

National Data Protection Commission

OPINION/2023/50

I. Order

1.0 The President of the Commission for Economy, Public Works, Planning and Housing of the Assembly of the Republic asked the National Commission for Data Protection (CNPd) to issue an opinion on Proposal for Law No. 71/XV/1 (GOV) , which “Approves measures under the “More Housing” intervention plan (hereinafter Proposal).

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

3. This request was requested on May 16, 2023, for the issue of pronouncement until June 2, 2023.

II. Analysis

4. The present proposal, as stated in its explanatory memorandum, corresponds to “an intervention plan that intends to respond to the «More Housing» design, adding solutions and responses to the immediate needs of families, at the same time that it aims to contribute to the structural objective of reinforcing the housing supply”.

5. It was immediately added that “The regime of the special eviction procedure and the injunction in terms of rent is also reviewed, simplifying, streamlining and improving the functioning of these mechanisms, with reinforcement of the guarantees of both parts.”

6. In its final part, it is argued that this legislative initiative is part of "a structural reform, which goes beyond the horizon of the legislature - based on the promotion of new public housing responses and on the qualification of existing responses, with the mobilization of the State's unoccupied property suitable for housing -, and a conjuncture response - that allows for more immediate responses to intervene in the rental market and guarantee that everyone has access to dignified housing, adequate

to the income and size of the different households - which aims to achieve the goal of having a housing stock capable of guaranteeing decent housing for all."

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7. The legal design of this legislative initiative comprises the following chapters: I - General provisions; II - Promotion of affordable housing; III - Encourage housing rentals; IV - Reinforce security in the rental market; V - Complementary, transitional and final provisions. Some of these chapters break down into sections and subsections.

8. The purpose of this Proposal is defined in article 1, with emphasis on its paragraph 2, whose wording is as follows: "For the purposes of the provisions of the previous number, this law proceeds: a) To the creation of a support for the promotion of affordable housing; b) The promotion of a new generation of cooperativism for the promotion of affordable housing; c) The definition of exceptional and transitional rules regarding the value of rents in new lease contracts, subsequent to contracts entered into in the last five years; d) The protection of tenants with leases prior to 1990 and the guarantee of fair compensation from the landlord; e) The integration of the processing of the special eviction procedure and the injunction in matters of leasing with the Tenant's Desk and the Landlord (BAS), with a view to simplifying and improving its operation and strengthening the guarantees of the parties; f) The approval of various fiscal measures to promote and support rentals; g) The incentive to transfer apartments in local accommodation for housing lease; h) The creation of an extraordinary contribution on apartments in local accommodation; i) Revocation of residence permits for investment activities; j) The expansion of the scope of exemptions from prior inspection by the Court of Auditors".

9. Accordingly, this Proposal amends a vast legal portfolio, which is listed in paragraph 3 of its article 1, highlighting, within the scope of this Opinion, only those with an impact on the protection of personal data .

10. Thus, in the referenced chapter III - Encouraging housing leases, article 13 appears epigraphed "Harmonization of the classification system for vacant buildings", proceeding with the amendment of Decree-Law No. 159/2006, of 08 August, which deals with cases in which an urban building or autonomous fraction is considered vacant, for the purposes of applying the municipal property tax rate (IMI).

11. The amendment to Decree-Law No. 159/2006, of August 8 in question, affects Article 5, called "Duty of collaboration" to determine whether a given urban building or autonomous fraction is vacant (n. ° 1), imposing a comparison between the previous essays and those now proposed, ours being in bold:

proposed antecedent

2. Telecommunications and water, gas and electricity supply companies 2. Telecommunications companies and gas and electricity distribution companies

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provide the municipalities, upon written request, with the information necessary to identify the existence of supply or consumption contracts for each urban building or autonomous fraction, preferably through electronic communication or other computer support and water mandatorily sent to the municipalities, up to the on October 1 of each year, an updated list of the absence of supply contracts or low consumption, for each urban building or autonomous fraction, via electronic communication or other computer support.

3. The list referred to in the previous number must include the matrix identification of each building

12. Further on in article 26 of the Proposal, with the heading "Amendment to the Municipal Property Tax Code", there is a modification to its article 125, entitled "Entities supplying water, energy and telecommunications", being also to compare the essays in question:

proposed antecedent

1 - Entities providing water, energy and fixed telephone service must, by April 15, July 15, October 15 and January 15, communicate to the Tax and Customs Authority the contracts concluded with their customers, as well as any amendments made in the previous quarter. 1. By April 15th, July 15th, October 15th and January 15th, water, energy and fixed

telecommunications entities must inform the Tax and Customs Authority of contracts with final customers, as well as their changes, which occurred in the previous quarter, regarding consumption in the respective delivery point codes, universal installation code or equivalent

2. The communication referred to in the previous number must contain the tax identification of the owner, usufructuary or superficiary and respective domicile, as well as the registered article of the building, fraction or part, or, 2. The communication referred to in the previous number must contain the tax identification of the final customer and the indication of the matrix article of the urban building, in the terms described in the following number, or, in the cases

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in the case of an omitted building, the indication of the date of delivery of the declaration for its registration in the matrix. where the urban building is not identified, the georeferenced information of the place where the service is provided in the distribution network.

3. The communication is made exclusively electronically, through an official model declaration, approved by ordinance of the member of the Government responsible for the area of finance 3. Fixed telecommunications companies and water and energy distribution companies must, through the communication referred to in paragraph 1, present an updated list of the absence of consumption or low consumption, for each urban building or autonomous fraction, using mandatory matrix identification of the buildings

13. In the confrontation between the previous texts and those contained in the legislative proposal, we can see a paradigm shift in terms of the model of information to be provided by the aforementioned entities, as the duty of collaboration gives way to a duty of communication.

14. But there is also an expansion of the scope/accuracy of the information to be provided, covering the absence of a supply contract, absence of consumption and low consumption, always associated with the tax identification of the building.

15. From the perspective of the CNPD, the reading of these legislative amendments to article 5 of Decree-Law no. 159/2006, of August 8, as well as to article 125 of the CIMI should not be carried out in isolation, calling the RGPD, from the outset some of the definitions contained in article 4 of the RGPD, such as personal data (1), processing (2) and definition of profiles, also bearing in mind the diplomas where such norms are inserted.

16. Thus, "personal data" will be "information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is considered to be identifiable, directly or indirectly, in particular by reference to an identifier, such as a name, an identification number, location data, electronic identifiers or one or more elements specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;"

17. While "Processing" is "an operation or a set of operations carried out on personal data or on sets of personal data, by automated or non-automated means, such as the collection,

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registration, organization, structuring, conservation, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or any other form of making available, comparison or interconnection, limitation, deletion or undoing".

18. "Profiling" corresponds to "any form of automated processing of personal data that consists of using such personal data to assess certain personal aspects of a natural person, in particular to analyze or predict aspects related to their professional performance, your economic situation, health, personal preferences, interests, reliability, behavior, location or travel".

19. Thus, we can conclude that the nature of personal data assumes the nature of those that telecommunications companies, gas, electricity and water distributors become part of the duty of communication - and not so much the duty of collaboration - to the municipalities and the Tax Authority and Customs.

20. Such data subject to processing by private or municipal companies can outline the consumer profile of the respective natural person, namely "low consumption", although it is not known what this means, and for this purpose, the legislator must previously densify this concept.

21. On the other hand, there is a potential deviation regarding the purpose of processing personal data, since the absence of consumption or "minimal consumption" - this will no longer happen in relation to consumption that exceeds the latter -, associated with the identifying elements that integrate a contract for the provision of telecommunications, gas, electricity and water services, which are now transferred for tax purposes, both to municipalities and to the Tax and Customs Authority - it should be noted that in the analysis of the CNPD only in question the personal data of individuals and not of legal persons.

22. The circumstances referred to in items 20 and 21 require, pursuant to article 13, paragraph 2, subparagraph f) and paragraph 3 of the RGPD that telecommunications companies, gas, electricity and water distributors upon collection of personal data from the respective holder inform him of the following: i) the possibility of automated decisions to profile the absence of consumption or "low consumption", specifying the content of this concept; ii) the possibility of these same companies, in compliance with the duty of communication for the purposes of tax taxation, inform the municipalities, as well as the Tax and Customs Authority, of the personal data covered by that duty.

23. In turn, both the municipalities, as well as the Tax and Customs Authority, when obtaining this personal data through the aforementioned business entities in the implementation of the referenced duty of communication, must also inform the holders of the personal data of this occurrence, under the terms of article 14 of the RGPD, even if included in the right to be heard by the latter in the corresponding process

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administrative - cf. Article 4, No. 2 of Decree-Law No. 159/2006, of August 8; article 60, no. 4 of the General Tax Law, approved by Decree-Law no. 398/98, of 17 December.

24. The CNPD also considers the following amendments to Law No. 6/2006, of February 27, which approved the New Urban Lease Regime (NRAU), as well as to Decree- Law No. 1/2013, of January 7, which set up and defined the rules for the

National Rental Desk (BNA) and the special eviction procedure (items i) and j) of paragraph 3 of article Proposal).

25. In this regard, it should be remembered that the Balcão Nacional de Arrendamento (BNA) was created by Law No. 31/2012, of August 14, through Article 5, introducing Article 15-A into the NRAU - in the wording of Law No. 6/2006, of February 27, since the original diploma did not contain any article 15.º-A and much less reference to the BNA.

26. The rule with a foreseeable impact on the protection of individual personal data is found in article 35 of the Proposal when it amends the New Urban Lease Regime, more precisely with the introduction of the Tenant and Landlord Desk (BAS) (15.º-A).

27. It should be noted that BAS becomes the new designation of BNA, which was added by article 5 of Law no. 31/2012, of 14 August.

28. Both at the time of approval of the NRAU, as well as the alteration that first led to the creation and later implementation of the BNA, as well as the very special eviction process, the RGPD was not in force, which is why questions of compliance with the latter now arise diploma, which previously did not exist.

29. Article 35 of the Proposal reads as follows: "1 - The Tenant and Landlord Desk (BAS) is created, with the Directorate-General for the Administration of Justice, to ensure the processing of the special procedure for eviction and the injunction in matters of leasing. 2 - The BAS has jurisdiction throughout the national territory."

30. BAS has access to the elements of the eviction application, which are listed in paragraph 2 of article 15-B of the NRAU, of which we highlight; a) Identify the parties, indicating, depending on the case, their names or designations, domiciles or headquarters and the respective civil, tax or legal person identification numbers;... I) Indicate the International Bank Identification Number (IBAN) of account held by itself, attaching the respective supporting document". It is added in paragraph 3 that "If there is a plurality of tenants or the rented place constitutes a family home, the applicant must indicate as defendants all the tenants and both tenants spouses, as the case may be, and identify the respective domiciles".

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31. In turn, in opposition to the eviction provided for in article 15 - F, the projected paragraph 2 establishes that "With the opposition, the tenant identifies: a) The people to whom, under the terms of the law, the respective right is communicable;

b) The respective property regime in force, when applicable; c) Other people who, lawfully, are residing in the leased property; d) Any of the situations that lead to the suspension and/or postponement of the vacancy of the leased property under the terms of article 15-M; and e) If the lease corresponds to the family home."

32. Thus, there is an exhaustive reference to personal data, as identifying or identifiable elements of a natural person.

33. In turn, article 36 of the Proposal amended article 2 of Decree-Law No. 1/2013, of January 7, with the following wording:

"The BAS, created by article 15. °-A of Law No. 6/2006, of February 27, in its current wording, is the judicial secretariat with exclusive competence for processing the special eviction procedure throughout the national territory."

34. As can be seen from the design of the Proposal, the now designated BAS, as was already the case with the previous BNA, is a hybrid figure, as it was "created with the Directorate-General for the Administration of Justice", but is simultaneously a "judicial secretariat", but which is not foreseen in Law n.° 62/2013, of August 26, which approved the Law on the Organization of the Judiciary System.

35. As BAS has an essentially administrative structure and is disconnected from the tout court judicial system, several questions arise in the scope of the application of the RGPD.

36. The first stems from the existence of serious risks regarding the rights and freedoms of natural persons, in terms of the protection of personal data circulating in BAS.

37. In this way, it would be advisable to establish and specify the security guarantees, both in terms of integrity and in terms of confidentiality, in the automated processing of personal data, including the elaboration of a code of conduct, as results from the provisions of paragraph f) of Article 5(1) of the GDPR.

38. As such security measures are essentially technical and organizational, as well as the code of conduct is essentially directed at those who operate with such personal data, including enforcement agents and notaries, they could result from regulation through an ordinance, but which should be expressly included in the qualifying diploma, that is, in this Proposal.

39. The second also arises from the serious risks raised with the security of the personal data to be processed by BAS, which is why it would have been advisable to carry out an impact assessment on data protection of the provisions of article 35(1) of the GDPR.

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40. The third concerns the data protection officer, as the activity of BAS is outside the scope of exercising the jurisdictional function of the courts, and is therefore not covered by the exclusion provided for in the final part of paragraph a) of the Article 37(1) GDPR.

41. Lastly, Article 40 of the Proposal states that "The Government shall implement, within 60 days, an integrated system of access to information relating to the lease, from the point of view of the landlord and the tenant".

42. By the way, it should be specified what this integrated system of access to information on the lease consists of, whether it will be a personal data system or a publicity system for the "Mais Habitação" regime.

III. CONCLUSIONS

43. Under the terms and on the grounds set out above, the CNPD issues this opinion, in which it recommends:

- a) The expansion of the concept of "low consumption" contemplated in no. 2, article 5 of Decree-Law no. 159/2006, of August 8 (article 13 of the Proposal) and no. Article 125 of the Municipal Property Tax Code (Article 26 of the Proposal);
- b) The provision of the legal duty of the companies mentioned in the amendments to the previous normative segments to inform the data subject of the following: i) the possibility of automated decisions to draw the profile of lack of consumption or "low consumption", specifying the content of this concept; ii) the possibility of these same companies, in compliance with the duty of communication for the purposes of tax taxation, to inform the municipalities, as well as the Tax and Customs Authority, of the personal data covered by that duty;
- c) The legal provision of the duty to inform the holders of personal data, under article 14 of the RGPD, both by municipalities and the Tax and Customs Authority, whenever they obtain data from natural persons under the aforementioned duty of communication of the mentioned companies;
- d) The establishment and precision of security guarantees, both in terms of integrity and confidentiality, in the automated

processing of personal data, including the elaboration of a code of conduct, under the terms mentioned in 37 and 38;

e) carrying out the impact assessment on the protection of data circulating in the BAS;

f) the legal provisions of the person in charge of data protection, especially the entity that appoints him.

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g) The consolidation of the purposes of the "integrated system of access to information related to the lease, from the point of view of the landlord and the tenant"

Approved at the meeting of May 30, 2023

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