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National Data Protection Commission

OPINION/2023/15

I. Request

1. By order of the Secretary of State for the Presidency of the Council of Ministers, an opinion was requested from the National Data Protection Commission (CNPD) on Draft Decree-Law No. 28/XX1II/2023, which "establishes the general regime of application of European funds from Portugal 2030 and the Fund for Asylum, Migration and Integration for the 2021-2027 programming period".

2. The CNPD issues an opinion within the scope of its attributions and competences, as an independent administrative authority with authoritative powers to control the processing of personal data, conferred by paragraph c) of paragraph 1 of article 57, paragraph b) of paragraph 3 of article 58 and paragraph 4 of article 36, all of Regulation (EU) 2016/679, of April 27, 2016 - General Regulation on Data Protection (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 of August, which implements the GDPR in the internal legal order.

3. When requesting an opinion, it is requested that it be issued by February 14, 2023, that is, within eight (8) days.

4. Decree-Law No. 274/2009, of October 2, which regulates "the formal consultation procedure of public and private entities, carried out by the Government, within the scope of the preparation and instruction phase of acts and diplomas subject to approval by the Council of Ministers or members of the Government" (article 1, paragraph 1), establishes in its article 4, paragraph 1, that "The term for the opinion of the entity consulted is 10 consecutive days, when another deadline is not indicated in the request for direct consultation".

5. The CNPD cannot fail to point out that, although the rule period for formal consultation during the formation of the legislative activity is ten (10) days and the law allows the establishment of a different period, the setting of a shorter period must ensure effective consultation and the respective weighted pronouncement, which requires preparation and discussion when, as is the case, the advisory body is a collegiate body. Moreover, the indication of a shorter period, as it is exceptional in nature, would justify a minimum of reasons.

6. It is therefore noted that, although there is a difference of two (2) days between the requested period and the rule period, in the calculation of 10 days it represents 20% of this period, which is significant, by including Saturdays and Sundays, unless the matter subject to consultation does not deserve due analysis, because it is trivial or of little impact, or if the intention is to carry out a merely pro forma consultation.

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II. Analysis

7. The present draft decree-law (hereinafter, Draft), according to its object set out in Article 1, establishes "the general regime for the application of the European Regional Development Fund (ERDF), the European Social Fund Plus (ESF+), the Cohesion Fund (CF), the European Maritime, Fisheries and Aquaculture Fund (EMFF) and the Just Transition Fund (FTJ), as well as the Asylum, Migration and Integration Fund (FAMI) for the period 2021-2027, designated, for the purposes of this diploma, as European funds, in accordance with the provisions of Regulations (EU) No. 2021/1056, 2021/1057, 2021/1058, and 2021/1060 of the European Parliament and of the Council, of 24 June 2021 and in Regulations (EU) Nos. 2021/1139 and 2021/1147, of the European Parliament and of the Council, of 7 July 2021".

8. As explained in the explanatory memorandum, the Project regulates “[...] the requirements associated with eligibility, the obligations of beneficiaries and the modalities and forms of financing. It also defines the general rules regarding the procedures for analysis, selection and decision of the operations to be financed and the financial circuit [...]".

9. It is recalled that some aspects of this regime are already outlined or framed by the options laid down in Decree-Law no. 5/2023, of January 25 (on which the CNPD was not heard), which provides for a system of information consisting of a one-stop shop - the Balcão dos Fundos -, the Linha dos Fundos, a fund information system and a data platform, therefore, a centralized and/or integrative system of information, part of which corresponds to personal data, in the terms of Article 4(1) of the GDPR.

10. Essentially, the attribution and execution of support from European funds imply processing of personal data, with the

consequent impact on fundamental rights to privacy and protection of personal data (cf. articles 26 and 35 of the Constitution of the Republic and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union). Personal data concern candidates for financial support, when they are natural persons, the beneficiaries, when they are natural persons, and also the legal representatives and effective beneficiaries of the candidates or beneficiaries who are legal persons, as well as third parties that are relevant for the calculation of the fulfillment of the selection requirements (e.g., respective family members, workers, clients or purchasers of financed services, when relevant for the purpose of fulfilling these requirements). In this regard, the Project emphasizes the concept of beneficiary (cf. Article 13(1) of the Project), but also that of participant (cf. Article 3(n) of the Project).

11. The set of personal data processed, in addition to data relating to criminal convictions or administrative offences, may also contain data from the special categories provided for in paragraph 1 of article 9 of the RGPD, depending on the nature of the activity or operation object of financing. At issue are data

personal data subject to enhanced protection regimes, provided for in Article 10 and Article 9(2) of the RGPD, respectively.

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12. However, as the diploma refers the definition of selection criteria to further regulation, the CNPD is unable, in this context, to issue specific recommendations to ensure compliance with the principle of proportionality in the processing of personal data,

13. In any case, it should be noted that the definition of personal data to be processed must respect the principle of minimization, provided for in subparagraph c) of paragraph 1 of article 5 of the RGPD, and in the different operations of treatment, maximum access to personal data - for example, to audit the execution of funds -, those responsible for the treatment must respect that principle, opting for forms of access to pseudonymized or encoded data when the direct identity of the respective holders is not relevant (for example, when for the audit function what matters is the number of customers or users of the financed service) - cf. Article 4(5) and Article 25 of the GDPR.

14. Thus, this opinion will limit itself to the analysis of the norms that intend to constitute a condition for the lawfulness of the

processing of personal data, which, in general, suffer from the same fragility: they are generic provisions of legitimation of the processing of data personal data, without any clarification of the terms of treatment (data categories, categories of holders, guarantees of the holders' rights), contrary to what is indicated in paragraph 3 of article 6 of the RGPD, and, as such, without conferring any predictability and certainty regarding the restriction of the fundamental rights of the holders of personal data, which, it is insisted, may be third parties, in relation to the candidate or beneficiary of the fund.

15. The Project rules regarding the processing of personal data are essentially referenced in articles 6.° (Dematerialization), 7.° (Personal data), 14.° (Eligibility requirements of candidate entities and beneficiaries), 15.° (Obligations of beneficiaries), 17th (Information on suitability, reliability and debts to European funds), 21st (Prohibition of double funding), which are specifically analyzed below.

i. Article 6.

16. It is important, in the first place, to consider article 6, where it is enshrined that “The application of European funds, in its different stages, is processed through electronic means that make it easier, faster and more efficient to access the processing of procedures and access to information, simplifying and reducing their duration, promoting the speed of decisions and greater transparency and control of processes".

17. The subsequent paragraph 2 sets out the general rule for the procedure by electronic means, listing the electronic processing of applications and operations and the submission of electronic invoices, as well as the presentation of tax documents (a), the use of electronic identification through authentication with a citizen card or digital mobile key (b), the signature of documentation with qualified electronic certificates, including citizen card or digital mobile key; availability, at the Balcão dos Fundos, of a reserved area for the beneficiary, where information regarding the respective processes is contained

(c).

18. And paragraph 3 establishes that, for the preparation of candidacy processes and operations, access to Public Administration databases can be accessed "in an unofficial manner, with the consent of the candidate or beneficiary, under the terms of the law" (our italics), namely regarding the identification and characterization of candidates and beneficiaries, respective effective beneficiaries and legal representatives and also the recipients of support (a), tax and social security situation (b).

19. However, paragraph 3 of article 6 is merely illustrative, admitting, therefore, that any relevant personal data within the scope of the aforementioned procedures may be obtained in this way, and based on the consent of the candidate or beneficiary. Relating this provision to paragraph k) of paragraph 1 of article 15 of the Project, which imposes the obligation to provide personal data of third parties "involved in the operations", it appears that paragraph 3 of article 6. ° recognizes the consent of the candidate or beneficiary as a condition for legitimizing access to personal data contained in Public Administration information systems.

20. Now, in relation to personal data, the consent of the candidate or beneficiary is only relevant to legitimize access if he/she is the holder of the information, that is, if the information to be accessed is related to the person who gave the consent (cf. Article 6(1)(a) and Article 9(2)(a) of the GDPR). When it comes to personal data of third parties, even legal representatives, this consent is, of course, irrelevant. Therefore, what is intended with this standard is not achieved.

21. For this reason, paragraph 3 of article 6 of the Project must be revised, delimiting the relevance of consent for access to personal data processed by administrative entities only when the respective holder expresses it or, alternatively, providing for such access without making it dependent on the consent of the respective owner. In the latter case, the legislator will assume the option of imposing the reuse of personal data for a purpose other than the one that justified their collection, assuming that reasons of efficiency justify it, assuming that it is access to essential personal data for the selection of applications or for other operations within the execution of the funds. Incidentally, although with a different impact on the fundamental rights of data subjects, this was the solution followed in Article 8 of the Project, binding the

interested in using the single digital address, to the detriment of the freedom recognized by Decree-Law No. 93/2017, of August 1, to opt for this service.

ii. Article 7

22. Considering now Article 7 of the Project, it appears that this corresponds to a generic norm for the legitimacy of the processing of personal data by the different controllers for the treatments, however in a miscellany that does not facilitate its interpretation in terms that can be may claim to comply with the GDPR.

23. In fact, paragraph 1 of article 7 provides for "the processing of personal data of candidates, beneficiaries, effective beneficiaries and subcontractors, participants and recipients of support, when this is necessary for the fulfillment of obligations arising from the this decree-law and other related legislation", legitimizing the set of "bodies responsible for carrying out the functions of coordination, management, monitoring, certification, payments, auditing and communication and the beneficiaries of the operations".

24. And it is added in paragraph 2 of the same article that "[the] processing of personal data is authorized only for the purpose referred to in the previous number" (our italics), being, however, certain that the purpose referred to here is the general purpose of attributing and executing European funds, which does not exempt the specification of the purpose of each personal data processing operation, for which it matters, from the outset, who is carrying out the processing. In this sense, the Court of Justice of the European Union ruled in this regard (cf. judgment of December 8, 2022, VS c. Inspetktor v Inspektorata kam Visshia sadeben savef (Case C-180/21), case C- 180/2021, points 43 and 50).

25. This is because the treatments covered by the Project actually have different purposes. There is, first of all, the processing of personal data aimed at selecting candidates for funds, there is also processing aimed at the payment of financial support, another still associated with the purpose of auditing, etc.

26. Incidentally, it is enough to pay attention to the functions and powers of the different bodies that Article 7(1) of the Project implicitly considers - provided for in Decree-Law No. 5/2023 - to realize that, for example, of the bodies with coordination functions only as regards the technical coordination bodies, it makes sense to foresee the eventual processing of personal data, that the essential part of the processing of personal data is carried out by the bodies with management functions and, to another extent, by those with audit functions (even that, most of the time, we are talking about the same body or entity, which has the same functions).

27. In fact, the aforementioned Decree-Law no. 5/2023 establishes the governance model of the European funds for the 2021-2027 programming period, determining that the “Portugal 2030 governance model is made up of bodies that, regardless of their legal nature, specialize in

the duties they perform: a) Political coordination; b) Technical coordination; c) Management; d) Monitoring; e) Certification; f) Payment; g) Audit; h) Monitoring of regional dynamics; i) Functional articulation."

28. In the legal design of this governance model for European funds outlined by the aforementioned Decree-Law No. 5/2023, we find the following responsible bodies: Interministerial Coordination Committee, which includes the Government members mentioned therein (article 7) ; the IP Agency for technical coordination (articles 10; 48); management authorities, created by resolution of the Council of Ministers (articles 12, 13); the presidents of the directive commissions and of the managers and regional coordinators of the Mar Program (Article 16); authorities managing the programs of the Autonomous Regions (Article 18); intermediate bodies (Article 19); monitoring committees (Article 21); the paying agencies (Article 24); audit bodies (Article 26); the monitoring bodies for regional dynamics (Article 28); the organs of functional articulation (Article 30); the Funds Counter, whose responsibility is the Agency, I.P. (Article 41, paragraph 1, subparagraph a), paragraph 3); PEPAC's governing bodies (Article 52); the National Commission of Agricultural Funds 2030, as PEPAC's political coordination body (Article 53); the GPP as the coordinating body of PEPAC (Article 55); the mainland and regional management bodies, designated PEPAC managing authority (Article 57); the monitoring bodies of PEPAC (Article 61); the IFAP, I.P. as a paying agency (Article 64); the CNFA as a certification body (Article 65); intermediate management bodies (Article 67).

29. In short, the different bodies with functions within the scope of European funds are not - and cannot be - legitimized to the same extent for the processing of personal data, having to differentiate according to the respective and specific purpose or legal function assigned to them assigned.

30. On the other hand, it seems appropriate, in order to highlight this treatment and facilitate the reading of the rule in

accordance with the RGPD, that the processing of personal data to be carried out by the beneficiaries of the operations be autonomous.

31. Even if the legislative option is to legitimize the processing of data relating to any natural person (it refers, in paragraph 1 of article 7, the effective beneficiaries and subcontractors, participants and recipients of support) provided that the treatment proves to be necessary for the fulfillment of the obligations foreseen in the Project, it is important to bear in mind that this means the collection and communication of personal information of third parties that do not benefit or do not benefit directly or immediately in this process {e.g., the third parties involved in the operations, the referred to in paragraph k) of paragraph 1 of article 15 of the Bill), which is why this legislative option must be clear and not be lost or disguised in the midst of processing of personal data carried out by administrative entities in the exercise of their duties. public functions relating to European funds.

32. Thus, the CNPD recommends the autonomy of the processing of personal data to be carried out by the beneficiaries of the operations in relation to the treatments for which the (administrative) entities are responsible in the exercise of public functions of coordination, management, monitoring, certification, payments, audit and communication and, with regard to these, the explanation that the processing must prove necessary for the exercise of the specific competences and for the fulfillment of the specific legal obligations of each of the bodies in question.

33. Furthermore, in the same article 7, now in paragraph 3, when regulating the limitation of data conservation, it was decided to reproduce the corresponding principle enshrined in paragraph e) of paragraph 1 of article 5 .° of the RGPD, establishing that "Personal data are kept for the period strictly necessary for the fulfillment of the obligations that motivated the treatment, under the terms of paragraph 1, and must be destroyed or anonymized when the respective obligations are fulfilled or extinguished".

34. The absence of a precise period for the retention of personal data by these entities is not understandable - when for one of the categories of persons responsible for the treatment (the beneficiaries) the period for the retention of information is delimited in the Project (cf. paragraph c) of the paragraph 1 of article 15) -, in disrespect for the requirements of legal certainty and security that European jurisprudence has been claiming in this type of restrictive norms of fundamental rights.

iii. Article 15.

35. Let us now consider article 15 of the Project, to focus on item k) of paragraph 1, where the applicant or beneficiary is required to "[ensure the supply of elements necessary for monitoring and evaluation of operations, guaranteeing access, namely to personal data owned by them or third parties involved in the operations carried out by them, in strict compliance with the rules relating to the protection of personal data".

36. This obligation may imply the processing of personal data of third parties (e.g., students of an educational establishment), which is why the provision of data must strictly comply with the principle of data minimization, and personal data cannot be required from the outset irrelevant to the purpose (for example, the tax identification number, often used as identification data without it assuming any relevance in the context of the treatment, since third parties are not taxable here, having other identification elements if the are actually necessary). Strictly speaking, the requirement, in the final part of this provision, of compliance with the rules relating to the protection of personal data leaves out compliance with the principles of data protection, at most the minimization,

enshrined in paragraph 1 of article 5 of the RGPD, therefore, it is recommended that explicit reference is also made to the principles of data protection.

37. This prediction has a greater impact when one considers that the processing of personal data of third parties that are part of the category of special data, provided for in paragraph 1 of article 9 of the RGPD (eg, users of a health establishment, it being unequivocal that personal data relating to health is the information that a particular person was hospitalized or was treated in that establishment), in which case the provision or provision of personal data assumes a much more significant risk for the fundamental rights of data holders. In addition, this diploma is directly aimed at European funds for the purpose of supporting and integrating asylum seekers and migrants, people who are in a situation of special vulnerability, in which the processing of personal data can facilitate discriminatory treatment or a stigmatizing effect. .

38. In this type of situation, paragraph k) of paragraph 1 of article 15 of the Project, as it is written, is not enough to legitimize

the processing of personal data of third parties, firstly because the rule does not provide for adequate measures and specific measures that safeguard the fundamental rights and interests of the data subject, as required by Article 9(2)(g) of the GDPR.

39. Thus, the CNPD recommends revising paragraph k) of paragraph 1 of article 15 of the Project, to safeguard the principles of data protection and to provide for adequate and specific measures that safeguard the fundamental rights and interests of data holders - or, at least, referring, in this paragraph or in another point of the article, the provision of such measures to a diploma that specifically regulates the application process.

iv. Article 17 (and Article 14(7))

40. Article 17, in turn, provides, in its first paragraph, for those responsible for maintaining an up-to-date information system on suitability, reliability and debts to European funds.

41. Simply, no. 2 and no. 3 of the article do not establish the relevant information for this purpose, especially with regard to the relevant information to assess the suitability and reliability of the entities with regard to the risk associated with good implementation of the support granted.

42. As for the reliability criteria, paragraph 3 of the same article refers to their definition for those responsible for the treatment, the precept limiting itself to presenting an example devoid of any specifics ("namely corporate information, economic and financial that appears to be relevant for the competent risk assessment"), corresponding to a legal provision without its own normative content, other than that of, in a circular manner, renewing the setting of criteria relating to risk for the proper execution of support to the

that are relevant to the risk assessment... And with the final note, recurring in this Draft diploma, of requiring compliance with the rules relating to the protection of personal data.

43. The same judgment deserves paragraph 7 of article 14 of the Project, which provides that “[the] beneficiaries of support from European funds are subject to an assessment of the risk of default, based on keeping information inserted in own codification, incident namely on the requirements foreseen in no. 1 of the same article [...]".

44. Article 17(4) of the Project also constitutes a provision without any specific normative content. Reiterates the principle of

purpose limitation, but enshrines it in general terms, without specifying the different purposes of data processing associated with the allocation and implementation of European funds (cf. supra, points 24 to 26), and repeats the principle enshrined in point e) of paragraph 1 of article 5 of the RGPD, when it states that the information must "[...] be kept for the time necessary to pursue the purposes for which it was collected".

45. The omission to set a retention period for personal data in a database - rectíus, in an information system - created ex novo, cannot fail to come as a surprise, especially when the retention periods for information by the beneficiaries are well delimited in the Project (cf. article 15, paragraph 1, letter c) of the Project), in disrespect for the requirements of legal certainty and security that European jurisprudence has been claiming in this type of restrictive norms of fundamental rights.

46. In summary, with regard to the processing of personal data within the framework of the information system on suitability, reliability and debts to European funds, Article 17 adds nothing in relation to the principles and rules of the RGPD and, therefore, does not serves to legitimize or confer lawfulness to the processing of personal data carried out at that location, for the purposes of Article 6(1)(c) of the RGPD.

47. The CNPD therefore recommends the expansion of article 17 (as well as paragraph 6 of article 14) regarding the main elements of the processing of personal data that the up-to-date maintenance of the information system on suitability, reliability and debts to European funds constitutes, under penalty of the rule, due to the lack of specific normative content, not serving as a legal basis for the purposes of Article 6(1) of the RGPD.

48. Finally, article 21 of the Project establishes in its paragraph 2 that "The assessment of double funding is carried out, namely through interoperability mechanisms between information systems and demonstration by beneficiaries that the operation and respective expenses were not subject to co-financing by the same European fund, by another European fund, or by another instrument of the European Union".

49. Once again, it is not specified how the measurement process is carried out, as it is likely to involve the processing of

personal data. In this perspective, and in parallel with what was stated above, regarding article 17, the rule of little serves as a basis for the lawfulness of the treatment.

III. Conclusion

50. The CNPD understands that the Draft Decree-Law in question presents a set of norms that generically foresees processing of personal data with the intention of constituting the condition of lawfulness of the same, but without densifying the main elements of the processing (e.g., categories of personal data, categories of holders, measures to guarantee the rights of holders), not conferring any predictability regarding the restriction of the fundamental rights of holders of personal data, which, it is insisted, may be third parties in relation to the candidate or beneficiary of the support , in a situation of particular vulnerability (for example, migrants and asylum seekers) and therefore without independent legal force to legitimize the processing of data, maximum, data of special categories of data.

51. Thus, the CNPD considers it essential to densify the rules related to the processing of personal data, specifically recommending the revision of the following provisions of the Project:

The. paragraph 3 of article 6, delimiting the relevance of consent for access to personal data processed by administrative entities only when it is the respective holder who expresses it or, alternatively, providing for such access without making it dependent on the consent of the respective holder;

B. Article 7, making the processing of personal data to be carried out by the beneficiaries of the operations autonomous in relation to the processing to be carried out by entities (as a rule, administrative) in the exercise of public functions of coordination, management, monitoring, certification, payments, auditing and communication and, with regard to these, the explanation that the processing must prove necessary for the exercise of the specific competences and for the fulfillment of the specific legal obligations of each of the bodies in question; as well as specifying the data retention period;

w. paragraph k) of paragraph 1 of article 15, to safeguard the principles of data protection as well as to provide for adequate and specific measures that safeguard the fundamental rights and interests of third party data holders - or, at least, referring, in this paragraph or in another point of the article, to the normative diploma that specifically regulates the application process, the forecast of such measures;

d. article 17, to provide for the main elements of the processing of personal data that represents the up-to-date maintenance of the information system on suitability, reliability and debts to European funds, maximum the categories of personal data and the

period of conservation of the data;

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National Data Protection Commission

It is. Article 21, to provide for the main elements of the processing of personal data.

Lisbon, February 14, 2023

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