

NATIONAL DATA PROTECTION COMMISSION

OPINION/2019/57

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 electronic communications carried out by judicial courts addressed to Banco de Portugal under point c) of Article 38(6) and Article 230(2) of the Insolvency and Business Recovery Code, approved by Decree-Law No. 53/2004, of 18 March.

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. Article 4(2) and Article 6(1)(a), all of Law No. 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

Decree-Law No. 97/2019, of 26 July, which came into force on 16 September 2019, amended the electronic procedure for judicial proceedings provided for in the Code of Civil Procedure, and the CNPD issued a statement on the draft diploma in question through Opinion No. 22/2019, of 15 April.

Pursuant to paragraph 5 of article 132 (Electronic Process) of the aforementioned Decree-Law, communications between courts and public entities may be carried out electronically, by sending structured information and interoperability between the information system of support to the activity of the courts and the information systems of the referred entities, in the terms foreseen in the decree of the members of the Government responsible for the area of justice and for the public entity in question.

As follows from the preamble of this draft Ordinance, with the publication of Decree-Law No. 97/2019, of 26 July, the conditions for the implementation of

various measures that respect the simplification and dematerialisation of communications between the courts and public entities.

This Draft Ordinance implements one of these measures by providing that the communications from the judicial courts addressed to Banco de Portugal, provided for in paragraph c) of paragraph 6 of article 38 and paragraph 2 of article 230, be made electronically. .° of the Code of Insolvency and Corporate Recovery, approved by Decree-Law no. termination of the proceedings, as well as the annulment or revocation of the sentence, the withdrawal of the request or the instance or the termination thereof, the notification of the initial or final order for exoneration of the remaining liability, the notification of the order for early termination or revocation of the exoneration of the remaining liability and the confirmation order by the judge of the end of the inspection period.

It is noted, however, that article 2 of the draft Ordinance is limited to mentioning that such communications are carried out electronically, by sending structured information and electronic documents between the support system for the activity of the courts and the Banco de Portugal information system. However, this normative provision proves to be manifestly insufficient to guarantee compliance with the principles relating to the processing of personal data, in particular the principle of minimization of personal data, implementation of the principle of proportionality, enshrined in subparagraph c) of paragraph 1 of the Article 5 of the GDPR.

It is therefore important that the draft Ordinance precisely defines the terms in which such processing of personal data can take place, specifying the categories of personal data involved in the transmission of information between the judicial courts and Banco de Portugal and specifying the types of documents transmitted electronically. Otherwise, the CNPD cannot assess or conclude on the proportionality of the data to be processed, under the terms of Article 5(1)(c) of the GDPR. The CNPD recommends, therefore, the densification of article 2 of the draft Ordinance in order to contain the aforementioned specifications.

It should be noted that article 2 of the project mentions that the sending of information between the information system supporting the activity of the courts and the information system of Banco de Portugal will be carried out under the terms of a protocol to be signed between the Instituto de Gestão Financeira e Equipamento, IP and Banco de Portugal, without, however, mentioning the prior consultation of the CNPD.

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The CNPD recalls that the protocols, insofar as they correspond to legal acts of public entities that define binding rules for the parties regarding the processing of personal data, have the nature of an administrative regulation. To that extent, under the terms of Article 36(4) and Article 57(1)(c) of the GDPR, they must be subject to prior assessment by the CNPD. So that there is no doubt as to this duty, the CNPD suggests its clarification in the text of the article.

In turn, article 3 of the draft Ordinance raises particularly relevant issues regarding the security of the communications in question, since it only states that the support systems for the activity of the courts and the information system of Banco de Portugal guarantee the respect for security and access to information rules in order to ensure data confidentiality. It is strange that the standard is completely silent on the security measures involved in the transmission of data, without specifying, from the outset, whether the transmission is carried out on a public or private network. It is still strange that the normative precept uses a notoriously vague formulation to refer to the confidentiality of data without specifying the way in which it is guaranteed. Thus, in compliance with the principle of integrity and confidentiality provided for in subparagraph f) of paragraph 1 of article 5 of the RGPD, the CNPD recommends amending article 3 of the draft Ordinance in order to contain the security measures involved in this processing of personal data.

Finally, paragraph 2 of article 3 of the draft Ordinance refers to “electronic records necessary for the knowledge of the communications made” and it is not clear whether these records are intended to record activity (iogs). It should be noted that information systems must have mechanisms that allow recording and auditing the activity, namely that concerning the transmission of information to other bodies. Due to the importance that the registration (iog) of activity has in the scope of audits and inspection, it is suggested to include in this article the duty to record such interactions.

III. Conclusion

On the above grounds, in order for the Draft Ordinance to comply with the legislative command contained in paragraph 5 of article 132 of Decree-Law No. 97/2019, of July 26, the CNPD recommends:

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- 1 - The densification of article 2 of the draft Ordinance, specifying the categories of personal data involved in the transmission of information between the judicial courts and Banco de Portugal, as well as the types of documents transmitted electronically;
- 2 - The express consecration of the obligation for the protocol referred to in the same article to be subject to prior appraisal by the CNPD;
- 3 - The reformulation of article 3 of the draft Ordinance, in order to contain the security measures involved in this processing of personal data;
- 4 - The clarification of paragraph 2 of article 3 in the sense of including the duty of registration (/og) of activity. Lisbon,

September 17, 2019

Filipa Calvão (President)