statements issued by public entities or bodies in the exercise of legally assigned powers and in compliance with of legal duties.

i NATIONAL COMMISSION

DATA PROTECTION

2. With regard specifically to the Project's compliance with the legal data protection regime, it is important to pay attention to

the provisions of article 4, which requires the creation of a public transparency register or the use of the Transparency Register of Representation of Interests (RTRI) managed by the Assembly of the Republic The following aspects are highlighted in this register:

2.1. Article 5 of the Draft provides for the information to be included in the aforementioned transparency register. Considering that, as explained in article 2, the entities to be registered may correspond to natural persons and, even when they are legal persons, identification data of the holders of the governing bodies and the person responsible for the representation activity are collected, this registration corresponds to the processing of personal data, pursuant to Article 4(2) of the GDPR.

Although the information listed in Article 5(1) corresponds to personal data that are not specially protected (that is, information that does not fall under the provisions of Article 9(1) of the GDPR), it does not fail to reveal aspects related to the private life of data subjects, so its public on-line disclosure raises the greatest reservations for the CNPD. At issue is the information regarding the address, telephone, e-mail, as well as the identification of annual income arising from the activity of representing interests.

In fact, the fact that the register is of a public nature (cf. Article 4(1) and Article 11(1)) and that, in Article 11(1) of the RTRI under the responsibility of the Assembly of the Republic, referring to the «portal for each registry» leads to the conclusion that this information will be publicly available on the Internet, therefore, in free access mode for anyone.

However, the fact that the contact details of people who carry out the activity of professional representation of interests are adequate and necessary for the public entity with which they will represent their respective interests, does not imply the adequacy and necessity of their disclosure on a portal online. -iine. The reasons for transparency that justify the registration of this activity and the different steps in which it takes place do not extend to public disclosure and knowledge, by any third party,

of the contact details and address of the natural persons who carry out this activity, so the border of transparency must be drawn there.

It should be noted that this information, once made available on the Internet, is perpetuated there, and can be accessed and used for the most varied purposes, not all of which are legitimate, without it being possible to exercise effective control over the

reuse of personal data and guarantee the compliance with the principles and rules for the protection of personal data in force in Portugal, with an impact on the legal sphere of data subjects that goes far beyond what is appropriate and necessary for public scrutiny of the activity of representing interests.

Such a provision therefore violates the principles of proportionality and the minimization of personal data, enshrined in Article 5(1)(c) of the GDPR, promoting the disproportionate restriction of rights, freedoms and guarantees (here, especially , the right to respect for private life and the right to the protection of personal data, enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and in Articles 26 and 35 of the Constitution of the Portuguese Republic).

In fact, the disproportionality of such a legal provision is evident when one considers that, in this way, those who professionally promote interests with public entities would be subject to greater scrutiny than the holders of the bodies of these entities, i.e., than the holders of political office and the holders of high public office.

In fact, for them, and rightly so, Law no. Sensitive personal data such as address, civil and tax identification numbers, mobile and telephone numbers, and email address; [...] Data that allow the individual identification of the residence, except for the municipality of location, or vehicles and other means of transport of the holder of the position».

The impact of this legal regime on the privacy of data subjects is, therefore, much smaller than that projected here for representatives of interests with public entities, which, considering the nature of the functions performed by each of the universes of data subjects, data, objectively constitutes a disproportionate and unfair outcome.

In this way, the CNPD recommends that, with regard to natural persons, the data relating to address, telephone and e-mail, provided for in article 5 of the Project, be safeguarded from public disclosure.

2.2. The CNPD also recommends reviewing the provisions of subparagraph a) of article 7 of the Bill, since the provisions in the final part of this precept are in clear contradiction with the GDPR. The rule in question imposes on registered entities - among which, as highlighted, individuals may include the duty to "comply with the declarative obligations provided for in this iei, or in a complementary regulatory act, accepting the public nature of the elements contained in their declarations '».

Now, without questioning the imposition of declarative obligations, the prescription of acceptance - or the presumption that the

fulfillment of these obligations means acceptance - of the public character of the elements contained in their declarations is no longer reached. One of the two: either the legislator assumes that it imposes the public disclosure of information, or makes its lawfulness depend on the consent of the data subjects (in which case, such disclosure would not be admissible in the absence of consent).

In fact, at least when the declarants are natural persons, consent to the disclosure of information concerning them must be manifested through an unequivocal, informed, free and specific positive act, pursuant to Article 4(11) and Article 6(1)(a) GDPR. And this legal provision, by linking to the fulfillment of a legal duty a supposed manifestation of will in accordance with the publicity of personal data, in the context of a data processing that is imposed by law, is in contradiction with the RGPD, as it does not guarantee the freedom of such manifestation of will.

In view of the uselessness and incongruity of such an association or presumption of consent, as well as the total lack of freedom of the presumed manifestation of the same, in violation of paragraph 11) of article 4 of the GDPR, the CNPD recommends the elimination of the second part of the provisions of paragraph a) of article 7 of the Bill.

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2.3. The provisions of paragraph 2 of article 9 of this Project also raise some reservations, in view of imposing the publication of the application of sanctions provided for in paragraph 1.

The CNPD understands the need for public entities to be able to verify the legitimacy of a natural person to promote interests, but the means provided for this purpose has an impact that goes beyond what is necessary for the fulfillment of this purpose, in violation of paragraph c) of Article 5(1) of the GDPR. In fact, the CNPD believes that it is appropriate and sufficient, for this purpose, that this information be made available on the Internet, but with access restricted to public entities provided for in article 3 of the Project - for this purpose, it may be justified to make it available, in restricted access, of that information in the Transparency Register.

In this way, the CNPD recommends the revision of paragraph 2 of article 9 of the Bill, in order to limit access to the registration of sanctions to public entities.

4. Finally, the CNPD recommends that, in compliance with the principle of protection of personal data from conception -

specifically enshrined in article 25 of the RGPD -, and the principle of data minimization (provided for in subparagraph cj of no. of article 5 of the GDPR), the RTRI and the other registers of transparency of representation of interests, created under this regime, are de-indexed from search engines.

In fact, it is insisted that the same recommendation applies to the processing of personal data, which embodies the online publication of personal data relating to holders of public offices and high public positions, within the scope of Law No. 52/2019 , of the 31st of July.

III. Conclusion

Based on the above grounds, the CNPD recommends:

i. That, in article 7 of the Draft Law, personal data relating to address, telephone and e-mail be safeguarded from public disclosure, in parallel terms to those provided for in paragraph 2 of article 17. Law no. 52/ 2019, of July 31, under penalty of violating the principles of proportionality and minimization of personal data;

ii. The elimination of the second part of subparagraph a) of article 7 of the Bill, regarding the acceptance of the public nature of the data, in view of the uselessness and incongruity of such a presumption of willingness to accept, as well as the total absence of freedom from the presumed manifestation of the same, in violation of the GDPR;

iii. The revision of paragraph 2 of article 9 of the Bill, restricting access to the registration of sanctions to public entities, under penalty of violating the principles of proportionality and minimization of personal data;

iv. De-indexing search engines of personal information contained in the RTRI and other similar records, in accordance with the principle of data protection by design, enshrined in Article 25 of the GDPR.

Approved at the meeting of June 29, 2020

Filipa Calvão (President)