National Data Protection Commission

OPINION/2023/10

I. Order

1. On January 10, 2023, the Coordinator of the Working Group - Mental Health of the Health Commission of the Assembly of the Republic requested the National Commission for Data Protection (CNPD) to issue an opinion on Proposal for Law no. 24/15/1, which approves the new Mental Health Law and amends related legislation.

2. The CNPD issues an opinion within the scope of its attributions and competences as an independent administrative authority with authoritative powers for the control of the processing of personal data, conferred by articles 57, paragraph 1, letter c); 58, paragraph 3, subparagraph b); 36, no. 4, all of Regulation (EU) 2016/679, of April 27, 2016 - General Regulation on Data Protection (hereinafter RGPD), in conjunction with the provisions of articles 3; 4th No. 2; 6, n.° 1, letter a), all of Law n.° 58/2019, of August 8, which implements the GDPR in the internal legal order (hereinafter LERGPD).

II. Analysis

i. Framework

3. Proposed Law 24/XV/1 (hereinafter Proposal) creates the new Mental Health Law, also amending the related legislation, giving special emphasis, as expressed in its explanatory memorandum, "to the approach providing care from a perspective of respect for the dignity of the human person, fundamental rights and the fight against stigma, and guaranteeing the participation of people in need of mental health care, and their family members, in the definition of health policies and plans mental" (§ 6)

4. As is also clear from the explanatory memorandum, it mobilized and had "as a reference, among other documents, the United Nations Convention on the Rights of Persons with Disabilities, approved by the United Nations in 2006, the Global Mental Health Action Plan, approved by the World Health Organization in 2013, the Strategic Action Lines for Mental Health and Well-being, approved by the European Union in 2016, and also the content of the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with regard to involuntary placement and involuntary treatment within mental healthcare Services, approved by the Bioethics Committee of the Council of

Europe, in November 2021." (§ 7)

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5. He further explained that "As the main innovations of the proposed regime, the review and update of the rights and duties of people in need of mental health care, in line with the progress of medical sciences and pharmacology, among others, and with the instruments of international, European and domestic law, namely Law No. 95/2019, of September 4, which approved the new Basic Health Law, Law No. 49/2018, of August 14, which defined the legal regime of the adult accompanied, and Law No. 25/2012, of July 16, which regulated advance directives".

6. Its legislative object focuses on the provision of care in the context of mental health which, as the Proposal recognizes from the outset, is very sensitive for human life and the daily life of any person, as it affects their freedom and autonomy, continuing to leave markedly stigmatizing marks on the personal profile and discriminatory behavior to which they may be the target.

7. In this way, this Proposal assumes a clear and accentuated relevance with regard to the protection of personal data, as it covers personal data of particularly vulnerable people.

8. As a mere note, and even though the CNPD is read from the exclusive perspective of the compliance of this Proposal with the legal regime for the protection of personal data, it cannot fail to ignore, due to the sharp sensitivity of this matter, the controversies raised by the admissibility or otherwise of involuntary processing, not obviously to rule on them, but to underline the impact that the processing of personal data, especially in these circumstances, can have on the fundamental rights of data subjects.

9. And this is because the draftAdditional Protocol to the Convention on Human Rights and Biomedicine concerning the Protection of Human Rights and Dignity of Persons with Mental Disorder with regard to Involuntary Placement and Involuntary Treatment, referenced in the explanatory memorandum, motivated a contesting Open Letter promoted on May 14, 2018 by a

group of organizations (European Disability Forum, European Network of (former) Users and Survivors of Psychlatry, Autism Europe, Inclusion Europe, Mental Health Europe and the International Disability Alliance), as well as the opposing position Assumed by the Commissioner for Human Rights of the Council of Europe, 8 November 2018 - the first accessible at https://www.mhe-sme.org/wp-content/uploads/2018/05/EDF-018-19-YV-Open-letter-on-protocol-to-Oviedo-Convention-FINAL-Mav-14th.pdf and the second one at https://rm.coe.int/comments-bv-dunja-miiatovic-council-of-europe -commissioner-for-human-r/16808f1111.

10. We also recall the Report presented to the Parliamentary Assembly of the Council of Europe on May 22, 2019, entitled Ending coercion in mental health: the need for a human rights-based approach

(https://pace.coe.int/Ddf/c9ff42fa77c73dc5ba11 a9331283d60e6a62c227b149ca6ffb2c709dfc1172a7/doc.%2014895.pdf).

11. But returning to the scope of the Proposal, it is recalled the set of normative provisions with direct relevance in the processing of personal data related to mental health, with special emphasis on the norms that enshrine fundamental rights, both national (articles 26, n. 1 and 2, and 35 of the Constitution of the Portuguese Republic), as well as European Union Law (Articles 7 and 8 of the Charter of Fundamental Rights of the European Union - CDFUE), and the respective legislative framework composed of: i) the GDPR and the LERGPD; ii) Law No. 10/2005, of January 26, regarding personal genetic information and health information, in particular Articles 3 (Ownership of health information), 4 (Processing of health information) and 5th (Medical information).

12. The following legal framework is therefore relevant to the assessment of this Proposal: a) The processing of personal data must be carried out in strict respect for the rights, freedoms and guarantees of natural persons, in particular the right to data protection personal (legal); b) Personal data are: i) Subject to lawful, fair and transparent processing (lawfulness, loyalty and transparency); ii) Collected for specific, explicit and legitimate purposes, and cannot be processed in a way that is incompatible with those purposes (purpose limitation); iii) Adequate, relevant and limited to the minimum necessary to pursue the purposes for which they are processed (data minimization): iv) Accurate and updated whenever necessary, with all reasonable measures being taken to ensure that inaccurate data is erased or rectified without delay (accuracy of the data): v) Retained in

such a way as to allow the identification of data subjects only for the period necessary for the purposes for which they are processed (conservation limitation); vi) Processed in a way that guarantees their security, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organizational measures (integrity and confidentiality); c) The person responsible for processing must adopt measures that allow him to prove that the processing of personal data is carried out in accordance with the principles set out (responsibility); d) The data relating to health are the property of the respective person, having, as a rule, the right of access to the entire clinical process, by themselves or through third parties with their consent (ownership of the data): e) The processing of data relating to health is subject to specific and adequate measures for the protection of confidentiality, guaranteeing the security of facilities and equipment, controlling access to information, strengthening the duty of secrecy (reinforced security).

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13. With this background in mind, the rules of the Proposal relevant from the perspective of the protection of personal data are considered below.

ii. Intermediation in the exercise of rights by the person of trust

14. Article 9(5) of the Proposal reads as follows: “The trusted person may, for the purposes set out in the previous number, access health information and the involuntary treatment process" - antecedent n. 4 provides that “Persons in need of mental health care have the right to appoint a trusted person to support them in exercising their rights, namely in exercising their rights to complain, submit suggestions and appeal and review the involuntary treatment decision"

15. This "trusted person" in supporting the exercise of rights, corresponds to an innovation of this Proposal, introducing a figure with antecedents in the commonly designated curator ad litem, being sufficient for the purpose to indicate the person subject to the provision of health care, no judicial intervention is necessary for its designation, as for example happens in the

representation by a special or provisional curator of the provisions of article 17 of the Code of Civil Procedure (approved by Law no. 41/2013, of 26 June, with successive amendments).

16. Article 9 thus regulates the exercise of rights by the data subject, directly or indirectly, through whoever has legitimacy to represent him, under the terms described in that article. However, nothing says about the form or procedure to be followed for the designation of the person of trust, nor, even less, if and where such capacity is registered.

17. This allows, or at least does not prevent, any third party from invoking this quality and having access to data relating to the mental health of others.

18. It is recommended, therefore, that this procedure be further regulated at the legislative level, eventually including the identification of the trusted person in the clinical file or the involuntary treatment process.

19. Incidentally, in cases of involuntary treatment, it is fully acceptable to draw up the eventual record of appointment of a trusted person, in order to be authentic in court, all the more so as the Criminal Procedure Code is applied in a subsidiary way (article 37 of the Proposal), namely paragraph 1 of article 99, according to which “the record is the instrument intended to attest to the terms in which the procedural acts were carried out, whose documentation the law obliges and to which the person assisting he writes, as well as to collect the declarations, requests, promotions and oral decision-making acts that have occurred before him”.

iii. The Article 43 database

20. It is now important to focus the analysis on article 43 of the Proposal, whose title is “Database”, and which is inserted in section V, regarding the “Commission for monitoring the execution of the legal regime of involuntary processing”. It can be read that: "The commission promotes, under the terms and conditions provided for in the legislation on the protection of personal data and on medical secrecy, the organization of a computer database relating to the application of this chapter, to which public entities will have access or private parties that have a legitimate interest in this".

21. Although this article raises concerns about the protection of personal data, as it invokes the respective legislation, it is recalled here that, in the context of the processing of personal data relating to health, it is based on the prohibition, contained

in paragraph 1 of Article 9 of the GDPR, of your processing.

22. However, paragraph 2 of article 9 of the RGPD admits exceptions to the stated general rule, and since for the purpose of medical diagnosis and the provision of mental health care, personal data are already processed in the in the context of the clinical process, it seems that only subparagraph g) can be considered here, which admits the exception of "processing [if] it is necessary for reasons of important public interest, based on the law of the Union or of a Member State, which must be proportionate to the objective pursued, respect the essence of the right to the protection of personal data and provide for adequate and specific measures that safeguard the fundamental rights and interests of the data subject" (ours in italics). Although, as it is not explicit, it is not clear what public interest is pursued with the creation of this database.

23. As can be seen, the processing of health-related data is subject to specific and restrictive requirements, subject to four conditions: i) existence of an important public interest, as recognized by law; ii) proportionate to the stated objective, that is, appropriate, necessary, in fair measure and to preserve this important public interest; iii) respect the essential core of the fundamental right to the protection of personal data; iv) provide for appropriate and specific measures to ensure the fundamental rights and interests of whoever is the holder of health-related data. Accordingly, there is no "legislative carte blanche" for the processing of health-related data, but rather a strong and impressive "catalog of constraints".

24. However, Article 43 of the Proposal is far from meeting those requirements.

25. In fact, article 43 of the Proposal reveals inaccuracies in its standard text, which do not allow understanding the global meaning of its scope and normative program, as well as reveals insufficiencies in the definition of the main elements of the processing of personal data, and in particular in regulating access by third parties.

26. The inaccuracy is revealed, from the outset, regarding the purpose of the database, which is nowhere made explicit, as well as regarding the categories of personal data to be collected and the respective retention period.

27. But the imprecision still results especially from the reference to the terms and conditions provided for in the legislation [...]

on medical confidentiality in the "organization of a computer database", not understanding whether its meaning is to bind the Commission of Monitoring to the obligation of secrecy, or if the personal data thus structured in the database are protected by the legal regime of medical secrecy.

28. This is because medical secrecy is a deontological duty that only covers doctors. However, there are other health professionals who are subject to professional secrecy, such as pharmacists, psychologists and nurses. Law No. 12/2005, of January 26, even mentions the "duty of secrecy [...] of all professionals" (Article 4, No. 1) and "the deontological rules of professional secrecy of doctors and other health professionals" (Article 6, paragraph 7).

29. Above all, taking into account that there are members who are not bound by professional obligations of secrecy as per Article 40(1) of the Proposal, which describes the composition of the Monitoring Committee: "three psychiatrists, two lawyers , a clinical psychologist, a nurse specialist in mental health and psychiatric nursing, a social service technician, a representative of user associations and a representative of family associations".

30. Thus, it is recommended to clarify what is meant by «under the terms and conditions of the legislation on [...] medical secrecy» and impose an explicit duty of secrecy on the members of the Monitoring Committee.

31. The final part of article 43 of the Proposal raises greater perplexity, when it admits "access [by] public or private entities that have a legitimate interest in this".

32. Now, in a sensitive matter such as the one at issue here, the provision of a processing of personal data (the access operation) that is likely to generate discrimination and stigmatization of particularly vulnerable people, admitting that the mere "legitimate interest" of a private entity is sufficient to compress the fundamental rights to the protection of personal data and the reservation of the privacy of private life, without being accompanied by conditions or limits that ensure the protection of these fundamental dimensions, it is a disproportionate provision and in clear contradiction with the provisions of paragraph g) of paragraph 2 of article 9 of the RGPD.

33. It is recalled that this rule of EU law is not sufficient with the mere legal provision of processing, requiring an important public interest that justifies the processing of personal data - which is not

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equates to the mere prediction of any legitimate interest of a public or private entity manifestly. Moreover, and contrary to what is required in the aforementioned paragraph g) of paragraph 2 of article 9 of the RGPD, the rule does not provide for any adequate measure to prevent or mitigate the risks of discrimination and stigmatization.

34. In this regard, some recitals of the RGPD are recalled, which underline the importance of providing adequate guarantees for the protection of personal data, making it impossible, as a rule, to directly identify them, namely through the pseudonymization of such personal data (75), as well as by minimizing treatment (78), in order to safeguard potential risks with its disclosure to third parties (85). And this even if it is for archival purposes in the public interest, for scientific or historical research purposes or simply for statistical purposes (156), and must be subject to a careful and careful evaluation by the person responsible for processing the data (cf. Article 4, paragraphs 5), 10 and 15 of the GDPR).

35. It should also be remembered that public entities do not pursue legitimate interests, since their purpose can only be the pursuit of public interests defined by law, which, incidentally, the RGPD makes explicit in the last paragraph of paragraph 1 of article 6th.

36. For all these reasons, the CNPD recommends revising Article 43 of the Proposal, in particular to rethink the creation of a mental health database, bearing in mind the risks that the centralization of this information may imply, especially in a time that has been characterized by manifest vulnerabilities of the information systems and by the users in their handling, promoting or enhancing undue access and the consequent illegitimate reuse of stigmatizing information for the holders of the respective data.

37. If the forecast of its constitution persists, the CNPD warns of the need for the law to densify the conditions of its creation, specifying the security and data protection measures that must be adopted, otherwise this national provision will not be able to meet the requirements set out in Article 9(2)(g) of the GDPR.

38. Finally, it recommends that the access regime to this very sensitive personal information be reviewed, insisting, on the one hand, that public entities cannot invoke legitimate interests in accessing personal data and, on the other hand, that access access to personal mental health data represents such a high degree of interference in the private life of the respective holders that only specific interests and in well-densified circumstances at the legislative level should legitimize access to such information.

39. As the CNPD has been insisting, the recurrent legislative option of abdicating the minimum delimitation of a framework of legality for the administrative bodies to decide the intensity and contours of restrictions on rights, freedoms and guarantees, in particular fundamental rights to protection of personal data and respect for the privacy of particularly vulnerable people, without guarantees for data subjects

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rights, and without ensuring the required predictability and legal certainty as to the situations in which their rights may be restricted, in violation of the principle of proportionality.

40. Most notable is the omission in this Proposal regarding the retention period of personal data related to health and the monitoring of involuntary hospitalization processes, inserted in the aforementioned database.

41. It should be noted that such data relating to health and involuntary hospitalization processes exist in duplicate, that is, with clinical information and the respective judicial processes, so that they are only placed in the domain of the Evaluation Committee for compliance of its purposes, which is mentioned in article 38 of the Proposal and which consists of "monitoring the implementation of the legal regime of involuntary treatment", with the powers listed in the subsequent article 39 of the Proposal.

42. Accordingly, the CNPD recommends the legal provision of a maximum retention period for data collected and entered into the database.

43. The CNPD also points out that no rule was expressly enshrined in this Proposal regarding the reservation regarding the publicity of treatment processes, as it is known that they include personal data related to mental health and, in particular, compulsory hospitalization can generate very marked stigmatizing effects on community level.

44. Contrary to the provisions of the previous Mental Health Law approved by Law No. 36/98, of July 24, which, in Article 36, determined that “The processes provided for in this chapter are secret and urgent", the now proposed Article 36 states only that "The procedures provided for in this chapter are of an urgent nature", having "dropped" the secret nature of involuntary processing procedures.

45. By the way, it could be argued that through the subsidiary application of the Criminal Procedure Code we would have the rule of paragraph 1 of its article 86, according to which "The criminal procedure is, under penalty of nullity, public, subject to the exceptions provided for in the law". The closest exceptions provided for in the law were immediately listed in the subsequent numbers of this article 86. And in these we find its number 7, according to which "Advertising does not cover data relating to to the reserve of private life that do not constitute evidence". .

46. The CNPD recommends recovering the previous prediction of the secret nature, or at least of the reserved access, of involuntary treatment processes, under penalty of risk of invasion of private life, in its

more intimate sphere, during and after the process of involuntary treatment to provide mental health care.

47. Finally, it appears that, in the legal design of this proposal, the omission of security rules in the processing of data related to mental health, which, it is insisted, are extremely sensitive data and whose improper access can bring serious risks.

48. Incidentally, the CNPD suggests that security rules be indicated by requiring control measures, namely: a) access to facilities used for processing information; b) on the information supports, to prevent them from being read, copied, altered or removed by any unauthorized person; c) in the insertion of information, to prevent the introduction, as well as any unauthorized acknowledgment, alteration or deletion of personal data; d) access to information, so that authorized persons can only have access to information that is of interest to the exercise of their legal attributions; e) in the transmission of information, to ensure that its use is limited to authorized entities; f) in the introduction, consultation, alteration or deletion of personal data in the information system in order to verify which data were introduced, consulted, altered or deleted, when and by whom, keeping the record of these operations for a period of two years ; h) in the transport of information supports, to prevent data from being read, copied, altered or deleted in an unauthorized manner.

49. Bearing in mind the technical specificity of control measures and their "non-legal nature", although with clear repercussions on fundamental rights, it is essential that, either in this diploma or in an administrative regulation, the obligation to adopt them is imposed, that the option either in the sense of its subsequent regulation through regulation; in the latter case, the law must refer to regulatory intervention.

III. Conclusion

50. Under the terms and on the grounds set out above, the CNPD recommends:

The. the regulation in article 9 of the Proposal of the procedure for identifying the trusted person, eventually in the clinical file or in the process of involuntary treatment, for reasons of legal certainty;

B. The reconsideration of the forecast of a mental health database (related to involuntary treatment) in article 43 of the Proposal, bearing in mind the risks associated with the centralization of

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such sensitive information, maximizes the risks of undue access and consequent illegitimate reuse of stigmatizing information for the holders of the respective data, who are in a situation of manifest vulnerability, without the purpose of that database being clear and, consequently, without demonstrate proportionality in restricting the fundamental rights of data subjects;

51. If the prediction, in article 43, of the constitution of this database persists, the CNPD recommends:

The. the clear definition of the main elements of the processing of personal data, in particular, the purpose, categories of personal data processed and the respective conservation period, as well as the security and data protection measures, under penalty of this standard not meeting the requirements Article 9(2)(g) of the GDPR and, therefore, is not sufficient to guarantee the lawfulness of the processing;

B. that the access regime mentioned in article 43 of the Proposal be revised, either because public entities cannot invoke legitimate interests in accessing personal data, or because access to personal mental health data represents such a high degree of interference in the private life of the respective holders, who are especially vulnerable here, that only specific interests and well-densified circumstances at the legislative level should legitimize access to such information, for reasons of proportionality and predictability of the restriction of fundamental rights;

w. The legal provision of security rules regarding personal data relating to mental health, regulating the respective control

measures, eventually to be carried out by Ordinance;

52. It also recommends establishing the secret nature of the involuntary treatment process (which was part of the previous legal regime) or, at least, a reserved access regime.

Approved at the meeting of January 24, 2023

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Filipa Calvao (President)