

Home »Practice» Opinions of the CPDP for 2020 »Opinion of the CPDP on the requirement to present a criminal record when appointing unaccounted for positions Opinion of the CPDP on the requirement to present a criminal record when appointing unaccounted for positions Reg. № PNMD - 01 - 5 / 16.01.2020 Sofia, 20.02.2020 Subject: Opportunity to use the legitimate interest within the meaning of Art. 6, para. 1, p. "E" of Regulation (EU) 2016/679 (General Data Protection Regulation, Regulation) as a basis for employers to require a criminal record in cases where this requirement is not provided for or does not arise from law or other normative act of Personal Data (CPDP) composed of: Chairman - Ventsislav Karadzhov and members - Tsanko Tsolov and Maria Mateva, at a meeting held on 12.01.2020, considered a received letter requesting an opinion with ent. PNMD-01-5 / 16.01.2020, filed by Mr. F., proxy of a bank. The letter is based on Art. 80, para. 1, item 8 in conjunction with Art. 58, para. 3, p. "B" of Regulation (EU) 2016/679 and is in connection with the application of Art. 1, para. 1, item 5 of Ordinance № 4 for the documents, which are necessary for concluding an employment contract, in connection with art. 10 and Art. 6, para. 1, p. "E" of Regulation (EU) 2016/679. The letter states that according to Art. 10 of the Regulation, the processing of personal data related to convictions and violations or related security measures, based on Art. 6, para. 1, shall be carried out only under the control of an official body or where the processing is permitted by Union or Member State law. For its part, in connection with the procedure for entering into employment relationships with employees, Art. 1, para. 1, item 5 of Ordinance № 4 states that a criminal record certificate is provided when a law or other normative act requires the certification of a judicial past. Such examples can be found in Ordinance № 63 on the implementation of Decree № 1074 on limiting the holding of accounting, material responsibility and other positions by convicted persons. Art. 3, para. 1 in conjunction with Art. 1 of this Ordinance indicates that a criminal record certificate is provided by candidates for employment in positions related to: a) collection, storage, spending or reporting of public monetary or material values; (b) persons who actually perform these functions without being appointed to such positions; (c) the persons who manage or dispose of those valuables; and (d) the persons exercising financial control. Another similar example can be found in Art. 11, para. 1, item 3 of the Credit Institutions Act, where certification of judicial history is required by the members of the management board, the board of directors, as well as a procurator of a bank. Certification of the lack of judicial record has been raised as a prerequisite for obtaining legal capacity as a lawyer - Art. 5, para. 1, item 1 of the Bar Act. According to Mr. F., from the above it is necessary to conclude that in the Republic of Bulgaria there should be legislation that explicitly specifies the positions and professions for which the provision of a criminal record is required in order to certify a criminal record. On the contrary, such information

should not be required for all other positions and the processing of such sensitive data would be contrary to the requirements of Art. 10 of the Regulation. Despite the legal framework discussed in this way, in practice employers often prefer to require a certificate of criminal record by providing a criminal record from job applicants before entering into employment. Employers wish to have information on the absence or presence of previous convictions of their potential employees, given the assessment of a person's suitability to perform his / her duties correctly and successfully. As an example, the Bank cites a vacancy with an employer for the position of driver, for which a person who has been convicted of a transport crime applies. Another such example is applying for a vacancy for a computer specialist by a person convicted of computer crimes. This information is an essential element that should be assessed by the employer in order to assess whether one job candidate is more suitable than another for vacancies in his organization. At the same time, the requirement to certify a criminal record may be justified by security considerations, in view of the possibility to include in the working team a person convicted of crimes against the person, against property, etc. According to Mr. F., the indication of these examples raises the question of the argumentation of a legitimate interest within the meaning of Art. 6, para. 1, p. "Is from the Regulation" to require employers to provide a criminal record from job applicants. The processing of such personal data by employers would have minimal impact on data subjects, given the requirement to delete them shortly after the end of the recruitment campaign under Art. 25k of the LPPD. It can also be argued that job seekers can expect that such data could be required in order to compare all the qualities and qualifications of the candidates in the recruitment procedure. At the same time, the presence of peace and security in the employer and the work team could be raised as a sufficient basis to justify the processing of such personal data. On the other hand, however, the institute of rehabilitation within the meaning of Art. 85-88a of the Criminal Code. Pursuant to these regulations, after a certain period of time and subject to certain prerequisites, although a person has been convicted of a crime, the criminal record also states that the person has not been "convicted". The letter states that every employer should be able to assess all relevant factors in recruiting employees in their organization and that in any case, in view of the requirements of the Regulation, each employer could implement and clothe written form, to prove, its own internal analysis of the existence of a legitimate interest in complying with the criteria for purpose, necessity and balance under the Regulation. On the other hand, the relevant practice of the Commission for Protection against Discrimination and the relevant decision № 12 of 22.01.2013 of the CPD in case № 159/2011, 3rd AC, according to which, after Consideration of a complaint on complaints of discrimination on the grounds of "personal situation" in connection with Art. 12 of the Law on Protection against Discrimination (after the

presentation of the criminal record, a refusal to hire is claimed, ie discrimination on the grounds of "personal status"), although the claim was rejected as unproven, certain reasons should be taken into account. of the CPD: "The introduction of the mandatory norm of Art. 12, para. 1 of the PfDA. is an expression of the legislator's conviction of the need for the existence of certain norms that prevent discrimination and guarantee the right to equality established in the Constitution of the Republic of Bulgaria - Art. 6, para. 2, where it is stated that all citizens are equal before the law. No restrictions on rights or privileges based on race, nationality, ethnicity, sex, origin, religion, education, beliefs, political affiliation, personal or social status or property status shall be permitted. ' The right to equality and protection against discrimination for all persons is a universal right recognized by the Universal Declaration of Human Rights. The prohibition of discrimination is also enshrined in the primary law of the European Union, Title II Provisions of general application, Art. 10, which reads: "In defining and implementing its policies and activities, the Union shall endeavor to combat all forms of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." These reasons again lead to the understanding that a criminal record should be required for appointments only when required by law or regulation, and not for all posts, as is currently the common practice of employers. According to Mr. F., given the above, and in his capacity as an employer, the bank represented by him has a legal interest in requesting an opinion from the Commission for Personal Data Protection on the issue: Can the legitimate interest within the meaning of Art. 6, para. 1, p. "E" of the Regulation and in compliance with all the requirements for its justification, to serve as a suitable basis for employers for the processing of personal data for criminal record of job candidates or the provisions of Art. 1, para. 1, item 5 of Ordinance № 4 for the documents required for concluding an employment contract, in conjunction with Art. 10 of the Regulation should be strictly applied and for the positions for which it is not explicitly stated in law or normative act, a criminal record certificate cannot be required? "Appendix: notarized power of attorney. Legal analysis: Regulation (EU) 2016/679 (General Regulation on Data Protection, Regulation), which is directly applicable from 25 May 2018, along with the Personal Data Protection Act (PDPA), sets out the rules for the protection of basic data. rights, freedoms and interests of individuals in connection with the processing of their personal data and in particular the right to protection of personal data. According to Art. 4 (1) of the General Regulation, "personal data" means any information relating to an identified or identifiable natural person ("data subject") directly or indirectly, in particular by means of an identifier such as a name, identification number, location data, online identifier or one or more characteristics specific to the physical, physiological, genetic, mental, intellectual, economic, cultural or social identity of that individual. According to Art. 6 of Ordinance № 8 of 26

February 2008 on the functions and organization of the activity of the criminal records bureaus, criminal records shall be drawn up for all convicted persons of punishments under Art. 37 of the Tax Code, incl. and in the cases when the convicted person is released from serving the sentence or has not been punished according to art. 64, 158, Art. 182, para. 3, Art. 183, para. 3 and Art. 191, para. 4 of the Penal Code, or a suspended sentence under Art. 66 of the Penal Code, as in Art. 7, para. 1 the content of the conviction bulletin of the convicted person is indicated, namely: first name, patronymic and surname; the single civil number (PIN) or personal number of a foreigner (PIN); the day, month and year of birth; the field; citizenship; the first name, patronymic and surname of the mother and father of the convicted person; an extract from an effective judicial act in criminal cases, reflecting the operative part of the judicial act; the date of entry into force of the judicial act. In Art. 7, para. 2 it is indicated that the extract under par. 1, item 7 shall contain: the case number; the date and number of the judicial act and the court that issued it; the committed crime and its qualification; the time and place of the crime; the type and amount of the imposed penalty; the deduction and respect for the preliminary detention under Art. 59, para. 1 NK; the release from serving the punishment and the non-imposition of punishment according to art. 64, 158, Art. 182, para. 3, Art. 183, para. 3 and Art. 191, para. 4 of the Penal Code, as well as the conditional sentence under Art. 66 of the Penal Code, which also indicates the probation period.

As can be seen, the criminal record certificate contains a large volume of personal data of individuals, and with regard to the lawful conditions under which their processing is allowed, the provisions of Art. 6 of the Regulation, according to which the processing of personal data is lawful when there is at least one of the exhaustively listed and given alternative conditions for the admissibility of processing. In view of the above, the provision of information containing personal data may be carried out only in the presence of one of the hypotheses described in Art. 6, para. 1 of the Regulation.

In Art. 1, para. 1, item 5 of Ordinance № 4 for the documents required for concluding an employment contract, contains the requirement, when concluding an employment contract to present a criminal record, when a law or regulation requires certification of judicial history. It follows quite clearly that the legal basis for the processing of personal data contained in the criminal record certificate can be made only on the basis of Art. 6, para. 1, p. "C" of the Regulation where the processing is necessary to comply with a legal obligation to which the administrator is subject. In this case, it is the employer.

The possibility for such a restriction on data processing, through a legislative measure in the law of a Member State, is explicitly provided for in Art. 23 of the Regulation. In this sense, the scope of obligations and rights of the controller / processor

are limited in accordance with Art. 23, para. 2, p. "A" and "c", by introducing a restriction in a category of processing by presenting a criminal record, and the scope of this restriction is written - only for administrators / processors for whom no explicit legal permission is provided for this kind of data processing.

It follows that an employer may process personal data contained in a criminal record only on the basis of Art. 6, para. 1, p. "C" of the Regulation, but not on the basis of a legitimate interest according to Art. "Is" from the same. Therefore, all the arguments put forward by the bank's representative in favor of processing based on the legitimate interest of the controller do not prevail over the formal requirements of the General Regulation and national law.

Moreover, the requirement of Art. 10 of the Regulation, the processing of personal data relating to convictions and infringements should be processed only under the control of an official body or on the basis of a legal authorization under EU or national law, corresponds to the overall system introduced for the processing of personal data related to sentences. On the one hand, these data, within the meaning of Art. 1, para. 1 of Ordinance № 8, are processed by the Criminal Record Bureau at each district court and the Central Criminal Record Bureau at the Ministry of Justice, which issue criminal records and criminal records (Article 33, paragraph 1 of the same ordinance), and the information which is provided for processing to different addressees (especially considering that it also concerns data of third parties - parents of the data subject), is transmitted only on the basis of a legal requirement. This avoids excessive interference in the legal field of the data subject and third parties, which in essence eliminates the possibility of the legitimate interest of a controller to prevail in the hypotheses.

Therefore, in case the person falls under the hypotheses of a materially responsible person, or falls under the hypotheses of professions for which it is mandatory to present a criminal record, an analysis should be made of which of the positions to appoint a materially responsible person.

In view of the above, and on the grounds of Art. 58, para. 3 of the General Data Protection Regulation, the Data Protection Commission stated the following

#### OPINION:

For the purposes of concluding an employment contract, an employer may process personal data contained in a criminal record certificate only on the grounds of Art. 6, para. 1, p. "C" of Regulation (EU) 2016/679 and in accordance with the regulatory requirement contained in Art. 1, para. 1, item 5 of Ordinance № 4 for the documents required for concluding an employment contract. In these cases, a criminal record certificate is presented when the certification of a judicial past is

required by law or normative act.

THE CHAIRMAN:

MEMBERS:

Ventsislav Karadzhov

Tsanko Tsolov

Maria Mateva / p /

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