NATIONAL COMMISSION

DATA PROTECTION

Opinion No. 1/2018

I. Order

His Excellency the President of the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees sent the National Data Protection Commission (CNPD), for an opinion, the Bill No. 725/XIII/3a, which approves the regime of classified.

The request made stems from the powers conferred on the CNPD by paragraph 2 of article 22 of Law no. 67/98, of 26 October, amended by Law no. Protection of Personal Data (hereinafter, LPDP) and the opinion is issued in accordance with the competence set out in subparagraph a) of paragraph 1 of article 23 of the same legal diploma, being restricted to aspects relating to the protection of personal data.

II. appreciation

A. General Considerations

1. The object of the bill under analysis "establishes the regime for classified matters, determining the rules for classification, protection and access to classified information, as well as the security accreditation regime" (art. 1, n. 1), although excluding from its scope the classification of documents and matters as State secrets1 (No. 2) and the special classification regimes contained in the legislation relating to the Information System of the Portuguese Republic" (No. .

However, the exclusion of the matter of State secrecy takes us, from the outset, to a different scope from that inscribed in the constitutional provision of art. 164, al. q), of the CRP

1 There are, however, amendments to the State Secrecy Regime (approved by Organic Law No. 2/2014, of 6 August), adding two rules that implement access to information by the Assembly of the Republic and by deputies.

(Constitution of the Portuguese Republic), which, as is well known, falls within the subject matter of absolute reservation of legislative competence of the Assembly of the Republic.

This formal note only serves to clarify the hierarchy of the different classifications that we are dealing with depending on whether we are analyzing State secrecy or, as here, other classified matters. Such a distinction, therefore, helps to delineate the proportionality of the solutions conceived by this bill, in the light of safeguarding constitutional rights that undoubtedly face the restrictions that these classifications represent.

The reinforced requirements in the field of legislative activity in matters of State secrecy, particularly with regard to the form of organic law, imposed by article 166, no.

2, of the CRP, serve a substantive purpose of legitimizing the restriction of fundamental rights that may come into conflict with it, even if not unrestrictedly.

By not providing such a high level of requirement for other matters relating to the classification of documents or information, the constitutional legislator assumed, albeit tacitly, that these are presumed disqualified in the face of State secrecy. In short, due to the less restrictive scope of fundamental rights allowed to the ordinary legislator to regulate the classification of other matters that are foreign to State secrecy, the question of form allows us to place, with greater precision, the degree and scope of expansiveness that must be recognized in the classification provided herein.

The exceptions portrayed also allow us to conclude that the regime that the present bill seeks to establish in no way unifies the different matters of State secrecy and the special classification regimes contained in the legislation relating to the Information System of the Portuguese Republic. Without disdain for the objective set, in the preamble text, of coherence between all these regimes, what is certain is that, in this bill, what is regulated is the classification of matters that do not include those mentioned above, so its object is is limited and should only be considered in its strict range.

Although the introductory text presupposes a virtually indistinguishable character between the

matters relating to State secrecy and those relating to other matters

classified2, we do not foresee any practical utility and formal adequacy in the aggregation of two non-coincidental realities. If there can be, it is recognized, identity in some points, namely procedural, linked to the accreditation of people and entities with access to information, in addition to the establishment of a set of common or identical processes with regard to the specific activity of classification of the information, one cannot, even so, depart from this proximity to establish a complete uniformity of regime between the two worlds.

3. The preamble remarks properly recall the existence of another bill (554/XII) with content similar to what is now proposed. It should be noted that this same bill was the object of critical corrections by the only entity that was consulted at the time (Conselho de Fiscalização do Sistema de Informação da República Portuguesa) which we will recover in the analysis of the pleadings, since it recognizes the relevance of some of these critical comments, adding others deemed relevant.

4. Finally, whenever deemed relevant, the considerations of the Constitutional Court, expressed in Judgment no. Republic, concerning «State secret», given the evident approach to the theme.

B. Articulated

The combined reading of articles 1.° (where the object is defined), 2.° (which establishes the scope of security classification) and 3.° (where the general principles to which the regime of matters classified) refers us to what was noted

3 Note the opening paragraph which states that «The regime of state secrecy and classified matters is among the structuring matters of the democratic rule of law whose definition can benefit most from a global review intervention, harmonizing the various degrees of information protection to be implemented at the various levels of the State.».

3 Available at https://dre.pt/pesquisa-avancada/-

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i) Scope

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by the TC, in the aforementioned judgment, regarding compliance with the “principle of precision or determinability of laws” by the aforementioned Decree No. 129/VI of the Assembly of the Republic. Indeed, the TC understood that 'Documents that can be submitted to the regime of State secrecy [...] may concern a set of matters enumerated by way of example (those transmitted, on a confidential basis by foreign States or by international organizations; concerning the strategy to be adopted by the Country in the context of present or future negotiations with other States or international organizations; those aimed at preventing and ensuring the operation and safety of personnel, equipment, material and installations of the Armed Forces and forces and security services; those relating to security procedures in the transmission of data and information with other States or with international organizations; those whose disclosure may facilitate the practice of crimes against the security of the State; those of a commercial, industrial, scientific, technical or financial that are of interest to the preparation of the State's military defense);

The matters indicated by way of example, as they are the most frequent in the secular practice of sovereign States (id quod plerumque accidit), refer to one or more of the four indicated domains (for example, those in subparagraphs a) and b) have the to do with the unity and integrity of the State and its internal or external security; those of subparagraphs c) and d) have to do

with national independence, the unity and integrity of the State, its internal and external security; that of subparagraph e), with the internal and external security of the State, etc.].».

Now, article 2 of the project under analysis also uses a non-exhaustive, but illustrative method of enunciating situations to which the intended classification is applicable, so, in theory, we would have to consider that this formulation does not put at risk, per se, the “principle of the precision or determinability of laws”. We cannot, however, fail to note the need to restrict as much as possible the situations to which this classification is specifically applicable, since, as we have already stressed initially, we are not faced with situations that call for the invocation of the institute of State secrecy. This summons us to the necessary compatibility operation

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of fundamental rights in collision, itself admitted by the CRP, in article 268, paragraph 24.

In order to carry out this operation of compatibility, article 4 of the bill, which deals with “transparency and open administration”, assumes that it is intended to implement “the restrictions on the right of access to files and administrative records related to internal and external security ». Here, once again, the thematic exclusions of this project are reaffirmed, with the exception of restrictions that are based on "state secrecy or for reasons relating to criminal investigation or the privacy of persons [emphasis added], as well as those concerning the information services of the Portuguese Republic and specific subject classification systems'.

In this context and due to the specific relevance of the criterion of "personal intimacy" for the CNPD's powers and attributions,

it is necessary to conclude, as it could not be otherwise, that the restrictions sustained in the privacy of people, that is to say, in their privacy, are governed by the competent legislation on the protection of personal data and not by this bill.

ii) Control of the classification process

The draft law defines, in its article 7, what should be understood by classified information, brand and degree of classification, specifying in article 8 the admissible typologies ("Portuguese security classification" and " European and international security classification."5) Then, in articles 9 and 10, the concepts of classification, reclassification and declassification are clarified, as well as the

4 As Gomes Canotilho and Vital Moreira note, "The right of access to files and administrative records may conflict with constitutionally protected assets (internal and external security, criminal investigation and personal privacy). The constitutionally authorized restriction, for these reasons, to the right of access to administrative documents, does not exempt the law from observing the legal and constitutional principles that materially inform all administrative activity».

5 As for the European and international security classification, once again a regime is excluded from this project, since paragraph 3 of this article 7 refers its regulation to "the rules arising from international conventions that bind the Portuguese State, the rules of secondary law directly applicable under the terms of the constitutive treaties of the respective international organizations and the rules contained in directly applicable legal acts of the European Union».

procedure to be adopted depending on whether or not it is possible to classify the information partially and with different degrees.

In article 11, the effects of classification are defined, which «determine[s] the restriction of access» to classified information,

limiting this access to bodies, services and persons «duly authorized and adequately informed about the formalities, measures protection, limitations and sanctions'. From the joint interpretation of this article with article 26 (“Persons with access to classified information”), we would have to conclude that, with the exception of the President of the Republic, the President of the Assembly of the Republic and the Prime Minister, in addition to of the regime applicable to the Assembly of the Republic and the deputies (enshrined in article 29), a total ban on access to any other entity or person is instituted.

This means that the CNPD, contrary to what we concluded at the end of the previous point, is clearly and unrestrictedly removed from the constitutional role provided for in article 35, no. of personal data carried out under this project, mainly because there is no “escape valve” that allows it, nor does it control compliance with the rules for the protection of personal data during the life cycle of the treatments, especially those that are more easily anticipated: case of conservation and use of classified information by authorized persons and entities.

Such a provision appears to be disproportionate6 and, consequently, in violation of Article 18(2) of the CRP, precisely because it is not limited to the extent necessary to achieve the objective of limiting generalized access (and even restricted access)) to classified information. An alternative that is more in line with the CRP and without jeopardizing the object of the project is easily envisaged, such as allowing legally competent entities (National Data Protection Commission and Commission for Access to Administrative Documents) and to the strict extent of the your skills,

6 Note that the Council of the European Union itself, in Decision 2013/488/EU, of 23 September, on the security rules applicable to the protection of EU classified information, available at http://eur-lex.europa .eu/legal-content/PT/TXT/?uri=celex%3A12012£%2FTXT, except, in recital 10, application of article 16 of the Treaty on European Union. This article, in its paragraph 1, provides as follows: “Everyone has the right to the protection of personal data concerning them”.

monitoring the performance of those who hold and use this type of information. This would avoid the creation of a “free zone” in terms of personal data (and access to administrative documents), which is precisely what will happen if it is accepted that the constitutional control of classifications is limited to access to information that is expected to be admitted. to the Assembly of the Republic and individual deputies (as stated in article 38 of the project).

It is not disputed that the act of classification as a state secret can be understood, as sanctioned by the Constitutional Court in Decision 458/93, as a political-legal act and not a mere administrative act subject to challenge. It simply happens that here there are two substantial differences with the regime of state secrecy. Otherwise, let us see, on the one hand, the CRP provides for the possibility of much broader restrictions for State secrecy than for classified matters, simply by comparing the content of article 156, al. d), of the CRP, where limits are allowed to the power of deputies to question the government on matters of State secrecy, with no similar restriction on access to administrative archives and records, provided for in article 268, paragraph 2, of the CRP; on the other hand, and keeping to the text of this last constitutional precept, it is quickly seen that the restriction that exists there "in matters relating to internal and external security, criminal investigation and personal privacy" operates only for citizens, whose right of access to information is impaired. This wording also has the gift of “parifying” the matters that are now intended to be classified as questions of privacy (or “intimacy” as the CRP refers to it), there being no reason for the former to recognize precedence over the latter. .

The other reason that clearly distances us from the State secrecy regime is the absence, in this project, of any entity that has the competence to control the acts of classification, reclassification and declassification of information. It is recalled that the State Secrecy Regime provides, in its article 14, that "the supervision of the State Secrecy regime is ensured by a supervisory entity, whose creation and statute are approved by law of the Assembly of the Republic ». It was created, then, in this

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ensejo, an entity (the State Secrecy Inspection Entity7), with effective and comprehensive inspection powers (also) in terms of citizens' rights, freedoms and guarantees (cfr. art. 14, of the aforementioned organic law8). In the present project, as noted above, the Assembly of the Republic is only granted a power to access information (article 29, in conjunction with the added articles 16 and 17 of the secrecy regime). of State), without even realizing any obligation on the part of the Prime Minister or the President of the Republic to provide the required information.

Whatever the prism through which one wishes to analyze the union restrictions linked to the classification of these matters, it becomes clear that the removal of entities (such as the CNPD or CADA) from this control cannot be considered constitutionally legitimate, proportionate and, therefore necessary to achieve the objective that presides over the legislative initiative.

iii) Competence for classification

Another critical issue arises when analyzing which entities are competent to classify information. Article 15 (“Classification as National Classified Information”) provides that “The entities with competence to classify, reclassify and declassify in the various degrees referred to in this law, in relation to the activity of their bodies and services, for classification as a State secret, as well as the entities defined, respectively, by Decree of the President of the Republic, by Resolution of the Assembly of the Republic, by Resolution of the Council of Ministers and by Resolution of the Government bodies of the Autonomous Regions.».

The present formulation departs from that proposal in Bill No. 554/XII, where, in article 15, a very extensive, but exhaustive, set of entities that

7 Created by Organic Law No. 3/2014, of 6 August, amended by Organic Law No. 12/2015, of 28 August,

8 Its paragraph 1 provides the following: «EFSE monitors and supervises the activity of classifying State secrets, pronounces on requests and complaints submitted by citizens regarding this secret and ensures compliance with the Constitution and the law, especially in terms of citizens' rights, freedoms and guarantees."

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they could proceed with the classification, reclassification and declassification of the information, divided and limited, moreover, by the degree of classification that was intended to be attributed to them. We do not ignore and even adhere to the opinion of the SIRP Supervisory Board, which considered not only that it should be excluded from the list of entities classifying/reclassifying/declassifying information of a “secret” degree, as provided for in the aforementioned project, but also that the aforementioned cast appeared to be “excessively broad]”. Despite this, and contrary to what would be expected, the current wording of article 15 of the project under analysis also allows, due to the open nature with which it is presented, to increase a list that was considered too comprehensive. This circumstance calls into question two of the most notorious intentions of this project. From the outset, it fails to consolidate a regime that seemed to want to repudiate the current model «insufficiently disciplined through the regulatory framework of national security classifications (SEGNACs), approved on the basis of an enabling provision of the Internal Security Law, but insufficient in terms of constitutional guarantees associated with restrictive norms of fundamental rights»9. Instead of replacing the current solution, admittedly precarious, with one of reinforced legal and constitutional value, it ends up, instead, maintaining the same system10 and even worsening it, extending it to the AR and the organs of self-government of the Autonomous Regions this college.

The second intention that is seen to be vacillated is to make the principles of exceptionality and proportionality compatible with such an open list of potential information classification entities. Since the classification of information should be an exception in the normal relationship between the State and its citizens, it is not clear why the ability to use such an expedient is thus extended to a potentially unrestricted universe (within the margins of the central and regional State). , above all because the

faculty of classification is virtually indiscriminate. It remains only for the management, superintendence or supervisory bodies to "determine the alteration or revocation of the classification act performed by the subordinate or by the entity subject to the superintendence

9 Citing the preamble text of the bill under analysis.

10 So far based on resolutions of the Council of Ministers empowered by article 8, no. 2, al. d), of Law No. 53/2008, of 29 August, successively amended, lastly by Decree-Law No. 49/2917, of 25 May - Internal Security Law.

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or guardianship, as well as the reclassification of information, provided that it has competence for classification.» (Article 17).

As a footnote, the question raised, at the time, by the Constitutional Court (in the repeatedly cited judgment) regarding the possibility of the Autonomous Regions being able to classify any information as a state secret: "the solution of giving the Presidents of Regional Governments the power to definitively classify documents and information as State secrets. (...) the matter of State secrecy is a matter that concerns exclusively the organs of sovereignty and the Republic, since it is up to the State to «guarantee national independence and create the political, economic, social and cultural conditions that promote it» [Article 9(a) of the Constitution]. In fact, limits to the regional autonomy of Madeira and the Azores are sovereignty, the political unity of the State and the national interest, the Constitution making explicit that «regional political-administrative autonomy does not affect the integrity of State sovereignty and within the framework of the Constitution' (Article 227(3)). (...)

As is clear from the decree under consideration, the regime of State secrecy covers documents and information whose knowledge by unauthorized persons is likely to jeopardize or damage national independence, the unity and integrity of the State and its internal security. and external. It is, therefore, a means of protecting the interests of a sovereign State, having to

be evaluated, in the last analysis, by the organs of sovereignty. However, the Constitution assigns to the State, in its article 273, the obligation to ensure national defense, the objective of which is to "guarantee, in compliance with the constitutional order, democratic institutions and international conventions, national independence, the integrity against any external aggression or threat".

Nor can the provisions of article 114(2) of the Constitution be invoked to support a judgment of constitutional conformity, since the decree under consideration does not regulate any form of regional secrecy, specific to each of the Autonomous Regions , but rather state secrecy in matters of national security. Nor can the law "delegate" to the Autonomous Regions competences of their own sovereignty, under penalty of violating article 113 of the Constitution.".

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It is true that it can be said that this matter of classification is in a relationship of subordination in relation to that of State secrecy and, therefore, will admit an intervention by the Autonomous Regions in the areas that they are responsible for, however, and because there is not even a differentiation of competences of classification of the governing bodies of these regions in relation to Organs national bodies, we do not see how this new project cannot fail to incur the same vice of unconstitutionality then pointed out.

iv) Duration of classification

Another element that suggests less precision in the terms in which the legislator conceived this new regime is the time limits for extending the duration of the classification. Strangely and, it seems to us, contrary to the proportionality that was claimed,

the legislator intended to replicate in this project the deadlines set for matters classified as State secrets. As in Article 4(3) of the State Secrecy Regime, the proposed Article 18(2) maintains a maximum classification period of 30 years, with the obligation to review this classification, at most, every four years. The only difference in relation to the regime of state secrecy arises in the entity that can renew the classification beyond 30 years, which here is assumed to be an exclusive prerogative of the Prime Minister, with all the institutional and constitutional issues that may arise regarding the autonomy of action of the President of the Republic (or, even, of the Presidents of the Regional Governments) that does not have the same faculty for the information that he himself classifies.

In fact, there is no reason to enshrine such long deadlines for classifications that are not linked to State secrecy and that, therefore, do not deserve the same degree of restrictive access, being such a solution again disproportionate in the light of the CRP.

v) Specific issues of personal data protection

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(1) Protective measures

As for issues more directly related to the protection of personal data, it should be noted that article 22, where protection measures are provided for, only states that the National Security Authority (ANS) must be informed when any circumstances arise. that «configures compromise or breach of security of classified information». However, given the attributions provided for in Article 22(1) of the LPDP and the powers established in Article 23. no. 1, al. j) and n), of the same law, it seems reductive to

confine this information to the ANS, assuming that there is personal data involved. Furthermore, the new General Data Protection Regulation (EU Regulation 2016/679 - RGPD), applicable from May 25 of this year, requires, in its article 33, that they be notified to the CNPD , within 72 hours, breaches of personal data that are likely to result in a risk to the rights, freedoms and guarantees of natural persons (a contrario). It would therefore be appropriate to reformulate this article so that this aspect could be accommodated, advancing, as a possible solution, with the introduction of a new paragraph 4, whose wording is suggested here “4. Whenever the compromise or breach of the security of classified information, provided for in the previous number, results in a breach of personal data, the provisions of Section 2 of Chapter IV of Regulation (EU) 2016/679 of the European Parliament and of the Council are still applicable, of 27 April 2016 on notification and reporting obligations.”

(2) Other processing of personal data

Finally, articles 35 and 36 of the project establish the accreditation procedure for people who will be authorized to access classified content. To this end, Article 35(1) provides for an imperfect right to information, in which the accrediting entity is obliged to transmit to the data subject, subject to accreditation, "all the information and of all clarifications relevant to the same, namely: a) The object, meaning and extent of the procedure; b) The need to process personal data; c)Obligations arising from accreditation; d) Legal and regulatory provisions on security clearance, including those providing for disciplinary, administrative and criminal sanctions.». It is important to match the quantity and quality of this information with what is provided for in article 10 of the

LPDP and thus improve this insufficient compliance with the right to information. Furthermore, and taking into account the

specific provision of an entire section, in the GDPR, dedicated to the right to information11, with new and reinforced criteria for action aimed at those responsible for the treatment, it is recommended to revisit this article in the light of these changes.

In paragraph 2 of the same article, it is already mentioned that "Persons to be accredited must give their express and informed consent to the procedure, including authorization for the processing of personal data and information collected, as well as acceptance of the obligations arising from of accreditation.». This formulation seems to us to be equivocal, since consent is only relevant in cases where it can be configured as a manifestation of free will12. As it is assumed that the persons who become accredited will be accredited on the basis of a legal provision associated with labor issues (in the context of the professional relationship) or policies (when there is an appointment), it is not correct to choose another basis of legitimacy for the processing of the data subject's personal data that is not based on a legal obligation.

Article 36 (“Processing of personal data”) provides for the creation of an automated data file to “support decisions to grant, not grant, raise, lower and cancel security accreditation”. Since the fundamental elements of the processing are not defined there, it is recommended that the wording be revised in order to accommodate the essential requirements for the protection of personal data, as provided for in article 30, no. 1, of the LPDP.

No. 2 defines those responsible for the treatment, in this case, the entities responsible for accreditation, limiting the rights of data subjects to the rights of access and rectification. The reason why the data subject's right to erasure, if not to limit the processing is excluded (this is one of the new rights provided for by the GDPR, in its article 18) is ignored. The right of opposition cannot be exercised in this context, since this treatment is based on the fulfillment of a legal obligation. Additionally, the transfer and

11 Section 2 of Chapter III "Information and access to personal data".

12 As provided for in Article 3, par. h), of the LPDP, or article 4, no. 11, of the RGPD.

disclosure of the personal data of the persons concerned, with the exception of paragraph 3, where it is accepted that, in the case of "decisions to grant, not grant, raise, lower and cancel accreditation, [the] meaning and basis [of the same] may be communicated to public bodies and services, international organizations and foreign States that justifiably request it in the context of access to classified matters.", which is considered legitimate.

III. conclusions

Bill No. 725/XIII/3a, which approves the classified matters regime, presents itself as a standardizing instrument for information classification solutions in the national context, however

It is considered inadmissible, as seems to be the intention of the legislator, the limitation of the supervisory action of the CNPD, within the scope of its powers, based on this same classification, since

The. the regime at issue here is that of the classification of information, under the terms of article 268, no. 2, of the CRP and not, the other, more restrictive, state secret;

B. there is no entity here that supervises the classification of information and guarantees full respect for the fundamental rights of citizens, and it is imperative to keep the constitutional role of the CNPD fully in force and untouched;

The competence for classifying information is provided for in too broad terms, allowing numerous "entities defined, respectively, by Decree of the President of the Republic, by Resolution of the Assembly of the Republic, by Resolution of the Council of Ministers and by Resolution of the Government bodies of the Autonomous Regions' can do so. Such an opening clearly undermines the proportionality required by the CRP to establish limitations on the fundamental rights of citizens;

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iii. The constitutionality of allowing the governing bodies of the Autonomous Regions to classify "information whose unauthorized knowledge or disclosure could harm the national public interest, the interest of an international organization of which Portugal is a part or the interest of allied countries of Portugal», known as Judgment No. 458/93, of the Constitutional Court;

iv. The maximum duration of the classification of information (30 years) and the foreseen periodic reassessment (maximum of every four years), as they replicate the postulated solution for the regime of State secrecy, when this is not in question, is also presented as disproportionate to the specific needs of classified information under the terms of this iei draft;

v. The specific issues related to the protection of personal data, such as the notification of personal data breaches, the creation of a register of accredited individuals, the rights of the holders and the legal basis of these treatments deserve reformulation, in order to adapt to the current and future applicable personal data protection legislation.

This is the opinion of the CNPD.

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Lisbon, 4.~. January 2018

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