r

< (" NATIONALISSÃO

DATA PROTECTION

OPINION No. 2/2018

i. OF THE ORDER

The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees requested the opinion of the National Data Protection Commission (hereinafter abbreviated as CNPD) on the draft Law on the regime applicable to the extrajudicial collection of overdue credits and companies engaged in this activity.

The consultation is carried out under the terms and for the purposes of paragraph 2 of article 22 of Law no. 67/98, of 26 October, amended by Law no. 103/2015, of 24 August - Personal Data Protection Law (hereinafter abbreviated as LPDP), and the opinion is issued under the provisions of the rule contained in subparagraph a) of paragraph 1 of article 23 of the LPDP.

II. ASSESSMENT

1. Prior point

The draft law on the regime applicable to the extrajudicial collection of overdue credits on behalf of third parties and the regulation of the activity carried out by the companies that provide these services contains several rules that provide for or presuppose the processing of personal data. In fact, information on debtors is at stake, as well as on creditors and collectors, when they correspond to natural persons, and even third parties.

In particular, it is important to emphasize that personal data respect information on credit and solvency, and their treatment, due to the negative charge it carries, is likely to generate situations of discrimination against the natural persons concerned. The impact it may have on the privacy of its holders therefore justifies that such data be considered as part of the legal category of sensitive data provided for in Article 7(1) of the LPDP. And, to that extent, the legal regime to be applied must minimize the affectation, not only of the fundamental rights to respect for private life and the protection of personal data, but also of the fundamental right to equality, in terms of the right not to be discriminated against (cf. Articles 26, 35 and 13 of the Constitution of the Portuguese Republic).

Furthermore, if the processing of personal data relating to debts of individuals by companies that hold the credits deserves

express discipline in the legal protection regime

Rua de São Bento, 148-3° Tel: 213 928 400

1200-821 LISBON Fax: 213 976 832

www.cnpd.pt

PRIVACY LINE

Weekdays from 10 am to 1 pm

doubts@cnpd.pt

of data1, a fortiori the processing and interconnections of these data by third parties must be subject to clear rules that prevent illicit treatment and in disregard of the principle of good faith.

Therefore, the CNPD will rule on the rules that, directly or indirectly, deal with the processing of personal data and that are likely to affect the rights, freedoms and guarantees in the context of such processing.

In this opinion, the CNPD will take as its main reference for the evaluation, as it cannot fail to be, the current legal regime, that is, the LPDP. Considering that as of May 25, 2018, data processing will be governed by the General Data Protection Regulation - Regulation (EU) 2016/679 -, it is important to note that, for what matters here, the regimes are similar. It is only highlighted here that the new Regulation reinforces the regime of data subjects' rights, in particular with regard to information and access rights.

2. Consideration of the content of the bill

2.1. The processing of debtors' personal data

Firstly, it should be noted that the bill, although it provides for or presupposes various processing of personal data, does not strictly define its regime. Now, given that the project reveals an effort to regulate the activity of extrajudicial collection of credits and the intention to define rules that safeguard the legal position of debtors without harming the rights of creditors, it seems coherent that such an effort also extends to the aspect of the protection of personal data, densifying the data processing regime that results from it.

Thus, in addition to the rules that bind the collector to the general duty of confidentiality regarding personal data and that define specific duties, namely reservation on the amount owed in contact with third parties or, in the context of postal mail, on the

existence of a debt, or even respect for privacy and domicile (cf. Articles 7 and 9 of the Project), a legal provision stands out to determine that the processing of data concerning debtors can only be carried out under the terms and in the cases provided for in the legal data protection regime (cf. article 11).

1 See Article 28(1)(b) of the LPDP.

r

It so happens that this last rule, as it is written, adds nothing from the point of view of the protection of personal data, serving only to reiterate what already follows from the respective general legal regime: that any processing of personal data is subject to a set of principles. and rules of it constant. However, in a matter with the sensitivity that it is and considering the consequences that data processing can have on debtors, the mere reference to the general regime does not seem sufficient to guarantee their rights.

Therefore, the CNPD understands, in terms, moreover, of what results from article 30 of the LPDP, that article 11 of the Project must be densified, in order to delimit the processing of personal data of debtors.

The. Thus, the CNPD recommends that this article delimits the categories of personal data processed and the exclusive purpose of the treatment (specifying that the data can only be used for the collection of credits), also providing for the prohibition of data communication. to third parties and the data retention period.

It should also be specified that the collector is responsible for the processing of personal data of the debtors, and it is up to him not only to guarantee the security of the information, but also the right to information before the data subjects and the exercise by them of the rights of access. and rectification of data (in accordance with the provisions of articles 10 and 11 of the LPDP).

With regard to the categories of data, as a rule, these should be limited to the information contained in the contract that gave rise to the debt (eg identification data, contact data, amount of debt, and identification of the contact for the acquisition of goods or services in question), except in cases where the contact information is out of date. Information arising from statements by the (alleged) debtor should also be collected when the latter expresses disagreement as to the existence of the debt or its amount.

Regarding the data retention period, it follows from the principles of proportionality and data minimization that they must be kept only as long as they are necessary to pursue the purpose of the treatment, which, in this case, corresponds to the collection of credits (cf. Article 5(1)(e) of the LPDP). However, in article 6 of the Project, the duty to maintain contracts for the provision of credit collection services by a

Rua de São Bento, 148-3° Tel: 213 928400

1200-821 LISBON Fax: 213 976 832

www.cnpd.pt

PRIVÃCSBADE LINE Weekdays from 10 am to 1 pm doubts@cnpd.pt

period of two years from the end of the contract. The explanatory memorandum does not provide an explanation for the defined period; considering that the period in question is included in the scope of an article that regulates the supervision of the activity of extrajudicial collection of credits by the Directorate-General for Economic Activities, it seems to be possible to conclude that the raison d'être of the period established therein is related to the power to inspect compliance with the duties imposed in the Project regarding the exercise of the activity. Consistently, this being the retention period for the data contained in the contract, this would also be the retention period for personal data relating to debtors, by collectors and credit holders.

However, the CNPD cannot fail to point out that the retention of personal data relating to the debtor for a period of two years from the end of the contract for the provision of the collection service far exceeds the need to keep the information in order to achieve the intended purpose. with the processing of data, enhancing the risks associated with the storage of such data. Indeed, it is important here to consider that this type of information has a significant economic value in the market, at the same time that it is susceptible to generating negative profiles on debtors, even after collection, and the legislator cannot ignore the risks of improper access or reuse, even if such conduct is expressly qualified as unlawful.

Now, if the need to prove compliance with the contract can justify the retention of personal data for a reasonable period after the collection, the extension of this retention for two years from the end of the contract for the provision of the collection service, perhaps justified due to the need to inspect the collection activity, it does not seem to properly balance the public and private interests involved.

In fact, the relevant time for counting the term should not be the end of the contract, as this may concern different credits,

charged at very different times. On the contrary, the time when the period begins to run must be when the credit is extinguished (due to effective collection) or when the right to demand payment is extinguished, or when the debtor declares non-payment.

In addition, the period of two years from any of these moments is still excessive, given the purpose pursued with the processing, and should therefore be limited to the period strictly necessary for the purpose of proving that the collector has fulfilled the obligations assumed in the contract.

B. Another essential aspect that is not regulated in this Project concerns the interconnections of personal data.

In fact, one of the biggest problems that the credit collection activity has revealed is the accumulation and relationship of information received from various customers (creditors), creating real lists of negative information about citizens, often outdated, which is then used in the information and business activity.

Given that such lists are not admissible in view of the general regime for the protection of personal data, it is important that this result is expressly prohibited here.

Thus, in article 11 or in an autonomous precept, the interconnection of personal data must be prohibited, and the obligation to identify the origin of the information included in the file relating to each debtor is also imposed.

ç. Considering now the specific regime of the contract for the provision of the extrajudicial debt collection service, the formal elements that must be included in the contract are listed in paragraph 2 of article 5 of the Project.

Article 5(2)(b) of the Project provides for the identification of overdue credits subject to collection. However, considering that the identification of the credits does not necessarily correspond to the identification of the debtors, but that for the execution of a contract of this nature it is essential that the collectors have the personal data of the debtors necessary for their identification and contact, as well as for the identification of the respective credit in question, the terms in which the communication of such data must occur must be regulated in the contract.

Thus, the CNPD recommends that a paragraph be added to paragraph 2 of article 5 of the Project, obliging the parties to bind themselves to the communication of data

----personal..of-debtors-seia-eieittaéa-èe-mQèoagar-anti-the-security-of-themselves,

Rua de São Bento, 148-3° • 1200-821 LISBON

Tel: 213 928400 Fax: 213 976 832 lsnhji privasibade

www.cnpd.pt

Weekdays from 10 am to 1 pm

doubts@cnpd.pt

either in the transmission or in the transport of its support, in accordance with subparagraph h) of paragraph 1 of article 15 of the LPDP.

d. In relation to Article 6, paragraphs 1 and 2 define the periods for keeping the contracts. To the extent that the contracts do not contain personal data of the debtors, as argued above, the CNPD has nothing to hinder the period of conservation of the contracts defined therein.

and. With regard to the specific duties of the collector, the CNPD recommends the provision in paragraph 5 of article 9 of the Draft of an autonomous paragraph prohibiting the disclosure by any means of personal data relating to debtors.

It also suggests, following the concern to ensure the right to privacy of private and family life and peace at home, reflected in paragraph c) of no. residence after 20:00 hours, a minimum limit is also set before which such travel is not possible, possibly eight hours.

f. Article 9(6) of the Bill also provides that collectors who are legal entities are required to record telephone contacts with their customers and debtors.

In the first place, the reason why this duty is limited to legal persons is not clear. In fact, this obligation is only understood to guarantee proof of performance of the contract and to ensure that legal limits are not exceeded in the interaction with the debtor. If so, the ratio of the rule justifies the extension of the duty to collectors who are natural persons.

Secondly, it is recalled that the recording of communications constitutes a processing of personal data; to that extent, it must comply with the general data protection regime, namely as regards the guarantee of the rights of information, access and eventually deletion, as well as the duty to delete it after the retention period has expired. For this reason, it will not be enough to provide for the obligation to provide access to the complaints book.

In addition, in order to fulfill the purpose of this duty of recording communications, it is important to create mechanisms that

allow the debtor to obtain proof of the content

of communication, with reliability - which will only be achieved if records (logs) of communications are made, digitally signed.

2.2. The processing of personal data of collectors

As mentioned initially, this Project is not limited to predicting or presupposing the processing of debtors' personal data. It also provides for the processing of personal data of collectors (when they are natural persons, or administrators of legal collection persons), under the responsibility of the Directorate-General for Economic Activities.

The. In article 14, when establishing the criteria for concluding that the requirement of suitability is met, as a requirement for access to the activity, consultation of the criminal record certificate is provided. More than the formal question (strictly speaking, what is consulted is the criminal record and not the certificate, whose presentation the law may require), it is important to note that the criteria defined in paragraph 2 unbearably affect rights, freedoms and guarantees in the context of processing personal data, which is why the CNPD cannot fail to highlight it.

Indeed, a lack of suitability is defined as a set of situations in which the interested party was subject to main or accessory sanctions of a criminal or administrative nature, regardless of the time when such sanction took place.

It should be noted that such a provision extends the effects of the sanction beyond the period of time to which it relates, i.e., beyond the execution of the sanction. The underlying logic of the Portuguese criminal system is still, it is believed, the social reintegration of agents who committed crimes, after serving their sentences; logic or intention that is contradicted by this legal provision, which stigmatizes agents far beyond the concrete measure of the penalty, promoting their exclusion from the labor market and consequently from society.

Considering also that the list of crimes considered relevant is very extensive and that it covers crimes whose penal framework does not exceed one year in prison, it is necessary to conclude that this requirement without any time limitation, even if it were considered adequate, is unnecessary and excessive. Thus, the CNPD understands that certain criminal convictions with sentences served in a short period of time (for example,

in the last two/five years) must be considered sufficient in a fair balance of the values and rights involved.

In addition, the relevance for this purpose of some of the crimes listed there is very doubtful, with no material connection between the criminal conduct and the purpose sought here - take as an example the infractions related to hygiene and safety conditions at work.

Thus, the CNPD recommends the temporal delimitation of the relevance of the sanctions applied, as well as the exclusion of some criminal offences, under penalty of such a rule offending the principle of proportionality, enshrined in paragraph 2 of article 18 of the Constitution.

Even the provisions of Article 14(2)(d) appear to be excessive, given the length of the time period indicated. In fact, denying suitability to anyone who has been declared insolvent or held liable for the insolvency of a company controlled by them in the last 15 years, or in whose management or supervisory bodies they have participated, materially constitutes an accessory sanction that extends for a period of a very long time, stigmatizing the insolvent beyond what can be considered relevant.

In fact, there is another preliminary issue, which is related to the lack of adequacy of this measure in relation to the intended purpose: it seems to be intended that a debtor cannot collect debts from another debtor under any circumstances, not reaching the indispensability of an appeal. to the highest moral standards in this context. Furthermore, the legal insolvency regime distinguishes culpable from fortuitous insolvency, limiting, even in the former, the possibility of carrying out economic activities to a period of time between 2 to 10 years and only if the judge of the case so decides.

In these terms, the CNPD recommends the revision of this precept, so that it does not correspond to an accessory sanction added to those that the insolvency regime already provides and substantially and disproportionately aggravated in relation to what is established therein.

B. A final note to point out that Article 17 of the Bill, in the part relating to accessory sanctions, in regulating recidivism

presupposes a record of sanctions, the regime of which is not established here.

Thus, it is appropriate to provide for such a regime, specifying that it is not subject to public disclosure.

III. OF THE CONCLUSIONS

1. On the grounds set out above, the CNPD understands that the processing of personal data relating to debtors, due to the negative impact it may have on their private life, must be duly regulated in the Bill in question.

Thus, regarding the processing of personal data relating to debtors, the CNPD recommends that:

The. The categories of personal data processed and the exclusive purpose of the treatment are delimited, prohibiting the communication of data to third parties or their disclosure by any means;

B. The period of storage of personal data is fixed, for the period strictly necessary to fulfill the purpose of processing personal data, therefore, taking as a reference the moment of collection or termination of the right to collect and not the end of the contract;

ç. The interconnection of personal data is specifically prohibited, in order to prevent the creation of lists of negative information about citizens, which are often outdated, which are then used in information and business activities.

d. It is specified that it is up to the collector, as responsible for the processing of debtors' data, to guarantee information security, as well as the right to information and the exercise of the rights of access and rectification of data;

and. The duty of recording communications, especially with debtors, is extended to collectors who are natural persons, taking into account the underlying purpose, and minimally regulating the processing of data that such recording constitutes.

2. With regard to the processing of personal data of collectors, when they are

natural persons, the CNPD recommends:

The. The revision of subparagraphs a), b), and c) of paragraph 2 of article 14, in the sense of temporally delimiting the relevance of the main and accessory sanctions applied, as well as excluding the reference to some criminal offenses that do not have a material connection with the economic activity in question, under penalty of having such a rule as violating the

principle of proportionality, enshrined in paragraph 2 of article 18 of the Constitution;

B. The revision of subparagraph d) of paragraph 2 of article 14, so that it does not constitute an additional sanction added to those that the insolvency regime already provides and which is substantially and disproportionately aggravated in relation to what is established therein;

ç. The provision and regulation of a register of sanctions related to the activity of extrajudicial collection of credits, so that the provisions of article 17 of the Draft Law can be implemented.

This is the opinion of the CNPD.

Lisbon, January 23, 2018

Filipa Calvão (President)