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NATIONAL DATA PROTECTION COMMISSION

OPINION/2020/4

I. Order

The Budget, Finance and Administrative Modernization Commission sent the National Data Protection Commission (CNPD), for an opinion, Draft Law No.

The request made and the present opinion fall within the attributions and powers of the CNPD, as the national authority to control the processing of personal data, in accordance with the provisions of subparagraph c) no. 1 of article 57 and no. 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. , in Article 4(2) and Article 6(1)(a), all of Law No. 58/2019, of August 8 (which aims to ensure the execution , in the domestic legal order, of the GDPR).

The assessment of the CNPD is restricted to aspects of the regime relating to the processing of personal data, that is, operations that focus on information concerning natural, identified or identifiable persons - cf. lines 1) and 2) of article 4 of the RGPD - focusing on the precepts that provide for or imply processing of personal data.

II. Analysis

1. The interconnections of public entities' databases with other entities

It is important to note, first of all, that, as in previous years, this Draft Law provides for a very high number of interconnections of databases of public bodies, including those with private entities.

The CNPD has been drawing the attention of the Portuguese legislator to the risk that the interconnections of personal databases pose, especially when the law is limited to providing for their realization without establishing adequate guarantees for the protection of the fundamental rights of the people to whom such data. data concern and even without defining

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precisely the scope of these interconnections1.

And as in previous years, the proposed State Budget Law is used to provide for this type of data processing, a solution that is at least objectionable. On the one hand, a legal diploma of this nature is used to allow processing of personal data, the provision of which, in the midst of so many provisions on specifically budgetary issues, ends up not deserving the attention (both of Parliament and of society) which, in a specific diploma for the purpose or of a sectoral nature, it would certainly deserve. On the other hand, the rules in question are limited to providing for the processing of personal data without regulating it, especially without imposing the adoption of measures to guarantee the rights of citizens as the RGPD requires in paragraphs b), g) and h) of paragraph 2 of article 9, and often without even delimiting the object of the interconnection, constituting in some cases, indicated below, true blank norms, which in terms of regulation of rights, freedoms and guarantees contradicts the constitutional requirements more basic.

It is therefore important to explain in a more developed way the impact of this type of normative provisions in this Draft Law, from a double perspective: the consequences of normative indeterminacy and openness, on the one hand, and the implications of the extended interrelationship of personal data citizens, on the other hand.

1.1. The use of open legislative norms

In this Draft Law, the establishment of database interconnections is generically foreseen, not only without specifying the databases object of interconnection but also without identifying the entities, services or public bodies whose databases are the object of this operation.

In fact, paragraph 1 of article 202 of the Proposal is limited to indicating the private entities and other entities with whose databases the interconnection will be carried out, without determining which public entities will make information on citizens available

1 Cf., for example, opinion No. 56/2017, accessible at https://www.cnpd.pt/bin/decisoes/Par/40_56_2017.pdf and opinion No. 54/2018, of 15 November, accessible at https://www.cnpd.pt/bin/decisoes/Par/40_54_2018.pdf.

entities.

It should be noted that the State Budget Law for 2019 did not specify with which exact databases, for example, the Tax and Customs Authority (AT) or the Social Security Institute, I.P., the interconnections were established, being certain that these public bodies have several databases and interconnection, depending on the purpose it seeks to pursue, must be limited to the data (and therefore the databases) that are adequate and necessary for that purpose, pursuant to point c) of Article 5(1) of the GDPR.

But now, in the present Law Proposal, the rule that provides for interconnections goes further in its indeterminacy: not even the entities and public bodies whose databases will be the object of interconnection are identified.

Such a degree of legislative indeterminacy, in a matter such as the provision of interconnections with the personal databases of citizens, is clearly contrary to the principle of legality, not allowing compliance with the degree of normative density required for the restriction of rights, freedoms and guarantees, that these interconnections always represent - in particular, the fundamental right to the protection of personal data, but also the fundamental right to respect for private life, enshrined in articles 35 and 26 of the Constitution of the Portuguese Republic (CRP).

Even a possible interpretative effort in the sense of, based on the diplomas referred to in paragraph 1 of article 202 of the Proposal and in particular the purposes of interconnections, to reveal the list of public entities and bodies whose databases are addressed here fails. before provisions such as the one relating to the purposes of interconnection with the databases of Santa Casa da Misericórdia de Lisboa (cf. subparagraph c) of paragraph 1 of article 202) or the one referring to the National Strategy for the Integration of People in Homeless Situation 2017-2023 (cf. subparagraph d) of paragraph 1 of article 202), in which the quantity and variety of public attributions set out in the Resolution of the Council of Ministers raises fears of the crossing of all Central Public Administration databases.

The CNPD insists: the determination of the extent and intensity of the relationship of the personal information of the citizens, in particular when it respects the private life of these, revealing dimensions that the constituent legislator and the legislator of the Union wanted

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especially protect (cf. Article 35(3) of the CRP and Article 9(1) of the GDPR), cannot be left in the hands of the Public Administration without minimally precise legal commands. The continuous option for open legislative norms that delegate to the administrative bodies very broad decision-making powers regarding the processing of data that have direct repercussions on the most fundamental dimensions of the citizen - generically providing for the possibility of relating all personal data held by the Public Administration - puts crisis the first guarantee of the constitutional regime of fundamental rights, which is to reserve to the law the definition of restrictions and conditions of rights, freedoms and guarantees (cf. paragraph 2 of article 18 and subparagraph b) of paragraph 1 of article 165 of the CRP)2. And it undermines the essential function of a legislative norm such as that of article 202 of the Proposal, which is to ensure that citizens can be predicted with regard to future restrictions and conditioning of their fundamental rights.

The mere reference to a regulation or administrative agreement, such as that contained in paragraph 2 of article 202 of the Proposal, should also be noted, despite the effort, revealed in paragraph 3 of the same article, of listing elements of the processing of personal data to be defined in terms of administrative regulations, is not sufficient to make up for the incompleteness at the legislative level.

In fact, within the scope of article 202 of the Proposal, specially protected data are necessarily at stake - cf. the list provided for in Article 9(1) of the GDPR

2 Reservation of law understood not only in its aspect of reservation of competence in relation to legislative bodies, but also in the aspect of reservation of competence in relation to the Public Administration and its discretionary power.

As J. C. Vieira de Andrade teaches, «it is not allowed to leave to administrative discretion the determination of the content or limits of rights, freedoms and guarantees in specific cases», following those who maintain that «from the reservation of law arises the need for legal authorization administrative action and that this positive link must, in principle, determine, in addition to the competent body and the purpose [...], the content and procedure of the act liable to jeopardize the exercise of a right, freedom and guarantee» ; in this field, the specific terms of administrative intervention must be set out in law, “[it is] not legitimate that they depend on a judgment of opportunity and convenience of the administrative authority itself, not predictable or measurable by individuals, nor controllable (if not negatively) by the courts” (cf. Fundamental rights in the Portuguese Constitution of 1976, 5th ed., Almedina, Coimbra, pp. 327-328).

-, such as those relating to health or other potentially discriminatory dimensions of people who are in a deprived situation (eg ethnic origin, sexual orientation), as well as those relating to offenses and convictions (cf. Article 10 of the GDPR) 3, which makes that rule manifestly insufficient to legitimize the data processing operations that interconnections and consultations and information exchange represent. This is because it follows from subparagraphs b), g) and h) of paragraph 2 of article 9 and also of article 23, both of the GDPR, that national law cannot be limited to providing for the processing of personal data protected by paragraph 1 of the same article 9, having to regulate it, in particular, establishing adequate guarantees of the rights and freedoms of data subjects. And such impositions of Union law, read in conjunction with Article 18(2) and Article 165(1)(b) of the CRP, require that such regulation be carried out by law. Which, in an open rule such as the one in question, is clearly not complied with.

1.2. The relationship risks of citizen information

From another perspective, one cannot fail to be alert to the risks that the generalization of interconnections and reciprocal access to information contained in databases brings to citizens. Indeed, even if the objective of efficient management of information and streamlining of administrative procedures is understood, especially in the field of the social economy and the provision of care to people in need, and the usefulness, for this purpose, of sharing information on the citizens owned by the State and by other public legal persons, the risks arising from this to the rights of citizens cannot be ignored.

As we warned in Opinion No. 56/2017, regarding the draft law on the State Budget for 2018, and we reiterated in Opinion 54/2018, on the Draft Law on the Budget for 20 1 94, «however justified it may be whether each of the interconnections provided for in the light of a specific and legitimate public interest, the truth

3 Including information on crime prevention and investigation, as appears from the reference in paragraph 4 of article 202 of the Proposal for Law No. 59/2019, of 8 August.

4 Accessible, respectively, at https://www.cnpd.pt/bin/decisoes/Par/40__56_2017.pdf and https://www.cnpd.pt/bin/decisoes/Par/40_54_2018.pdf.

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is that from all of them - those that already exist, those that are now foreseen and those that will still be foreseen in the future - there is a web of connections between databases that allows, from any identifying element - e.g., the identification number civii, tax identification number or e-mail address - interrelate all the information relating to each citizen held by the entire Portuguese Public Administration. The universe of this information is composed not only of the information that is collected directly by the different public entities (e.g., ownership of real estate and certain movable assets, health data; data on the assessment of people's qualities and knowledge), but also by the personal data of citizens collected by private companies (as employers, as providers of essential services, such as energy or communications services, or as providers of most services or goods acquired over a lifetime).

The risk associated with this de facto possibility of interrelationship of all information relating to each individual citizen, not only affects privacy, but also the freedom of each one and their identity; further enhancing the risk of discriminatory treatment, which at each historical moment is renewed under different guises (just think that nationality and birthplace are today factors of discrimination, even by public entities, in Europe)».

Added to these risks is the recent determination of the national legislator that allows the free reuse - in the sense of being able to serve any purpose of public interest - of the personal data of citizens held by public entities and bodies, contained in article 23 of Law no. 58/2019, of August 8th.

This last legal provision, associated with the proposed rule for the creation of interconnections between any databases for which any and all public bodies are responsible, defrauds the constitutional prohibition of state centralization of citizens' information that the provision of paragraph 5 of article 35 of the CRP is implicit.

In fact, this opening of the databases with information on identified citizens who are in the possession of the Public Administration to interconnections, without legislative delimitation of those that are adequate and necessary for this purpose,

associated with the legal provision of its free reuse for any purpose of public interest opens the door to the relationship of all personal data of citizens, in an effect equivalent to the centralization of information in a single national database that the constitutional prohibition of the single citizen's number wanted and seems to continue to want to avoid.

For the reasons mentioned, the CNPD recommends the densification of article 202 or the reference, in the same article, to legislative acts, which define the essential elements of the processing of personal data mentioned herein, first of all, the identification of the entity responsible for each interconnection and the categories of data or databases covered, under penalty of not verifying a condition of lawfulness of the processing of personal data, under the terms imposed by the RGPD, nor guaranteeing the predictability constitutionally required regarding these processing of personal data.

1.3. Specific analysis of standards that provide for database interconnections

i. The interconnection of databases of public bodies with the entities participating in the National Strategy for the Integration of Homeless People 2017-2023

Special mention should be made of the provision for the interconnection of databases, via a platform, of public bodies with the entities participating in the National Strategy for the Integration of People in a Homeless Situation 2017-2023, in paragraph d) of n. 1 of article 202 of the Proposal.

In addition to what has been stated above, it is important to bear in mind that Council of Ministers Resolution No. freedoms and guarantees, under the terms defined in subparagraph b) of paragraph 1 of article 165 of the CRP. It is reiterated: it is not enough to enunciate the public interests that are intended to be pursued. It is also necessary, at the legislative level, to define the essential aspects of such processing of personal data, especially when

are, as it is believed to be, special data (provided for in Article 9(1) and specially protected by Article 35(3) of the CRP).

To that extent, the provisions of article 99 of the Proposal - where protocols relating to the financing of the aforementioned National Strategy are foreseen - and the provision in article 202 of interconnections, without specifying between which databases and without identifying the person responsible for the interconnections , with mere reference to protocols to be concluded is not enough to legitimize the different data processing operations that the execution of the aforementioned Strategy will imply.

It is therefore important to define, from the outset, at the legislative level, the essential aspects of the processing already mentioned (responsible for the processing and categories of personal data covered), as well as adequate guarantees of negative non-discrimination and prevention of improper access or abusive use of data. (cf. points b), g) and h) of paragraph 2

of article 9 and paragraph 2 of article 23, both of the GDPR). In any case, it should be noted that the protocols constitute inter-administrative agreements, which, because they aim to regulate legal rules and define the terms of these personal data processing operations, are obviously regulatory in nature. In other words, they are administrative regulations issued by two or more administrative entities (and with the participation of other entities) and, to that extent, they constitute what some doctrine qualifies as substitutive agreements for administrative regulations. Thus, both administrative regulations (unilateral) and those that take the form of protocols must be submitted to the CNPD for the purpose of issuing the necessary opinion, in compliance with the provisions of subparagraph c) of paragraph 1 of article 57. and Article 36(4) of the GDPR, as well as Article 6(1)(a) of Law No. 58/2019 of 8 August.

ii. The interconnection of Social Security databases with those of AT and public records

Another obvious example of normative indeterminacy is that contained in article 111 of the Draft Law.

A similar precept was already provided for in the Draft Law on the State Budget for

2019, with the addition of the Social Security Institute, I.P. (ISS, I.P.), to the Social Security Financial Management Institute, I.P. (IGFSS, I.P.), in recognition of the possibility of, in the execution of social security debt collection attributions, «obtaining information regarding the identification of the debtor and identification and location of his seizable assets, through direct consultation of the databases of the tax authority, social security, land registry, commercial registry, motor vehicle registry and civil registry, and other similar records or files".

Since the consultation operation, in this context, implies the interconnection of files, we have here a delimited interconnection as to the purpose and categories of the personal data object of the same, but in which the possibility of accessing "other records and files similar". However, it is not possible to identify the records and archives whose constitution and maintenance are intended to fulfill a registration function in the public interest, and whose access may constitute a suitable means for fulfilling the function of those public entities.

It should be noted that, in the light of the national legal system, the constitution or use of other databases of citizens' assets is not admissible, namely for the purpose of accessing them by creditors.

But, above all, it is important to reinforce that AT's databases cannot constitute a repository of information on citizens, available

to any and all Public Administration bodies - or to public or private entities that intend to collect debts - because this is not the purpose of its constitution. Most of the information that the IGFSS, IP, and the ISS, IP, need to obtain to carry out the execution of social security debts is available in the public registers mentioned in the law, and there is no need to access the AT to obtain information which is already available in databases specifically created for the purpose of advertising. To that extent, the provision of access to the AT databases can only have, in this context, a strictly subsidiary nature, only to the extent that it is not possible or does not exist information on assets (sufficient for the execution of the debt) of the debtor. in those records.

Otherwise, it is with this the Portuguese State to recognize and promote the

centralization of citizens' information in a single public body, with all the risks this poses to citizens' rights and freedoms. It is never too much to remember that rights, freedoms and guarantees, and therefore also the right to respect for private life and the right to the protection of personal data, are, in the first place, rights before the State, of defense in relation to its action. . And that the sharing of personal information of citizens has, precisely, in order to prevent the easy relationship between that information, thus preventing the temptation of domination and manipulation of the same by the public power.

In short, the CNPD reiterates the recommendation to eliminate the final reference to “other similar records and files”, as well as the provision for access to AT's databases only in the last place and with the mention of the subsidiary nature of this access.

2. Online publication of personal data relating to privacy

The CNPD has also pointed out to national legislative bodies the risks arising from the exposure on the Internet of citizens' private lives and other potentially stigmatizing information, stressing the importance of careful consideration of the need for such exposure for the pursuit of purposes of public interest and suggesting measures to mitigate such impact. The proposed Law in question contains two rules that, in this context, deserve detailed analysis.

2.1. The disclosure of lists of debtors to Social Security

The Draft Law also maintains, as was the case with previous laws that approved the State budget, an article referring to the publication of lists of Social Security debtors.

Indeed, paragraph 1 of article 107, under the heading Measures of contributory transparency, provides that '[it is] applicable to taxpayers in debt to social security the disclosure of lists provided for in paragraph 5(a) of the article 64.0 of the General Tax Law, approved as an annex to Decree-Law n.0 398/98, of December 17".

In relation to the provisions of paragraph 1, the CNPD has already commented on the treatment of

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personal data in previous opinions5, but reiterates here the impact that such disclosure has on people's private life, in terms that are certainly excessive, in violation of the principle of proportionality to which the legislator is bound, under the terms of paragraph 2 of the Article 18 and Article 26(1) and Article 35(3) of the CRP.

It is undeniable that the option for the on-line disclosure of information concerning each person has an impact that is not limited to the purpose of this publication - which is to make known to the parties involved in contractual relations that the eventual counterparty currently has debts to Social Security. -, extending into the future. In fact, the information made available on the Internet will remain there far beyond what is necessary to fulfill the purpose of its publication, in a logic of perpetuating personal information, given that such context facilitates the collection, aggregation, crossing and subsequent use of this information for the more diverse purposes. In fact, the dissemination of personal data on the Internet allows and easily enables the aggregation of information about people, namely the establishment of profiles, which are likely to serve as a means of unfair discrimination against people, as they allow their use very much for in addition to the period of time in which the law dubiously considered it necessary to stigmatize people with Social Security debts.

The CNPD reiterates, therefore, the need to rethink this rule, with a view to adequate harmonization of the public interests pursued and the fundamental rights of data subjects.

2.2. Online publication of convictions

Another provision of the Proposal that raises similar concerns is that contained in subparagraph i) of paragraph 2 of article 203, where, within the scope of the Government's legislative authorization to establish the legal regime for economic offences, the possibility of

5 Cf. Opinions no. 38/2005, 16/2006, no. 56/2017, accessible, respectively, in

https://www.cnpd.pt/bin/decisoes/Par/40_38_2005.pdf,

https://www.cnpd.pt/bin/decisoes/Par/40_16_2006.pdf, and more recently in opinion No. 54/2018, of 15 November, accessible at https://www.cnpd.pt/bin /decisions/Par/40_54_2018.pdf

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'provide for the publication of administrative decisions or sentencing court sentences'.

Even if one can understand the need to publicize some individual situations, to protect public interests and individual interests (promoting self-preservation in relation to potentially harmful situations), the CNPD maintains the understanding that the publication of condemnatory decisions in the Internet must be subject to a special weighting judgment, especially when the offenders are natural persons. On the one hand, considering the temporal and territorial extension of the impact that the online publication of this type of information on the lives of convicted persons has by virtue of the global and perpetual nature of the Internet: for a lifetime and far beyond the territorial space in that such information is directly relevant.

On the other hand, and consequently, because such publicity assumes, in practice, a sanctioning nature, given that the disclosure that a sanction has been applied socially stigmatizes the offender. Without discussing the legally foreseen possibility of applying accessory sanctions of this type, what the CNPD intends to emphasize here is the importance of an adequate consideration of the need for such publicity and, if it is concluded that it is essential, of the definition of adequate measures to reduce the impact of its prediction (e.g., publication only of final decisions and relating to very serious infringements, de-indexing of search engines).

3. Other provisions regarding the processing of personal data

Following the above, maximum in 1.1. and 1.3, it is also important to point out that the mere provision of processing of personal data resulting from the granting of subsidies in article 193 of the Draft Law, with mere reference to the administrative regulation defining the main aspects thereof, does not comply with the degree of legislative density that the regulation of personal data processing requires.

At the same time, the implementation of the rule in article 138 of the Proposal, which provides for funding for the Choice Programme, will involve processing of personal data, without defining the essential elements of such processing in this legislative plan.

Likewise, the reference to the administrative protocol and regulation contained in article 277 of the Draft Law, which provides for the interoperability and communication of personal data between the Caixa de Previdência dos Advogados e Solicitadores (CPAS) and the IGFSS, I.P., for the purpose of debt collection, it is also not, from the perspective of the CNPD, for the reasons set out above, sufficient. Furthermore, the CNPD has nothing more to add on this processing of personal data, as the objections raised in Opinion No. in this Draft Law - whether in terms of legislative competence and form of the act, or in terms of the principle of the purpose of the treatment.

Thus, the CNPD recommends the legislative densification of these personal data processing, underlining the obligation that the different administrative regulations and protocols are subject to its opinion, under the terms provided for in subparagraph c) of paragraph 1 of article 57 and in Article 36(4) of the GDPR, as well as in Article 6(1)(a) of Law No. 58/2019, of 8 August.

III. conclusions

1. Under the terms developed above, the CNPD warns of the risks associated with promoting the interconnection of personal data between the information systems of different public entities and other entities, underlining that the successive and growing forecast of access or interconnection of citizens' personal data raises a reasonable concern about the domain that the State and the Public Administration have or are in a position to have over the information of the citizens, and with that the dominion over the same citizens.

Thus, the CNPD:

The. Recommends densifying the provisions of article 202, so that the scope of the envisaged interconnections can be understood, delimiting the public bodies and the specific databases that are susceptible to access or interconnection, in compliance with the provisions of paragraph 2 of article 18th

6 Accessible at https://www.cnpd.pt/bin/decisoes/Par/PAR_2019__61.pdf.

and in subparagraph b) of paragraph 1 of article 165 of the Constitution of the Portuguese Republic;

B. It believes that Article 202(2) should be revised, because the definition of the essential elements of this type of processing of personal data must be found at the legislative level and not at the level of unilateral or multilateral administrative decision.

2. The CNPD also reiterates the disproportionality of the provision for the publication of lists of debtors to Social Security, in disregard of the principle enshrined in paragraph 2 of article 18 of the Constitution, recommending the reconsideration of such provision or, at least, the adoption of measures to mitigate its impact.

3. The CNPD also points out the convenience of reconsidering the option set out in subparagraph i) of paragraph 2 of article 203, regarding the meaning and extent of the legislative authorization to provide for the publication of administrative decisions or convictions.

Approved at the plenary meeting and January 14, 2020

Filipa Calvão (President)