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National Data Protection Commission

OPINION/2021/72

I. Order

1. The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees of the Assembly of the Republic asked the National Data Protection Commission (CNPD) to issue an opinion on Bill No. 840/XIV/2.a (BE) , which “promotes the deepening of the availability of open data regarding public sector information (3rd amendment to Law No. 26/2016, of 22 August).

2. The CNPD issues an opinion within the scope of its attributions and powers 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, subparagraph b) of the paragraph 3 of article 58 and paragraph 4 of article 36, all of Regulation (EU) 2016/679, of 27 April 2016 - General Regulation on Data Protection (hereinafter RGPD), 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 No. 58/2019, of 8 December August, which enforces the GDPR in the domestic legal order.

II. Analysis

3. The Bill in question transposes Directive (EU) 2019/1024 of the European Parliament and of the Council, of 20 June 2019, on open data and the reuse of public sector information into the Portuguese legal system, proceeding to the third amendment to Law No. 26/2016, of 22 August, last amended by Law No. 33/2020, of 12 August (hereinafter, Law No. 26/2016).

4. According to the explanatory memorandum, the Bill aims to ensure “the availability to the public [of information] in accordance with the principles of gratuitousness and universality, clearly safeguarding sensitive data and other data that deserve legal protection”, “eliminating obstacles access to the reuse of information and imposing the fewest possible restrictions on the reuse of documents'.

5. As also mentioned in the same explanatory memorandum, the aim is to link Directive (EU) 2019/1024 with "certain related legal instruments, namely Regulation (EU) 2016/679 of the European Parliament and of the Council and Directives 96 /9/EC,

2003/4/EC and 2007/2/EC of the European Parliament and of the Council'.

6. It should be noted that the CNPD's analysis of this Bill closely follows its recent Opinion/2021/63, although reinforcing some of the arguments presented therein, since this Bill, regarding the regime aspects related to the processing of personal data, does not present significant differences in relation to Proposed Law No. 88/XIV/2.a (GOV).

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7. For the purposes of the CNPD's assessment of the new regime proposed here, from the perspective of the protection of citizens' personal data, it is important to consider, first of all, the scope of application of some of the European Union diplomas mentioned in the explanatory memorandum and , specifically, of the Directive that the Bill aims to transpose.

8. First of all, Directive (EU) 2019/1024, which is transposed here, is incisive when it determines, in paragraph 2 of its article 1, that "4 this Directive is not applicable to: [...] f) Documents access to which is restricted under Member States' access regimes, including where citizens or legal entities have to demonstrate a particular interest in order to gain access to documents; [...] h) Documents to which access is excluded or restricted by virtue of access regimes for reasons of protection of personal data, and parts of documents accessible by virtue of those regimes that contain personal data whose reuse has been defined by law as incompatible with legislation on the protection of individuals with regard to the processing of personal data, or as compromising the protection of the privacy and integrity of the data subject, in particular in accordance with national or Union law on the protection of personal data;" (See also Article 1(4) of the Directive, which applies the GDPR).

9. As a first consideration, it should be noted that the Bill, in an attempt to articulate different legal regimes - that of the protection of personal data (maximum, the RGPD) and that of open data and the reuse of data (Directive 2019/1024) ends up presenting a result that contradicts the RGPD, thus going beyond the scope of the legal force of Directive 2019/1024, since

this diploma saves the regime contained in the RGPD and determines the interpretation of its provisions in accordance with this regime.

10. Incidentally, Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a regime for the free flow of non-personal data in the European Union is also very clear to exclude from its scope of application personal data (in the sense given to it by subparagraph 1) of article 4 of the GDPR), as results from article 2 of the same regulation and in particular from paragraph 2 thereof, and even more expressively of recital 9, in the final part, which reads: "If technological progress makes it possible to transform anonymised data into personal data, that data should be treated as personal data, and Regulation (EU) 2016/679 should be applied accordingly. ».

11. The confusion between those regimes begins to be revealed in the changes introduced in paragraph c) of article 20 of Law No. 26/2016. It is recalled that this legal provision already allows, exceptionally, the reuse of nominative documents provided that there is (i) specific authorization of the data subject for the reuse of their data, (ii) express legal provision to that effect or (iii) « when personal data can be anonymized without the possibility of reversal, in which case it must apply, within the scope of the authorization granted

and under the terms of Article 23(1), the provision of special security measures to protect sensitive data, in accordance with the legal regime for the protection of personal data'.

12. Now, in the wording now designed, point c) presents a new source of legitimation of reuse: "legal basis under the applicable legislation on personal data for their processing" and, in the event that personal data are anonymized with no possibility of reversal, adds at the end «and in general those whose access or reuse is excluded or restricted by virtue of the legal regime for the protection of personal data;»1.

13. It will be said that the reference to the possibility of the reuse of nominative documents being based on a legal basis under the applicable legislation in terms of personal data for their processing does not bring anything new in relation to the provisions

of the applicable legislation in matter of personal data, which, in a sense, is true. But this legal provision has two not inconsiderable implications that can leave citizens unprotected, as data subjects, in their relationship with public bodies.

14. Before explaining them, however, it is important to point out that, if the national legislator, in defining the situations in which the reuse of nominative documents is admissible, intends to refer to the legal grounds for the processing of personal data provided for in the applicable legislation on of personal data, then it is preferable, without further ado, to refer to the RGPD and, consequently, to drop the express reference to the "authorization of the subject" and the "legal provision expressly providing for it", since these two grounds are contained in the Articles 6 and 9 of the GDPR. With this, by the way, the reuse of documents with personal data is referred to its own headquarters: the legal regime for the protection of personal data, which is where the question of the reuse of data personnel is regulated.

15. In this same vein, although with regard to the proposal for a Regulation on European data governance (Data Governance Act), presented by the European Commission, the European Data Protection Committee (CEPD) and the European Authority for Data Protection (EDPS), in a joint opinion, where they underline the need to clarify at European legislative level that, in terms of data reuse and sharing, when such operations concern personal data, they are governed by the RGPD and specifically by the conditions of lawfulness of article 6 of the GDPR2.

1 Note that this last addition does not raise reservations, from a data protection perspective, since it seems to have the sense of reinforcing the measures to be adopted in the process of anonymization of other categories of data in addition to the category of data specials.

2 Cf. paragraphs 53-54, 56, 77 to 79 and 83 of the EDPB-EDPS Joint Opinion 03/2021 on the Proposal for a regulation of the European Parliament and of the Council on European data governance (Data Governance Act), accessible at https: //edpb.euroDa.eu/svstem/files/2021-03/edph-

edpsJoinLopinion..doa en.pdf. This perspective was recently reinforced by the CEPD, in Statement 05/2021 on the Data Governance Act in

light of the legislative developments, 19 May 2021, pp. 2-3, accessible at https://edDb.euroDa.eu/svstem/files/2021-05/edob statementondaa 19052021 en O.odf

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16. But the innovation introduced in paragraph c) of article 20 of Law No. 26/2016 results in a consequence, perhaps intended by the presentation of this Bill. At issue is the use of the expression applicable legislation on personal data, which also seems to appeal to the rules of Law no. of its non-compliance with the GDPR. To avoid interpretations by public bodies, regarding the content of some articles of Law no. the processing of personal data carried out by public entities results from an express legal provision, of an imposing nature for citizens (who cannot escape such processing) and for the pursuit of a specific purpose of public interest legally provided for, the CNPD recommends that in new wording of subparagraph c) of article 20 of Law No. 26/2016, which reads "legal basis under the applicable legislation in terms of personal data for their processing" is entered as a basis for the lawfulness of data processing personal data provided for in Regulation (EU) 2016/679.

i. Personal data and the legal regime of free reuse

17. But it is the second implication of the new wording given to paragraph c) of article 20 of Law no. 26/2016 that raises the most reservations from the perspective of the protection of personal data. At stake is the inference that the personal data exempted in paragraph c) of that article are freely reusable, when this does not result either from the GDPR or from the Directive that is intended to be transposed.

18. Indeed, the Directive is explicit when, in points f) and h) of paragraph 2 of its article 1, it excludes from its application, as mentioned in point 7 above, documents whose access is restricted by virtue of Member States' access regimes, including the case where citizens or legal entities have to demonstrate a particular interest in order to gain access to documents [...] and documents to which access is excluded or restricted by virtue of the access regimes access for reasons of protection of personal data, and parts of documents accessible under these regimes that contain personal data whose re-use has been defined by law as incompatible with legislation on the protection of natural persons with regard to the processing of personal data

19. In other words, the Directive does not subject personal data to the regime of free reuse and open data, expressly excluding from its scope of application documents to which access is recognized on the basis of "private interest" (read, legitimate) - cf. recital 23, which reads '[this] Directive does not apply to cases where citizens or legal entities, under the relevant access regime,

can only obtain a certain document if they prove a particular interest» - as well as documents with personal data whose access is excluded or restricted by virtue of the respective legal regime.

20. And the Directive excludes personal data from its regime because its reuse, under the personal data protection regime, is not free, being restricted to the purpose for which the new treatment proved necessary under the terms of article 6. ° or even of article 9 of the R6PD - and this also applies when the reuse is authorized by the data subject, since the authorization or consent of the data subject must be specific, as well as when the basis is the law, since it provides for reuse for a specific purpose (since otherwise, if the law allowed reuse for any purpose, it would not be possible to assess and demonstrate the proportionality of the measure restricting the fundamental rights of data subjects)3.

21. Now, this is what the present Project seems to forget. It seems to be forgotten when the other grounds for processing personal data provided for in data protection legislation are added (in paragraph c) of Article 20 of Law No. 26/2016, and it seems to be forgotten when, in order to articulate the different legal regimes (access to administrative documents and reuse), it associates reusable documents or data with open data. Which is not at all admissible in view of the RGPD, and which leads to a result that Directive 2019/1024 precisely seeks to avoid.

22. Notwithstanding the positive attempt to articulate the different legal regimes, the Draft Law wrongly assumes that any nominative document that, under the terms of the law, can be reused for another purpose by the initial data processing officer (the public body) or by a third party that has legitimately accessed it, becomes freely reusable and advertiseable online. This is

what results from the combined reading of article 20 with paragraph 7 of article 22 and article 27, which provides for the duty to make available, on the website, updated lists of documents and data available for reuse, and that the information provided must be indexed in the data.gov portal, in order to facilitate the search for documents or data available for reuse.

23. Simply, if it is true that open data is reusable data, the reverse is not true. Reusable data is not necessarily free to reuse and, when this is the case, it is not and cannot be open data.

3 Precisely underlining the need to assess the impact on data protection resulting from the reuse of personal data, the joint opinion of the CEPD and the EDPS, cited above in footnote 2, in paragraphs 86 to 88.

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24. It is therefore essential, under penalty of manifest violation of the RGPD and Directive 2019/1024, that, in paragraph c) of article 20 of Law No. 26/2016, documents are excluded from the scope of reuse nominative4, except in the case of irreversible anonymization of personal data. Or, alternatively, the reference in paragraph c) of article 20 to the grounds of lawfulness of data processing provided for in the RGPD, in addition to the hypothesis of irreversible anonymization of the data, and the introduction of a new provision clarifying that the Named documents are not freely reusable and are therefore not subject to the open data regime of Article 27, nor subject to the provisions of Article 22(7).

ii. Anonymized data and the risk of re-identification of its holders

25. Another aspect that, from the perspective of the CNPD, should be reinforced in the Draft Law concerns the anonymization of personal data.

26. Anonymization is the first concept defined in the Directive, exactly transposed in the new subparagraph a) of paragraph 1 of article 3 of Law no. personal data and are therefore not subject to the protection provided by the GDPR. But the truth is that

anonymization processes do not crystallize over time, making data relating to natural persons indefinitely anonymized. On the contrary, intense technological evolution has revealed that initially anonymized information quickly becomes information relating to identified or identifiable natural persons. This is because the mass information set today available online (consisting of personal data and non-personal data, as recognized in Regulation 2018/1807) and the new techniques for analyzing and relating information (maximum Artificial Intelligence) allow at each step to reverse the anonymization process, re-identifying who the information relates to and thus transforming anonymized data into personal data5.

27. It is to this growing risk that Directive 2019/1024 draws attention when it points out in recital 16, in fine, that [the] Member States must also guarantee the protection of personal data, including in cases where the information in an individual dataset does not constitute a risk of

4 Which will be reusable for a specific purpose, according to the regime defined in the RGPD (where the consent or specific authorization of the data subject or in a special law is required).

5 On the risk of re-identification demonstrated in several studies, see, for example: on health data in the context of the pandemic, Tânia Carvalho, Pedro Faria, Luís Antunes, Nuno Moniz, «Fundamental privacy rights in a pandemic State», PLoS One, 2021 (in process of publication) and accessible at https://tmcarvalho.aithub.io/resume/: specifically on mobility data, Y.-A. de Montjoye, C. Hidalgo, M. Verleysen et al., "Unique in the Crowd: The privacy bounds of human mobility", SciRep 3,1376 (2013); or even on apparently unidentifiable data relating to the use of credit cards, Yves-Alexandre de Montjoye et al., «Unique in the shopping mall: On the reidentifiability of credit card metadata», Science 347,6221 (30 January 2015) .

identification or selection of a natural person, but may entail such a risk when combined with other available information'.

28. This is all the more important the more sensitive the personal data subject to the anonymization process are. As anonymization is a personal data processing operation, under the terms of Article 4(2) of the GDPR, such processing is subject to the principles and rules enshrined therein, and the risks of re-identification must be duly considered before

proceeding. for the anonymization of data for the purpose of making it available online. This is the meaning of recital 53 of the aforementioned Directive, when it states that "[I act to take decisions on the scope and conditions of re-use of public sector documents containing personal data, for example in the health sector, it may be necessary to carry out evaluations of impact on data protection in accordance with Article 35 of Regulation (EU) 2016/679."

29. Furthermore, as the anonymized data, once disclosed online, can be subject to successive reuse for the most varied purposes, not being possible to monitor the subsequent operations to which they are also subject for the purpose or as a result of their -identification, it is important to bind public bodies to careful selection processes of anonymizable and reusable information, otherwise, in the name of "developing the data economy" or "accelerating scientific progress and innovation", what is what remains of the privacy and dignity of human beings in their relationship with public bodies, especially when they are in a state of subjection to their power of authority or in a state of lack of support (social, educational, health, etc.).

30. This effort is especially important in the context of scientific research, and today it is not permissible to place the rights of data subjects in the background in relation to the advancement of science or in relation to the commercial use of scientific advances, since science and society cannot lose sight of its ultimate goal: the service of human dignity. For this reason, the provisions of paragraph 2 of article 27-B introduced in Law no. personal data also by reference to the technological capacity to reverse the processes of anonymization.

31. Thus, the CNPD recommends that a provision be introduced in Law No. 26/2016 specifying that the operation of anonymization of nominative documents is subject to the rules of the RGPD, and must be preceded by a careful assessment and weighting of the risks of re-identification of personal data and the impact of their free reuse on the rights of the citizens to whom the data relate (under Article 35 of the GDPR), in particular when it concerns special data categories, and it is specifically provided for the duty to eliminate anonymised data from the public body's website and from the portal

data.gov whenever it is proven that they allow the identification of the citizens to whom they relate6.

32. A final note just to point out that the introduction in article 3 of the concept of personal data, must imply a change in the

wording of the concept of nominative document, which appears in the current subparagraph b) of paragraph 1 of article 3. 26/2016 - now, with the Bill, item h) -, with the final reference to be made to item f) of the same article.

III. Conclusion

33. On the grounds set out above, the CNPD understands that, in an attempt to articulate different legal regimes - that of the protection of personal data (maximum, the RGPD) and that of open data and the reuse of data (Directive 2019/1024) -, the Bill contradicts the GDPR, by presenting a regime that does not differentiate reusable nominative documents (or reusable personal data) from freely reusable data and open data, thereby exceeding the scope of the legal force of Directive 2019/1024, since it saves the regime contained in the GDPR and determines the interpretation of its provisions in accordance with this regime.

34. Thus, under penalty of violating the RGPD and Directive 2019/1024, the CNPD recommends:

The. revision of paragraph c) of article 20 of Law No. 26/2016, to exclude nominative documents from the scope of reuse, except in the case of irreversible anonymization of personal data: or, alternatively,

B. the reference in paragraph c) of article 20 to the grounds of lawfulness of data processing provided for in the RGPD, in addition to the hypothesis of irreversible anonymization of data, and the provision of a new provision where it is made explicit that nominative documents are not freely reusable and which are therefore not subject to the open data regime of Article 27 and Article 22(2).

35. In view of the increasing risks of re-identification of anonymized data, the specification in Law No. 26/2016 that:

6 Note that the provision of this duty to delete data has a limited useful effect: only to prevent further downloads of information made available online.

The. the operation of anonymization of nominative documents is subject to the rules of the RGPD, depending on a prior assessment of the risks of re-identification and its impact on the rights of citizens, in particular when the data contained therein can be reduced to the category of special personal data ;

B. anonymized data must be deleted whenever it is proven that they allow the identification of the people to whom they relate.

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