

National Data Protection Commission

OPINION/2021/165

I. Order

1. The Assistant Secretary of State for Cultural Heritage asked the National Data Protection Commission (CNPĐ) to issue an opinion on the Draft Ordinance that «Regulates the communication of service provision contracts with professionals in the field of culture ».

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

3. The application is accompanied by the report on the impact assessment on data protection (AIPD).

II. Analysis

4. The CNPD understands to start by highlighting that this request was sent on December 24, 2021, for indictment to be issued until December 29 of this year.

5. Although it is understood the need or convenience of publishing the regulation until December 31, it is worth noting that the usefulness of prior consultation with the CNPD, legally required in the context of the procedure for approving administrative regulations that provide for or affect treatments of personal data, it depends on giving this entity enough time to analyze the legal rules and the accompanying IAPD - time that, under the terms of paragraphs 3 and 4 of article 92 of the Code of Administrative Procedure, it is at least 10 (working) days and sufficient time for the author of the regulatory project to consider the recommendations contained in the opinion, under penalty of having such consultation as a mere formality empty of any substantial content.

6. This reminder serves here to explain that the CNPD limits itself to pointing out some aspects that clearly deserve to be changed in the draft decree, without taking care to analyze the AIPD in more detail and, above all, without having the opportunity to request clarifications on some elements the processing of data that are not explained in this document; leaving a note on an element of data processing touched on in the IAPD.

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7. Thus, the draft ordinance regulates the communication of the conclusion of contracts for the provision of services with professionals in the field of culture, provided for in the Statute of Professionals in the Field of Culture (hereinafter, Statute), approved in annex to Decree-Law no. 105/2021, of November 29, on which the CNPD was not consulted.

8. In article 2 of the draft decree, it is not specified who is responsible for the processing of personal data, which translates into the communication of the conclusion of contracts for the provision of services and other personal data operations carried out subsequently (for example, the electronic checks provided for in Article 5 of the draft).

9. Indeed, the communication of the conclusion of the contract for the provision of services, which is made by the beneficiary entity, implies the processing of personal data of the professional hired by this entity, but also implies the processing of personal data by third parties in relation to the contract. (and there, not only the personal data of the hired professional, but also, eventually, of the beneficiary entity of the provision of services, if it is a natural person, or who represents it). Simply, Article 2 only provides that 'the General Inspectorate for Cultural Activities (IGAC) is responsible for managing communications in conjunction with [...] the public entities listed therein, referring to the protocol the regulation of 'exchanges of information' between them.

10. The delimitation of responsibilities for the processing of personal data is essential, when there are several actors, which must be defined by law (which did not happen in this case) or, at least, in the regulation that intends to regulate such

processing - cf. Article 6(3) and Article 26 of the GDPR. Under penalty of not being clear for the holder of the personal data (or for the different actors) on whom the obligations provided for in the RGPD regarding the processing of data fall. The CNPD therefore recommends the clear identification of the person responsible or responsible for the processing of personal data.

11. As for article 4 of the draft decree, it is important to clarify that the means of communication provided for in paragraph 3 are alternative, and cannot, under penalty of violating the legislation relating to the citizen card and the digital mobile key, require a specific medium for such communication. In order to make it clear that the list presented is alternative and, therefore, that the conjunction “or” refers to any of the means provided, it is recommended that the “other means of electronic identification recognized in Member States of the European Union be highlighted [...]», making it autonomous in paragraph d).

12. Still on article 4, now with regard to paragraph 5, it is emphasized that it is not enough to provide for the possibility of using 'other means of electronic data transmission', and that the adoption of security measures must be required. appropriate when other means of electronic transmission of personal data are used.

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13. With regard to article 5, the possibility of carrying out, for sanctioning purposes, "electronic checks between the communications carried out under this decree and the tax and contributory obligations associated with the same contract" is foreseen, without that it is explained what these electronic checks consist of. The CNPD therefore recommends that the provisions of this article be strengthened, providing, in particular, the means or means to be used for the purpose of carrying out these verifications.

14. Finally, a note on the IAPD report, to point out that the reference to “express acceptance of the terms and conditions of use” is not understood. Although the CNPD is not aware of such conditions - therefore, as for these, it only recalls here the need for them to comply with the principles and rules provided for in the RGPD, it is important to clarify that the legal basis for the processing of personal data in question here is in the law and in the obligation foreseen therein to carry it out (in accordance with Article 6(1)(c) of the GDPR). For this reason, this reference in the IAPD does not make sense, nor does it make the communication depend on the conclusion of contracts on the express acceptance of the conditions of use of the portal used to carry out the communication.

15. In fact, under the terms of paragraph 2 of article 30 of the Statute, the communication of the conclusion of the contract for the provision of services is mandatory for the beneficiary entities, so that the processing of personal data is based on into a legal obligation. Furthermore, the legal obligation to process personal data also extends to public entities that receive communications. What must be ensured is the provision of information on the processing of personal data - and it is certain that the AIPD report mentions that this information is provided - and, at the very most, ensure proof that such information has been made known to the holders of personal data.

16. Therefore, because the basis for the processing of personal data does not depend on the consent of the data subject, but is based on a legal obligation, the CNPD recommends reviewing this aspect of the data processing.

17. Finally, we take the opportunity to recall that, since the draft ordinance (and the AIPD) is silent on some aspects of the processing of personal data, from the outset it does not explain the delimitation of functions and responsibilities between the different actors in the regarding the processing of personal data, the protocol referred to in paragraph 2 of article 2 of the project must be submitted to the CNPD for prior consultation, with adequate time for its consideration

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III. Conclusion

18. Under the terms and on the grounds set out above, the CNPD recommends reviewing articles 2, 4 and 5 of the draft ordinance.

Lisbon, December 30, 2021 _____

Filipa Calvão (President, who reported)