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NATIONAL DATA PROTECTION COMMISSION

OPINION/2019/45

I. Order

The Office of the Minister of Labor and Social Security sent the National Data Protection Commission (CNPd), for consideration, the draft Decree-Law on the flexibilization of the old-age pension age in the convergent social protection regime. The request made and the opinion issued now derive from the attributions and powers of the CNPD, as an independent administrative entity with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and by the no. 4 of article 36 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of no. Article 21(1) and Article 22(1), both of Law No. 67/98, of October 26, amended by Law No. 103/2015, of August 24 (Law of Personal Data Protection).

The assessment of the CNPD is limited to the rules that provide for or regulate the processing of personal data.

II. appreciation

This draft Decree-Law amends the early retirement regime of the convergent social protection regime, bringing it closer to the new flexibility regime in force in the general social security regime.

The main change is the fact that the Retirement Statute now allows access to early retirement to beneficiaries who are at least 60 years old and who complete at least 40 years of effective service, without applying the sustainability factor, in conditions similar to those of the general social security system. The concept of personal retirement age was imported into the convergent social protection regime, allowing, under conditions identical to those of the general social security regime, that each worker can, depending on their actual length of service, adjust their retirement age. .

The draft Decree-Law makes the fifth amendment to Law n.º 60/2005, of 29 December, last amended by Law n. of social protection of the function

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public with the general social security regime with regard to retirement conditions and pension calculation; to the fourth amendment to Law No. 52/2007, of 31 August, last amended by Decree-Law No. 25/2017, of 31 August, which adapts the Caixa Geral de Aposentações regime to the general security regime social security in the field of retirement and pension calculation; the forty-ninth amendment to the Retirement Statute, approved by Decree-Law No. 498/72 of 9 December, last amended by Decree-Law No. 84/2019 of 28 June; to the seventeenth amendment to the Survivor's Pensions Statute, approved by Decree-Law No. 142/73, of 31 March, last amended by Decree-Law No. 133/2012, of 27 June.

It is now important to analyze the specific issues that arise in terms of the protection of personal data:

1 - The planned interconnections

Article 4 of the draft Decree-Law amends Articles 37, 37A, 39, 40, 41, 53, 64, 69, 83 .° and 109.° of the Retirement Statute approved by Decree-Law n.° 498/72, of December 9, in its current wording.

However, paragraph 9 of article 64 makes the payment of a pension dependent on the periodic proof of life, which takes place, for residents in national territory, by interconnecting data with the Instituto dos Registos e do Notariado, I.P. (IRN, IP), stipulating paragraph 10 of the same article that the interconnection process is carried out through a protocol established between the CGA, IP and the IRN, IP.

It should be noted that article 5 of the draft Decree-Law under analysis, when making changes to the Survivor Pension Statute approved by Decree-Law No. 142/73, of 31 March, enshrined the same regime in paragraph a) of Article 30(12) and (13) in relation to the payment of the survivor's pension.

Article 42(2) of the Survival Pensions Statute also stipulates that "proof of school status in the situations referred to in subparagraphs a) and b) of the previous number and that of family benefits or social inclusion benefits, in the the situations of subparagraph c) of the same number, is carried out preferably by data interconnection between the CGA and the competent ministries in view of the matter», with paragraph 3 establishing that the interconnection process is carried out through a protocol established between the CGA, IP and the relevant education, higher education and social security services.

It can thus be seen that the draft Decree-Law is limited to the mere provision of the aforementioned interconnections, referring the definition of the main elements of the processing of personal data to a protocol to be established between the CGA, IP and the IRN, IP, in the first two cases and between CGA, IP and the competent services of education, higher education and social security in the latter case.

As the CNPD has recalled, «the protocols constitute inter-administrative agreements, which, because they aim to regulate legal rules and define the terms of these personal data processing operations, are obviously regulatory in nature. In other words, they are administrative regulations issued not only by one administrative entity but by two or more and, to that extent, constitute what some doctrine qualifies as substitutive agreements for administrative regulations. To that extent, both administrative regulations (unilateral) and those that take the form of protocols must be submitted to the CNPD for the purpose of issuing the necessary opinion, in compliance with the provisions of paragraph 4 of article 36 of the GDPR» .¹ On the other hand, the reference to future protocols must be limited by the legal regime of data protection, guaranteeing that only the data strictly necessary for the purpose of the interconnection are accessed and collected, and measures must be taken that guarantee the control and audit of information access or consultation operations and that comply with the principles of data protection by design and by default.

Therefore, it is recommended that in the aforementioned articles (Article 64(10) of the Retirement Statute, Article 30(13) of the Survivor's Pension Statute and Article 42(3) of the Statute of Survival Pensions) that refer the regulation of interconnections to a future protocol, an express reference is made to the RGPD and other complementary legislation.

Finally, an observation to paragraph 2 of article 42 of the Statute of Survival Pensions, which provides for the interconnection of data between the CGA and the competent ministries in view of the matter to prove the school situation and family benefits or social benefit of inclusion. Given that interconnection does not occur between public bodies, but between files or databases, and in the case of ministries that have several databases, it is necessary to delimit

¹ Opinion 54/2018, of November 15

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of the interconnection in question, under penalty of having to conclude by violating the principle of proportionality, in the areas of necessity and prohibition of excess, to which the law in the restriction of rights, freedoms and guarantees is bound, under the terms of article 18. No. 2 of the CRP. It is therefore essential to specify in this precept the specific service that will be responsible for processing the data in question and whose database will be the object of interconnection.

2 - Notification of the resolutions of the CGA, IP

Article 109(2) of the General Retirement Statute as well as article 59 of the Survivor Pension Statute stipulate that the interested party will be notified of the preparatory or definitive resolutions of the CGA, IP, and any communications to the interested party will be carried out preferably by publishing the acts to be notified on Caixa's website, in a reserved access area.

Although it can be deduced from the text that the reserved access area referred to is that of CGA2, it is considered that the draft Decree-Law under analysis should contain more detailed information regarding the location (i.e. website) and form of access to the reserved area, in order to allow an appreciation of the security measures involved in accessing personal data. Therefore, it is recommended that the above-mentioned articles be reformulated by expressly referring to the reserved access area to which the interested party can access in order to be aware of the notifications addressed to them and what forms of access are possible to that same area.

On the other hand, the use of the term preferentially implies that there are other forms of notification in addition to the aforementioned publication of acts on Caixa's website, in a reserved access area, without, however, being specified. It is therefore suggested to clarify the various possible forms of notification of preparatory or definitive resolutions of the CGA, IP, and any communications to the interested party.

3 - The retention period

Article 69 of the General Retirement Statute and article 36 of the Survivor Pension Statute now impose on CGA, IP the obligation to keep on file

2 (<https://cgadirecta.cga.pt/cgaLogin.asp>), to which the user must register online to receive, later, the access credentials by post or, alternatively, access with a citizen's card reader or Digital Mobile Key

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all documents that make up the subscriber's individual file, including the communications record. Pursuant to paragraphs 2 of the aforementioned articles, digital files replace, for all purposes, the corresponding paper documents that Caixa is exempt from keeping. Therefore, Caixa's obligation to keep all documents of the process in digital format on file does not have any time limit in violation of the principle of limiting the retention of personal data enshrined in subparagraph e) of paragraph 1 of article 5. ° of the GDPR. It should be noted that under the terms of recital 39 of the GDPR, personal data must be adequate, relevant and limited to what is necessary for the purposes for which they are processed. For this, it is necessary to ensure that the period of retention of the data is limited to the minimum. This relationship between the principle of limiting conservation and the principle of minimizing data requires that data are only kept as long as they are necessary to pursue the purpose underlying their collection.

The CNPD therefore recommends that paragraph 1 of article 69 of the General Retirement Statute and paragraph 1 of article 36 of the Statute of Survivor Pensions be reviewed, with a maximum period of retention of personal data being set. treatment object.

III. conclusions

Based on the above grounds, the CNPD recommends:

- 1 - The reformulation of paragraphs 10 of article 64 of the Retirement Statute, paragraph 13 of article 30 of the Statute of Survivor's Pensions and paragraph 3 of article 42 of the Statute of Pensions for Survivor starting to contain an express reference to the GDPR and other complementary legislation;
- 2 - The densification of paragraph 2 of article 42 of the Statute of Survivor's Pensions specifying those responsible for the processing of data in question and the databases object of interconnection;
- 3 - The specification in paragraph 2 of article 109 of the General Retirement Statute as well as article 59 of the Statute of Survivor Pensions of the reserved access area to which the interested party can access in order to take cognizance of the notifications which are addressed to you and what are the possible ways of accessing that same area;
- 4 - The amendment of article 69 of the General Retirement Statute and of article 36 of the Survivor's Pension Statute

establishing a maximum period of retention of personal data being processed.

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