

NATIONAL DATA PROTECTION COMMISSION

OPINION/2019/77

I. Order

The Office of the Secretary of State for Justice asked the National Data Protection Commission (CNPd) to issue an opinion on the draft Ordinance that aims to regulate the terms of filing and publication of arbitration decisions in administrative and tax matters, under the terms of articles 185-B of the Code of Procedure in Administrative Courts and 16 of the Legal Regime for Arbitration in Tax Matters, approved by Decree-Law no. 10/2011, of 20 January.

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as the national authority for controlling the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and paragraph 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 article 3, no. 2 of article 4 and in point a) of paragraph 1 of article 6, all of Law n.º 58/2019, of 8 August.

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

II. appreciation

Law No. 118/2019, of 17 September, introduced amendments to article 185-B of the Code of Procedure in Administrative Courts, stipulating that "Arbitration awards can only be enforced after being deposited by the arbitral tribunal, duly purged of any elements likely to identify the person or persons to which they relate, to the Ministry of Justice for publication in electronic form, under the terms to be defined by order of the member of the Government responsible for the area of justice". Likewise, article 16 of the Legal Regime for Arbitration in Tax Matters, approved by Decree-Law no.

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dissemination and publication of arbitration decisions, pursuant to article 185-B of the Code of Procedure in the Administrative

Courts, duly purged of any elements capable of identifying the person or persons to which they relate”.

Thus, the draft Ordinance regulates the filing system for arbitration decisions in administrative and tax matters, with a view to increasing legal certainty and stability of enforceable titles in this domain.

The project raises questions regarding the processing of personal data, which will be analyzed later.

1 - The General Directorate of Justice Policy (DGJP) is responsible for managing the electronic platform that serves as a basis for the filing and publication of arbitration decisions. The deposit of arbitration decisions by an institutionalized arbitration center is made by a user, designated for this purpose by the arbitration center, and previously registered for this purpose with the DCPJ. In turn, arbitration centers must request the creation of users from the Directorate-General for Justice Policy (DGPJ) - cfr. no. 2 of article 4 of the Draft Ordinance.

It is noted, however, that regarding the administration of these user accounts, the Ordinance project is silent on some essential aspects: on the one hand, it does not clarify the way in which the password is defined, nor does it determine the way in which it is communicated to the user, and this communication must be covered by measures that guarantee its confidentiality; on the other hand, it does not mention who is responsible for granting and revoking access to the system. It should be noted that the DGPJ is responsible for the operationalization of user management, but depends on information from the arbitration centers to identify which users to create or eliminate (as follows from subparagraphs a) and b) of paragraph 2 of Article 7. °. It is therefore important to clarify in the Draft Ordinance who is responsible for attributing and revoking access to the system.

2 - In turn, paragraph b) of paragraph 4 of Article 4 and paragraph d) of paragraph 3 of Article 5 refer that the deposit must be accompanied, among other documents, with "the text of the

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arbitration decision / expunged of all elements likely to identify the person or persons to whom it relates, in "pdf format with searchable content".

Taking into account the risks of identifying the holders if the anonymization is done poorly, the CNPD recalls the importance of the services of arbitration centers and arbitral tribunals to adopt effective anonymization forms of the documents in question, also noting that they must be purged of the arbitration decision, in addition to the elements of direct identification, other

elements capable of making the persons identifiable (such as, for example, descriptions of real estate properties and kinship relationships).

3 - With regard to the filing of arbitration decisions by non-institutionalized arbitration tribunals, subparagraph b) of paragraph 3 of article 5 requires that it must be accompanied, among other documents, by a copy of the citizen card of the president of the arbitral tribunal or another identification document that replaces it under the law.

This requirement seems to result from the fact that the draft Ordinance does not provide for the creation of users, previously registered with the General Directorate of Justice Policy, for the presidents of non-institutionalized arbitration courts, forcing the use of that specific means of verifying their identity.

However, this provision calls into question the provisions of Article 5(2) of Law No.

7/2007, of 5 February, last amended by Law No. 32/2017, of 1 June. It is recalled that the aforementioned provision prohibits the "reproduction of the citizen's card in photocopy or any other means without the holder's consent, except in cases expressly provided for by law or by decision of a judicial authority". In fact, a provision that obliges a person to reproduce his or her civil identification card and to share or transmit it to third parties restricts the space of freedom or self-determination of the cardholder that that legal rule intends to ensure, given that such provision does not take the form required by law for that purpose, as it is merely regulatory in nature.

Furthermore, the copy of an identification document raises serious reservations as to the value of proof of identity, since the digitization of an identification document is easily manipulated, thus not guaranteeing the veracity of the data,

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in disregard of the principles of accuracy and completeness of personal data enshrined in points d) and f) of paragraph 1 of article 5 of the GDPR; on the other hand, sending a copy of the identification document for each arbitration decision filing implies a repetitive and, therefore, redundant process of communication of personal data, jeopardizing the proportionality required for this type of data processing operations personal.

To that extent, strong authentication mechanisms must be foreseen in the Draft Ordinance, which allow to certify that whoever is sending the decision is the legitimate entity for this purpose, namely the use of a qualified certificate, e.g., the citizen's card

or the digital mobile key.

In view of the foregoing, the CNPD suggests amending paragraph 3 of article 5 of the draft Ordinance in order to allow the president of the non-institutionalized arbitral tribunal, when depositing arbitration decisions, to prove his identification through an appropriate and legitimate mechanism.

4 - Finally, a brief reference to article 8 of the draft Ordinance (Rights of data subjects) which states that "the DGSJ, in articulation, whenever necessary, with the person responsible for the data, guarantees the exercise of the rights of rectification, updating and deletion of deposited data".

In addition to the terminology adopted (data responsible) being unclear, it would be important here, in terms of the rights of the holders of personal data, a reference to the legal regime of data protection, perhaps mentioning specifically the RGPD and Law no. 58/2019, of August 8th.

III. Conclusion

Based on the above grounds, the CNPD recommends:

- a) Adding a rule to the draft Ordinance that clarifies the responsibility for the attribution and revocation of access to the system;
- b) The amendment of paragraph 3 of article 5 to the effect that the president of the non-institutionalized arbitral tribunal, when depositing arbitral awards,

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prove your identity through a legitimate means suitable for this purpose;

- c) The reference in article 8 to the legal regime for the protection of personal data.

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