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NATIONAL COMMISSION

DATA PROTECTION

OPINION/2020/22

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. 181/X1V/1.a, which "regulates lobbying and creates a Transparency Register and a Legislative Footprint Mechanism (proceeds with the first amendment to Organic Law No. 4/2019, of 13 September and the fourteenth amendment to Law No. 7/93, of 1 of March'.

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 transparency rules applicable to the interaction between public and private entities that intend to ensure legitimate representation of interests and proceeds to the creation of a centralized «Transparency Register» and a «Legislative Footprint Mechanism».

As it contains a set of provisions similar to those provided for in Draft Law No. 30/XIV/1.a, on which the CNPD has already issued an opinion, with No. 2019/831, the reservations and recommendations therein will be reiterated here poured.

Article 2 of the Project specifies that "activities of representation of interest groups or lobbies" are "those carried out, in compliance with the lei, by natural or legal persons, with the aim of influencing, directly or indirectly, in own name,

Process PAR/2020/11 1v.

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of specific groups or third parties, decision-making processes and the formulation, implementation or results of public policies, legislative acts, regulatory acts, administrative acts, public contracts by public entities”.

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 by the legislative bodies (cf. point b) of paragraph 3 of article 58 of the RGPD and paragraph f) of paragraph 1 of article 30 of Law n° 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) of 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 lobbies 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.

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

Process PAR/2020/11 2

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NATIONAL COMMISSION

DATA PROTECTION

Transparency Register of Interest Representation and Centralized Lobbies. The following aspects stand out about this record:

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 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, in paragraph 2 of article 4, it is stipulated that the registration in the register is carried out "through a specific section for the purpose contained in the website of the Entity for Transparency", which is immediately underlined that «the information provided at that headquarters will become the public domain» 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. -line. The reasons for transparency that justify the registration of this activity and the different steps in which it takes place do not extend to the public disclosure and knowledge, by any third party, of the contact details and address of individuals who carry out this activity, so there the frontier of transparency must be drawn.

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.

Process PAR/2020/11 2v.

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and ensure compliance with the principles and rules of 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 subparagraph c) and paragraph 1 of article 5 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, Law no. 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 iocization, 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 paragraph 2 of article 4 and paragraph a) of article 8 of the Bill, since the provisions in the final part of the two precepts are in clear contradiction with the GDPR .

NATIONAL COMMISSION

. DATA PROTECTION

Process PAR/2020/11 3

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In fact, paragraph 2 of article 4 imposes the obligation to register in the Register, determining that this means the acceptance that the information provided at that headquarters becomes public domain. Likewise, subparagraph a) of article 8 imposes on registered entities - which, as noted, may include natural persons -, the duty to "comply with the declarative obligations provided for in this lei, accepting [that] the elements contained in their declarations, are in the public domain'.

However, 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 dependent 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. However, this legal provision, by binding 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 GDPR, as it does not guarantee the freedom of such manifestation of will.

The same reasoning and conclusion must apply to the provisions of subparagraph k) of Article 8. as it is manifestly incongruous to impose a duty to «Accept that complaints concerning them are dealt with on the basis of the rules contained in this law;».

In view of the uselessness and incongruity of such an association or presumption of consent, as well as the total absence 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 part end of paragraph 2 of article 4 and the second part of the provisions of paragraph a) of article 8 of the Bill, as well as of paragraph k) of the same article 8 of the Project.

2.3. The provisions of paragraph 2 of article 11 of this Project also raise some reservations, as it imposes the publication of the application of sanctions provided for in paragraph 1.

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Process PAR/2020/11 3v.

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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 c) of no. 1 of article 5 of the GDPR), the Transparency Register is de-indexed from search engines.

In fact, it is clarified that the same recommendation applies to the processing of personal data in which the online publication of personal data relating to holders of public and high public positions, under the scope of Law no. , of the 31st of July.

III. Conclusion

Based on the above grounds, the CNPD recommends:

- i. That 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 31 July, under penalty of violation the principles of proportionality and the minimization of personal data;
- ii. The elimination of the final part of paragraph 2 of article 4 and of the second part of the provisions of subparagraph a) of article 8 of the Draft Law, concerning the acceptance of the public nature of the data, in view of the uselessness and the inconsistency 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; on the grounds of equality of reason, the deletion of Article 8(k) of the Project;

Process PAR/2020/11 4

/ NATIONAL COMMISSION

. DATA PROTECTION

- iii. The revision of paragraph 2 of article 11 of the Bill, restricting access to the record 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 Transparency Register, in accordance with the principle of data protection by design, enshrined in Article 25 of the GDPR.

Approved at the plenary meeting of March 3, 2020

Filipa Calvão (President)

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