

I. Order

OPINION/2019/22

The Office of the Secretary of State for Justice sent the National Commission for the Protection of (CNPD) for consideration the Draft Decree-Law that amends the Code of Civil Procedure, approved by Law no. 41/2013, of 26 June, amending the regime electronic processing of court proceedings.

The request made and the opinion issued derive from the attributions and powers of the CNPD, as an independent administrative entity with powers of authority for the control of the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57. and by paragraph 4 of article 36 of Regulation (EU) 2016/679, of 27 April 2016 (General Regulation on Data Protection – RGPD), in conjunction with the provisions of paragraph 1 of article 21 and paragraph 1 of article 22, both of Law n.º 67/98, of 26 October, as amended 103/2015, of 24 August (Personal Data Protection Law - LPDP).

II. Of Appreciation

The draft diploma now submitted for opinion has provisions that deal with treatments of personal data with an innovative character, providing treatments that compress or condition the fundamental right to the protection of personal data, so under the terms of the articles 35 and 165, no. 1, subparagraph b), both of the Constitution of the Portuguese Republic, the it must also take the form of a law or an authorized decree-law.

With this legislative initiative, the aim is to introduce changes to the Civil Procedure Code with the aim of transforming the judicial process into a true electronic process, as follows from its preamble. In fact, an electronic process based on not only in electronic documents, but also in structured information of an effective information system, with tasks performed automatically by the information system, thus freeing magistrates and officials from

unnecessary.

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If any of the proposed changes correspond to the development and improvement of several regimes already in force, others are of an innovative nature, as is the case of possibility of recording the audience using image recording or obtaining automatically the information relating to the parties or other stakeholders included in databases of other public entities. This is what will be analyzed.

1. Safeguarding the legal regime for the protection of personal data

Entering now into the analysis of the content of the project, our first note concerns the forecast of the paragraph 4 of article 132, which results in the guarantee that the electronic processing of proceedings respects "the regime for the protection and processing of personal and jurisdictional data".

The caveat provided for here is welcome, especially in terms of clarifying that the processing of personal data arising from the jurisdictional function are subject to the GDPR and national legislation that implements and complements it. In this regard, it is noted that the meaning of the final reference to personal and jurisdictional data can only be to intends to specify the legislation on the processing of personal data in the system judicial system, not least because it has no meaning of its own in European Union law and in Portuguese the expression «jurisdictional data».

It is recalled that the GDPR, in its recital 20, speaks of "processing of personal data carried out by the courts in the exercise of their jurisdictional function", however, only for exclude from the scope of the competences of the national supervisory authority of each State-member such treatments – cf. Article 55(3) of the GDPR.

Thus, and in the sense of greater terminological precision, the CNPD suggests that, in the referred to 4 of article 132, instead of "the regime for the protection and processing of personal and jurisdictions", if indicated. the regime for the protection and processing of personal data and, in particular, that relating to the judicial system.

2. The preview of audio and video recording of hearings and depositions

Now focusing attention on the provisions that allow the possibility of audio recording or video of hearings, as well as witness testimony, in certain cases where

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law firm, opening up the possibility of using "other audiovisual media"

or "other similar technical processes", in the case of the Courts.

We refer to the provisions of paragraph 2 of article 155 and paragraph 2 of article 517 of the Project.

If the video recording does not, in itself, raise reservations, the CNPD cannot fail to

underline the indispensability of its forecast being accompanied by the imposition of

adoption of mechanisms that guarantee the authenticity of the information obtained through the

'video' systems that can be used to record images from

hearings or depositions taken in other physical contexts. And especially when

refers to the possibility of using other audiovisual means" or "other processes

similar technicians'.

The "video files" that will form part of the electronic process result from the export of the

images from the 'system' onto a digital medium. It is important to ensure that such files do not have

been tampered with, in compliance with the principle of information integrity, in particular

imposing the duty to keep a digital record of the images recorded through the

recourse to the digital signature certified with the citizen's card of the person(s) who

intervened in the process. Such a procedure not only guarantees the integrity of the

images, as it respects the principle of non-repudiation, insofar as the person who signed

digitally cannot later come to reject or call into question the act thus certified.

Thus, the CNPD recommends the introduction in the diploma of the explanation of the principle of

integrity of the information, as well as the provision of a procedure that guarantees the

authenticity of images.

3. Limitations on access to personal data contained in the process

The third aspect of the regime that is important to highlight concerns the text proposed for the article 164, no. 3, of the project (note that the article number, by mistake, is not referenced in the text).

This article contemplates the situations of limitation to the publicity of the process, determining that access to the file is not possible when, among other things, the disclosure of its content may damage the intimacy of private and family life, then listing a set of
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lawsuits that, due to their nature, are protected from access (of)
public.

With the introduction of paragraph 3, the intention is to extend the limitations on access to the process "in respect for the legal regime for the protection of personal data" in relation to personal data that 'are not relevant to the fair settlement of the dispute'. Seem to be here concerned the situations in which documents containing, among other information, personal data that are not relevant to the resolution of the dispute.

Welcoming the aforementioned forecast, the CNPD recalls, in this regard, that in the light of the GDPR, the collection and storage of information of a personal nature that is not necessary for the question that is intended to be resolved in the case file is not legitimized in accordance with the principle enshrined in subparagraph c) of paragraph 1 of article 5 of the GDPR, which suggests that the rule also provide for the possibility for the judge to order the deletion of the data or its purging partial, by reasoned order, whenever it concludes that the same for the purpose of settling the dispute.

4. Interconnection and access to databases of other public entities

They are also provided for in articles 270, no. 5, and 552, no. 2, no. 3, no. 6 and no. 15, interconnections and/or on-line transmissions between databases, which may involve personal data, with different purposes: unique identification of the parties or confirmation of information regarding the cessation of activity or death.

Thus, confirmation of the identity of the parties is foreseen through the use of the support for the activity of the courts, either through validation between this system and the Tax and Customs Authority (AT) and other databases of public entities, or through research carried out by the judicial representative to the databases of data from the AT, which transmits the information back to the IT support system for the court activity.

Whenever access to personal data is involved, it is important that the system registers information regarding everyone who consults the databases in order to be able to determine who accessed, as well as when and in the context of what legal process access has taken place. Due to the importance that the registration (log) of accesses has in the context of

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audits and inspections, it is suggested to include in this article or in article 132 the duty of record such interactions.

Also with regard to database queries, automatic updates are foreseen. systems, without realizing how and in what terms they will occur.

It is therefore recommended to introduce a provision regulating the procedure of updating or that sends its regulation to protocol, with prior consultation of the CNPD

Finally, article 271 establishes that the transmission of information between databases will be made by protocol, without, however, mentioning the prior consultation of the CNPD.

The CNPD recalls that the protocols, insofar as they correspond to legal acts of public entities that define binding rules for the parties regarding the treatment of personal data, have the nature of an administrative regulation (strictly speaking, they are agreements substitutes for administrative regulations and, therefore, subject to their legal regime).

To that extent, pursuant to Article 36(4) and Article 57(1)(c) of the GDPR, must be subject to the prior appraisal of the CNPD. So that there is no doubt as to

to this duty, the CNPD suggests explaining the text of the article.

III. Of the Conclusions

On the grounds set out above, the CNPD recalls that this project, insofar as it

which contains innovative provisions on the processing of personal data, affecting

Thus, the fundamental right to data protection must take the form of a law or decree-law.

authorized law.

It also recommends that:

i.

In paragraph 4 of article 132, instead of safeguarding "the system of protection and

processing of personal and jurisdictional data', for reasons of accuracy

terminology, the regime for the protection and processing of personal data and, in

in particular, that relating to the judicial system;

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ii.

The audio and video recording regime, provided for in paragraph 2 of article 155 and in paragraph 2 of the

Article 517 of the Project, explains the principle of information integrity and provides for

a procedure that guarantees the authenticity of the images;

iii.

In addition to the provisions of paragraph 3 of article 164, regarding the limitation of access to

personal data not relevant to the resolution of the dispute, if the

possibility for the judge to order the deletion of the data or its partial purging,

by means of a reasoned order, whenever it concludes that the

same for the purposes of settling the dispute;

iv.

On-line access and transmission of information between databases of

public entities, provided for in articles 270 and 552, whenever they involve

personal data, must be registered in the information system, and must be
for this reason, such a duty should be made explicit in these rules, as well as the procedure for
updating of information provided therein; any protocols concluded between the
entities to regulate these accesses and transmissions have, according to the GDPR,
to be submitted for consultation by the CNPD.

Lisbon, April 15, 2019