

CNPD

National Data Protection Commission

OPINION/2021/153

i. Request

1.0 Secretary of State for the Presidency of the Council of Ministers asked the National Data Protection Commission (CNPD) to issue an opinion on the Draft Decree-Law No. 955/XXII/2021, which amends the Regulation of the Nationality Law.

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

il. Analysis

3. In order to expand access to original nationality and naturalization, Organic Laws No. 2/2018, of July 5th and 2/2020, of November 10th, made the 8th and 9th amendment of the Nationality Act.

4. Pursuant to articles 4 and 3 of those legal diplomas, respectively, it is up to the Government to make the necessary amendments to the Portuguese Nationality Regulation, approved in an annex to Decree-Law No. 237-A/2006, of 14 43/2013, of 1 April, 30-A/2Q15, of 27 February and 71/2017, of June (hereinafter referred to as the Nationality Regulation).

5. The Draft Decree-Law now submitted to the CNPD aims, precisely, to regulate the acquisition of nationality by naturalization, more specifically, the general requirements for naturalization, the naturalization of foreigners born in Portugal and the naturalization of minors, as well as the new regimes for the naturalization of minors admitted to institutions and for the naturalization of ancestors of original Portuguese citizens.

6. It also intends to regulate changes in the regime of opposition to the acquisition of nationality and the regimes of nullity and

consolidation introduced by the aforementioned legal diplomas.

7. It also carries out terminological updates, adapting the regime to the lexicon introduced by the regime of the largest accompanied and to the organic of the Instituto de Registos e Notariado, I.P. (IRN, I.P.)

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i. The current regime for the use of electronic procedures for the performance of acts and notification of applicants

8. The Portuguese Nationality Regulation, in its current wording, already provides for some situations in which requests for attribution, acquisition and loss of nationality can be processed electronically.

9. Thus, in addition to the possibility of submitting the application on paper for the acquisition of nationality by naturalization, addressed to the Minister of Justice, delivered to one of the entities provided for in no. of other public legal entities, civil registry offices or Portuguese consular services - it is allowed that that application be sent by post or electronically to the Central Registry Office and that the entity with which the application has been submitted the send it to the Central Registry Office, which can be sent electronically (Article 27).

10. Under the terms of paragraph 1 of article 32, declarations for the purposes of attribution, acquisition and loss of nationality that are provided by the persons to whom they relate may also be sent electronically.

11. Under the terms of paragraph 2 of article 18, paragraph 1 of article 27 and paragraph 1 of article 37, in the current wording, the procedure would be carried out under the conditions that came to be determined by the Minister of Justice,

12. Likewise, that legal diploma establishes that applicants are exempt from presenting the documents required for the investigation of cases when they can be obtained electronically from the competent authorities (Article 37(1)) and that the

Central Registry Office communicates with the other entities involved in the process by electronic means, whenever possible (Article 43(1)).

ii. The regime to be established through the draft decree-law

13. In order to extend the electronic processing regime to new situations, an article is now added on the electronic processing and consultation of documents (cf. art. 43-A), as follows:

14. Pursuant to paragraph 1 of this article, an obligation is established for the electronic processing of procedures for the attribution, acquisition, loss, nullity and consolidation of nationality for interested parties represented by a lawyer or solicitor, providing for the optionality for interested parties not represented by those professionals (paragraphs 1 and 2 of that article). It is now foreseen that the notification of lawyers and solicitors will also be done electronically, without, however, indicating the means.

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15. With regard to the sending of documents by the services or entities with competence to receive requests, as well as communications between these and other entities, it is not mandatory, but a preference for the use of electronic means (cf. paragraph 8 of the same article)

16. The same is prescribed for the application of certificates and certificates, which may be made available in electronic form (no. 9). Nothing is said, however, as to how they will be made available, whether by sending by email, whether they will be available on the platform through which they formulate the application and present the documents, when required.

17. Decree-Law no. 30-A/2015, of 27 February, added article 24-A to the Nationality Regulation, which establishes the requirements for granting Portuguese nationality, by naturalization, to foreigners who are descendants of Sephardic Jews.

18. For this purpose, the application must be accompanied by several documents, including a certificate issued by a "Jewish community with the status of a religious legal person, based in Portugal, under the terms of the law, which attests to the tradition of belonging to a Sephardic community" (cf. Article 24a(3)), and communications with these communities are carried out electronically (cf. Article 43a(7)).

19. It is stated that the processing of procedures and consultation by electronic means will be defined by order of the member

of the Government responsible for the area of justice (cf, paragraphs 1,7 to 9 of article 43-A).

20. And that the same will be processed in the information system supporting the processing of procedures for attribution, acquisition, loss, nullity and consolidation of nationality, providing for its interoperability with the information system of the civil registry (cf. n. Article 34(A)(12).

21. Nothing concrete, however, is said about this system. In particular, where the servers are located, who has access to the data being processed, how requests are registered and, as well, if and how the logs are recorded and for how long they will be kept, in order to monitor possible undue access to information.

22. In fact, under the combined terms of subparagraph b) of paragraph 3 with subparagraphs of paragraph 3 of article 36 of the RGPD, within the scope of prior consultation with the CNPD, the data controller must inform the CNPD, namely, “the intended purposes and means of processing” and “the measures and guarantees provided for the defense of the rights and freedoms of data subjects”. That is, it is not enough to convey, in a vague way, the intention of guaranteeing the rights and security of the system, it is necessary that, in concrete, elements are provided that allow the CNPD to pronounce itself on the adequate protection of rights and means to be used in the processing of personal data.

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23. First of all, given its heading - “[processing of personal data]” - the new article 43.b seems to intend to exhaust the regime in this matter. However, this does not happen, since its precepts are vague and incomplete.

24. If not, let's see. The legislator begins by referring in paragraph 1 that the information system to support the processing of procedures for the attribution, acquisition, loss, nullity and consolidation of nationality (hereinafter the system), aims to allow the practice of the acts provided for in the Regulation.

25. It then establishes that the person responsible for processing personal data is the chairman of the IRN, I.P. Board of Directors, who is also responsible for "ensuring the rights of information, access, opposition, or data rectification" by the respective holders, as well as ensuring the legality of the consultation or communication of information" (No. 2 and 3).

26. And in paragraph 12 of article 43,°-A, it is provided that "[t]he electronic processing of nationality procedures and the electronic consultation of processes are carried out in the information system supporting the processing of award procedures , acquisition, loss, nullity and consolidation of nationality, interoperable with the civil registration information system".

27. This provision seems to presuppose the existence or implementation of a specific platform for processing these procedures.

28. However, from the outset, the rules relating to such processing, with regard to the processing of personal data, remain to be defined, since it is only provided that the submission of applications and documentation is carried out electronically, without further ado. specifications. However, this concept also includes the communication of personal data by e-mail. And the Draft Decree-Law does not specify the electronic means to be used, referring throughout the aforementioned article 43-A to an ordinance.

29. But the processing of personal data carried out through communications by e-mail poses different and higher risks than those posed in the context of an electronic platform specifically designed for the processing of these requests - which can and must be, from scratch, designed to ensure the confidentiality and integrity of the information transmitted.

30. On the contrary, electronic mail operates, as a rule, through networks generally available on the market, making it difficult to adopt specific security measures to safeguard the integrity and confidentiality of personal data (about which this Project says nothing). It is true that entities with a legal obligation to send personal data electronically correspond to a universe

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differentiated and extended (e.g., lawyers, solicitors, Jewish communities), not all eventually endowed with the necessary resources to adopt such measures.

31. It is also true that the present draft legislation is not accompanied by the assessment of the impact resulting from the processing of personal data that it provides, in breach of the obligation imposed by paragraph 4 of article 18 of Law n° 43/

2004, of August 18, in the wording given by Law No. 58/2019, of August 8. Such an assessment, if it had been carried out and sent to the CNPD, would now allow for the recommendation of providing for specific measures to protect against risks depending on the means envisaged to carry out such personal data processing operations.

32. Failing that, the CNPD limits itself to alerting to the need to take care of the increased risks in the case of using electronic mail or any other means, which specifically does not offer security guarantees.

33. With regard specifically to the obligation that falls on "entities authorized to access data directly", the CNPD fails to understand the scope of the provisions of paragraph 5 of article 43-B, which imposes on such authorized entities the obligation to adopt all necessary measures to strictly comply with the rules prescribed in the RGPD and LERGD. In fact, the CNPD does not know which entities this provision refers to, and the hypothesis that they are the ones accessing under the terms of paragraph 4 of article 43-B does not seem congruent, since, if the data accessed does not allow the identification of data subjects, as they are anonymised, it makes no sense to apply the legal data protection regime.

34. If Article 43B(5) is intended to regulate the communication of data carried out by lawyers, solicitors and Jewish communities, among others, it cannot speak of direct access to data, because that is not the operation that is concerned.

35. It is insisted that the omission regarding the specification of the means by which such access is ensured, namely if the access is on an electronic platform, makes it impossible to understand the real scope of the provisions of paragraph 5 of article 43, °- B.

36. Another aspect that should be highlighted concerns the enshrinement in paragraph 4 of article 43-B of the possibility that the information contained in the system may be disseminated for scientific research purposes or for statistical purposes, "provided that they cannot be identifiable persons whom it respects". Assuming that the expression "cannot be identifiable" means that the data will be anonymized or, at the very least, pseudonymized, pursuant to Article 4(5) of the GDPR before being provided, nothing is said as to how this anonymization will be carried out, or who will undertake this function and with what security measures for the data.

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37. There is also nothing said that makes it possible to know whether that operation, as well as the process of transmitting these data for those purposes, will be the subject of regulation.

38. Thus, taking into account the aforementioned omissions, the CNPD recommends that these essential aspects of the processing of personal data be regulated in the Draft Decree-Law, especially taking into account the different impact that the option for the means of communication of personal data has, from the outset, on the confidentiality and integrity of this information and, therefore, the impact it may have on the fundamental rights of data subjects.

III. Conclusion

39. On the grounds set out above, the CNPD recommends clarifying and densifying the text of the project, in order to ensure compliance of data processing with the legislation applicable in this area, or, at the very least, this densification should, in relation to the observations now expended, be the object of regulation, and the normative instrument that comes to materialize it must be submitted to the CNPD's opinion.

40. For the rest, the Draft Decree-Law under analysis does not raise reservations from a data protection perspective.

Approved at the December 7, 2021 meeting

Filipa Calvão (President)