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National Data Protection Commission

OPINION/2022/86

I. Order

1. The Secretary of State for Digitization and Administrative Modernization, by delegation of powers from the Secretary of State for the Presidency of the Council of Ministers, requested the National Data Protection Commission (CNPD) to issue an opinion on the Draft Decree- Law No. 169/XXIII/2022, which, according to the request, «aims to initiate the reform of simplification of existing licensing, through the elimination of licenses, authorizations, acts and unnecessary procedures, simplifying the activities of companies and contributing to encourage investment by reducing administrative burdens and context costs in the environmental area'.

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.

read Analysis

i. General appreciation

3. The Draft Decree-Law (hereinafter, Draft) under analysis aims to «[...] approve[r] measures to reduce burdens and simplify administrative procedures on companies [...], under the terms explained in paragraph 1 of article 1 of the Project, where the planned measures are listed - for example -, indicating, in paragraph 2 of the same article, the legislative diplomas subject to amendment.

4. Although focused on simplifying authorization procedures in the area of the environment, the Project announces, in the explanatory memorandum, the intention to extend this simplification effort to other areas. And then it provides for the

amendment of the rules of the Code of Administrative Procedure, thus generalizing these measures of simplification and acceleration of procedures to the entire Public Administration, with reduction of the deadlines for indictment and other measures that will be analyzed below.

5. As a general assessment, the CNPD begins by emphasizing that it understands the imperative of simplifying and accelerating administrative procedures, not being able, however, to omit that this Project fails to provide the opportunity to find a balance between that objective and the imperative, which falls on all

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Public Administration, of informed and considered appreciation of the interests in tension in the situations object of decision or administrative pronouncement.

6. The Project's exclusive focus on accelerating and purporting procedural efficiency undermines the principles of good administration and administrative efficiency, which aim at and demand the appropriate decision to the concrete circumstances, since it is certain that, if the Public Administration does not have the time or conditions to investigate, inquire and know the reality and, subsequently, make the balance between the interests involved, then good administration cannot surely be affirmed, nor the efficient pursuit of the public interest. And the need to balance interests is underlined, precisely because decisions and administrative opinions often require time to mature, in the context of situations that present new configurations of risks to the public interest or to the rights of citizens.

7. In fact, the Project totally disregards the conditions in which the Public Administration develops its activity, without sufficient human resources or adequate resources to implement information systems that speed up the decision-making process.

Difficulties that, if resolved by formally maintaining the power-duty of decision or administrative pronouncement in a new

procedural framework that makes this administrative intervention unfeasible, imply the lack of protection of citizens and society in the face of the risks that the different economic activities import or promote. Also because, if the Public Administration's resources are not sufficient for the prior control of these activities, they will hardly be enough for their successive control - an objective that the Project has in view, as stated in the explanatory memorandum.

8. In any case, as a whole, the changes introduced by the Project make prior informed and considered intervention by the Public Administration that satisfies or safeguards the public interest and ensures the protection of citizens' fundamental rights unfeasible.

9. It is within the framework of this general assessment that the CNPD then highlights the changes provided for in subparagraphs y) and z) of paragraph 1 of article 10 of the Project, and then analyzes the measure indicated in subparagraph w) of the same precept .

ii. Changes to the Administrative Procedure Code

10. As mentioned in subparagraphs y) and z) of paragraph 1 of article 1, the Project establishes two measures that imply the amendment of the Code of Administrative Procedure (CPA), under the terms defined in article 26 of the Project.

11. The first observation that the forecast of these measures deserves relates to the purpose of the Project, which, because it focuses on authorization procedures in the environmental area, is limited to the approval of "measures to reduce burdens and simplify administrative procedures on companies" (cf. Article 1(1)).

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12. Now, given the delimitation of the Project's object and the specification that the legislative changes provided for in paragraph 2 of the same article 1 are aimed at "the effects provided for in the previous paragraph", it seems to be possible to conclude that the amendments to the CPA, provided for in subparagraphs y) and z) of paragraph 1 of article 1, of the Project, are limited to administrative procedures in which the applicants or direct interested parties are companies, leaving out procedures in which the applicants are individuals , associations, foundations or public legal persons.

13. However, article 26 of the Project, which amends the articles of the CPA, does not reflect this subjective delimitation, in strange inconsistency with the purpose and object of the Project.

14. Regardless of the subjective scope of this amendment, the CNPD continues to analyze these amendments, with a view to

protecting the rights of citizens in the context of processing personal data.

15. In the context of investigative measures, the limitation to a single moment of interpellation to interested parties for the purpose of obtaining information that includes gaps in the request or request (cf. paragraph 2 of article 117 of the CPA), accompanied by the prohibition suspension of decision deadlines - which results, a contrario, from the provision that the deadline is only suspended if the interested party does not respond within 10 days (cf. Public Administration suited to the specific circumstances, which the administrative entity does not get to know or which it does not have time to consider properly).

16. Specifically, in the context of the procedures that run in the CNPD, in most cases the requests that involve a prior decision (in relation to the execution of the processing of personal data) are poorly instructed by the applicant, even if they formally meet the minimum admission requirements of the order.

17. This is the case with the prior consultation provided for in Article 36(1) of the GDPR, which is often accompanied by incomplete or missing data protection impact assessments regarding various aspects of the processing, which, even after the correction is requested, they remain incomplete.

18. With the amendment of article 117 of the CPA provided for in this Project, if it were to be applied in this type of procedure, the solution would have to pass through a formal refusal to issue a decision on the request, or, more radically, the prohibition of carrying out the treatment, as there are not enough elements in the process to assess the risk.

19. In any case, the final part of Article 36(2) of the GDPR is mandatory to provide for the suspension of decision deadlines “until the supervisory authority has obtained the information it has requested”. As this is a rule provided for in a Union regulation, therefore with direct application in the national legal system, the

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provisions designed by the national legislator do not have the legal force to exclude them, and therefore do not apply in the prior consultation procedure regulated in Article 36 of the GDPR¹.

20. However, in a procedure in which an entity requests authorization to capture and record sound under Article 19(4) of Law No. 58/2019, of 8 August, the instruction of the procedure with the limitations now designed conditions the action of the CNPD, being even susceptible to preventing it from knowing the risks of the treatment and determining the adoption of adequate measures to prevent or mitigate it, with evident lack of protection of the fundamental rights of the data subjects.

21. Therefore, a legislative change such as the one envisaged with the new wording of article 117 of the CPA, which seeks to protect the interests of the applicant in the procedure, has a very negative impact on the fundamental rights of citizens, and therefore, from the perspective of the CNPD, be subject to re-weighting and review.

22. But the same incongruous result is arrived at with the amendment provided for in Article 92 of the CPA.

23. Continuing to analyze these changes in relation to the specific activity of the CNPD, the consultative action of regulatory norms or administrative acts, even if not, as a rule, binding, is of the utmost importance for the (prior) guidance of public bodies regarding the processing of personal data for which they are responsible, helping them to comply with the legal data protection regime.

24. However, the large number of draft administrative regulations and protocols and agreements that regulate the processing of personal data submitted to the CNPD makes it impossible to issue the respective opinion within 10 days (in particular, taking into account that the CNPD has, at the same time, also the duty to deliver an opinion in the context of legislative procedures).

25. Added to this is the impossibility of suspending the advisory procedure in order to obtain clarification from the applicant (see paragraphs 4 and 5 of article 92), given that the processing of personal data is often poorly stated in the documents presented, omitting in the regulatory projects essential elements about the treatments that they intend to regulate.

26. Furthermore, in the context of the consultative (sub)procedure, despite the fact that paragraph 4 of article 18 of Law no. 43/2004, of 18 August, amended and republished by Law no. 2019, of August 8, regulate the instruction of the

10 the same applies to the procedures for approving certification criteria, approving codes of conduct, approving binding rules applicable to companies or authorizing contractual clauses for international transfers - these procedures presuppose the application of the foreseen coherence mechanism in the RGD, which follows its own deadlines, defined by the RGD or in

the operating regulation of the European Data Protection Committee approved under Union law, and the national legislator cannot prejudice the functioning of that essential mechanism in the economy of the legal regime of the Union (although procedures relating to certification criteria and codes of conduct are subject to new consistency procedures only if they concern cross-border processing).

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Even the CPA, in this new wording, does not provide for the possibility of inviting the request to correct the request or to provide clarifications (cf. paragraphs 2 and 3 of article 117, a contrario, since the deadline for response provided for in the latter number would expire the period for issuing the opinion), thus weakening the legal force of the legal requirement to instruct these projects with impact studies on data protection.

27. In this way, the national legislator thus empties the CNPD's (and other administrative entities with consultative functions) advisory competence, in clear contravention of the GDPR, harming the public entities themselves, so lacking in guidance in this matter, and above all with manifest damage to citizens and their rights, as the CNPD's intervention can only arise in the context of monitoring the treatment, therefore, after the effective affectation of their rights, which could have been prevented with appropriate measures.

28. Still within the scope of the amendments to the CPA, another rule that raises perplexity is the one included in paragraph 6 of article 130 of the CPA. The prediction that the non-payment of the fee is not a condition for the formation of the tacit deferral disregards the financial reality with which most public entities are struggling and will certainly promote the voluntary non-payment of fees. There is no question of a possible solution, given the administrative inertia, there is no place for any fee, because there is no service that deserves the corresponding financial. But this means in practical terms that the express decision, which will have to be issued within the legal term, without the possibility of suspending the procedure to ensure payment of the fee, can be issued without the interested party having paid the fee corresponding to the service actually provided.

29. The CNPD therefore recommends reconsidering the provisions of Article 130(6) of the CPA.

iii. The certification of tacit deferrals

30. The Project also provides, in subparagraph w) of paragraph 1 of article 1, a dematerialized and free procedure to obtain a document that proves the acquisition of rights by tacit deferral, through the addition of an article - the Article 28-B - Decree-Law No. 135/99, of 22 April, in its current wording.

31. The procedure described there intends to certify the formation of the tacit approval, within three (working days) after receiving the request from the interested party, this decree-law attributing the power to issue the aforementioned certificate to an 'entity designated by order of the member of the government responsible for the area of administrative modernization» - and which is expected to be a public institute with attribution in the area of administrative modernization.

32. This entity will be responsible for sending «an email» to the institutional email address of the entity or administrative body competent to carry out the administrative act, with the notice provided in Annex I of the Project.

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33. The conditions for issuing the certificate are provided for in paragraph 5 of the aforementioned article 28-B, corresponding not only to the formation of the tacit approval, but also to one of the following circumstances: confirmation, by the competent administrative entity or body for the performance of the administrative act, of which he did not notify the express act; failure to pronounce by the competent entity or body within one working day after receipt of the notice or failure to present, by that entity or body, sufficient grounds to prevent the recognition of the formation of the tacit approval.

34. However, this procedure thus defined cannot fail to give rise to reservations.

35. On the one hand, because admitting that an «email» sent to the institutional address of a public entity, with the time that some administrative organizations have in dispatching the same, is or must always be answered within one working day, reveals a disproportionate optimism or, from another perspective, makes a blank slate of the difficulties that administrative organizations face in registering and dispatching the dozens or hundreds of daily communications they receive.

36. On the other hand, and now when the independent Public Administration is at stake, it seems doubtful whether, from the outset, by decree-law, it is legitimate for an entity that forms part of the Indirect State Administration to question an

independent administrative entity regarding the exercise of its decision-making power. The independence of administrative entities, in order to be effective, must be ensured at all levels, and it is not clear how one can claim to recognize an entity of the Indirect State Administration, directly subordinated to governmental oversight and supervision, the competence to assess the sufficiency of the fundamentals. presented by an independent administrative entity - therefore, the imprecision of this concept means recognizing a discretionary or autonomous power regarding the determination of the action of this entity incompatible with safeguarding its independence.

37. Specifically regarding the CNPD, it is recalled that Article 35(2) of the Constitution of the Portuguese Republic (CRP), Article 52 of the RGPD and Directive (EU) 2016/680 bind the Portuguese State guarantee the independence of the national supervisory authority.

38. Thus, the CNPD recommends reviewing article 28-B added by article 27 of the Project to Decree-Law No. 135/99, of 22 April, changing the - very short - deadline for responding to the sending the notice and, in particular, excluding independent administrative bodies from its scope.

iv. The (in)adequacy of a decree-law to amend the CPA

39. Finally, despite the intention behind this Project to simplify administrative procedures for companies, the CNPD notes that the high susceptibility of impacting rights

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fundamental rights of citizens, by reducing the guarantees that the prior intervention of administrative entities means in the protection of those rights (in this opinion, especially demonstrated in the procedures related to the processing of personal data), it raises the doubt as to whether this matter is part of the area of concurrent legislative competence, as the government seems to understand. Or if it should not be understood that, for such reasons, it is a matter that falls within the reserved legislative competence of the Assembly of the Republic (cf. subparagraphs b) and s) of paragraph 1 of article 165 of the CRP).

40. All the more so since the CPA and, therefore, the rules that are being amended here, were approved by an authorized

decree-law, under an authorization law of the Assembly of the Republic that has already expired, and the last amendment of the CPA was determined by law of the Assembly of the Republic.

41. The CNPD thus draws the attention of the legislator to the importance of an extended public debate in its own seat - in Parliament - on a draft law with such radical changes for administrative activity and for the pursuit of the public interest, and with does not neglect the affectation of the rights, freedom and guarantees of citizens.

III. Conclusion

42. The CNPD underlines that the changes introduced by the Project make prior informed and considered intervention by the Public Administration that satisfies or safeguards the public interest and ensures the protection of citizens' fundamental rights unfeasible; in particular, the formal maintenance of the power-duty of decision or prior administrative pronouncement in a new procedural framework that makes this intervention unfeasible, such as what is now intended to be introduced in the Code of Administrative Procedure, implies the lack of protection of citizens and society in the face of risks that different economic activities import or promote.

43. Thus, on the grounds set out above, CNPD recommends:

The. The revision of article 26 of the Project, which amends the articles of the CPA, to reflect the subjective delimitation (restricted to interested parties that are companies) assumed in article 1 of the Project, when the purpose and object of the same is defined, or, alternatively, the revision of article 1 in order to eliminate the indicated incongruity;

B. The reconsideration of the changes introduced in article 117 of the CPA;

ç. The reconsideration of the shortening of the period for issuing opinions in article 92 of the CPA;

d. The reconsideration of the provisions of paragraph 6 of article 130 of the CPA.

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44. The CNPD also recommends reviewing article 28-B added by article 27 of the Project to Decree-Law No. 135/99, of 22 April, changing the deadline for responding to the sending of the notice and, especially , excluding from its scope of application independent administrative entities, under penalty of violating the constitutional norms and European Union law that impose the guarantee of their independence.

45. Finally, the CNPD draws attention to the importance of a broad public debate in its own seat -in Parliament - on a draft diploma with such radical changes for administrative activity and for the pursuit of the public interest, and with no negligible affectation of the rights, freedom and guarantees of citizens, especially since the Code of Administrative Procedure, which has been amended here, was approved by an authorized decree-law and until now has always been amended by law.

Lisbon, September 16, 2022

Filipa Calvão (President, who reported)