OPINION/2021/75

I. Order

1 The Committee on Budget and Finance of the Assembly of the Republic asked the National Data Protection Commission (CNPD) to comment on Bill No. prohibiting discriminatory practices, improving access to credit and insurance contracts for people who have overcome serious health risks, enshrining the 'right to be forgotten'».

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 cj of paragraph 1 of article 57, in conjunction with subparagraph b) of paragraph 3 of article 58, and with paragraph 4 of article 36, all of Regulation (DE) 2016/679, of 27 April 2016 - General Regulation on Data Protection (henceforth 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 domestic legal order.

3 This Project makes the 1st amendment to Law No. 46/2006, of 28 August, adding Article 4-A and the

2 the amendment to the Legal Regime of the Insurance Contract, approved by Decree-Law No. 72/2008, of 16 April, updating its provisions.

II. Analysis

4. Under the terms of the preamble, the Bill aims to «establish in Portugal the right to be forgotten by people who have overcome situations of aggravated health risk in accessing credit and insurance contracts. Replicating the French model, it is proposed not only the mandatory and general rule of the right to be forgotten, but also the development of rules to facilitate access to credit by these citizens through an agreement with the financial and insurance sector or in the absence of agreement by decree-law, always with the opinion of the National Data Protection Commission».

5. The CNPD cannot fail to praise the initiative of providing for a right to be forgotten in relation to personal health data that have a discriminatory potential in situations in which the analysis and weighting of these data in the risk assessment is not necessary or, at least , is excessive in relation to the degree of effective risk arising from the conclusion of insurance and credit

contracts.

6. Note that the right to be forgotten is enshrined in article 17 of the RGPD, corresponding to the obligation of the person responsible for the treatment to erase personal data when any of the

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reasons provided for in paragraph 1 of the same article; highlighting point e) of paragraph 1 of article 17, according to which "personal data must be erased in order to fulfill a legal obligation arising from the law of the Union or of a Member State to which the controller is subject'.

7. This Bill specifically enshrines a right to not be processed certain personal health data of people who have overcome situations of aggravated health risk, improving their access to credit and insurance contracts (cf. article I o), making the 1st amendment to Law no. 46/2006, of 28 August, adding article 4-A.

i. The instrument for the creation of the legal regime guaranteeing the right to be forgotten

8. The instrument for creating the legal regime guaranteeing the right to be forgotten It begins by pointing out that Article 4-A does not directly define the guaranteeing regime for the intended right to be forgotten; rather, the definition of the regime refers to a 'national agreement' to be concluded and maintained between the State '[...] and professional organizations representing credit institutions, financial companies, mutual societies, provident fund institutions and insurance and reinsurance companies , as well as national organizations representing people at increased health risk, people with disabilities and users of the health system." (cf. paragraph 1 of the new Article 4a).

9. In this regard, as it is not possible to determine which «professional organizations» will be able to represent the listed institutions, and for reasons of legal certainty, it is suggested to replace this expression with sectoral associations.

10. But, more relevant, is the doubt that sinks as to the suitability of the legal act to which, in the Bill, the primacy is given - the national agreement - to guarantee the effective adhesion of the set of institutions that operate in the national territory, despite of the provisions of Article 4a(6). In fact, assuming that there are institutions and societies that do not form part of the associations called negotiating and concluding the agreement, it is not seen how the law can determine that the agreement of professional organizations representing credit institutions, finance companies, mutual societies, social security institutions and insurance and reinsurance companies is bound by those who do not consider themselves represented by them and with regard to a business content whose legal effects are not clearly favorable to such institutions or companies and which binds them directly and immediately (contrary to what happens, for example, in the context of social consultation, in which there is still a subsequent legislative act to determine the binding legal effects). It is therefore doubtful whether this legal instrument is effectively adequate to achieve the intended purpose.

11. In any case, the option set out in paragraph 14 of article 4-A, of determining that the CNPD's prior opinion on the agreement is binding, is highlighted. If this rule is not in the legal system, it will be justified by the particularly sensitive nature of personal data, falling within the scope of Article 9(4) of the GDPR.

12. Furthermore, the alternative solution provided for in paragraph 15 of article 4-A - in the absence of an agreement or in the event of its waiver or non-extension or renewal, the legal regime is defined by decree-law - is not clear about its nature. Indeed, as the regime focuses on rights, freedoms and guarantees, its definition is up to the Assembly of the Republic, so the Bill would have to assume the nature of an authorization law - cf. subparagraph b) of paragraph 1 of article 165.3 of the Constitution of the Portuguese Republic (CRP). However, in that case, it would be important to comply with the provisions of Article 165(2) of the CRP, in particular as regards the duration of that authorization (with added difficulties as regards the determination of the timing of that period).

13. The CNPD therefore recommends reviewing the legislative option set out in paragraph 1 and paragraph 15 of article 4-A, in

order to ensure that the legal regime relating to guaranteeing the right to be forgotten here in question is defined in a suitable legal instrument to fulfill the intended purpose.

ii. The legal regime for the processing of personal data of the holders of this right to be forgotten

14. The provisions of article 4-A are now considered, which prescribe the regulatory elements on which the agreement (or decree-law) must relate, revealing for this opinion the provisions that directly relate to the processing of personal data.

15. This agreement, which has the objective of facilitating access to credit for people who have overcome situations of aggravated health risk or with disabilities, as well as ensuring that credit institutions or financial companies take into account their rights, freedoms and guarantees, it must define specific modalities of data and information that may be required, for the collection, use and assessment of this information and its guarantees of confidentiality (cf. Article 2 of the Project).

16. It is recommended, from the outset, that the terminology used, especially in subparagraph cj of no. : instead of 'specific modes of data' specific categories of data and, instead of 'modalities of collection, use and assessment of such information-', the operations of processing such data and information.

17. A note on point 10 of Article 4a, now added to Law No 46/2006, which provides that 'Applicants for credit or insurance contracts are informed of the provisions of this article, in format and language intelligible to non-specialists, and the applicant must sign that he has become aware of these provisions'. Such provision, of a contractual nature, does not replace or prejudice the information to which the data subject is entitled under Articles 12 and 13 of the GDPR.

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18. Regarding the stipulation of the relevant terms and deadlines for the purposes set out in paragraph 7, it is accepted that what is intended to be aimed at in subparagraph b) is health information and not «medical information», as this is which,

corresponding to a broader concept, is, as a rule, relevant in the pre-contractual context in the interaction of individuals with credit institutions or insurance companies and which is, moreover, subject to enhanced protection under Article 9 of the GDPR. In this regard, see articles 2 and 5 of Law No. 12/2005, of 26 January, amended by Law No. 26/2016, of 22 August.

19. It is also recommended to revise the wording of paragraph 7, as the subject of the sentence in paragraph b) is not the same as the sentence in paragraph a). In short, in order to understand what is stated therein, the following wording is suggested:

7- The agreement determines the terms and deadlines beyond which:

a) Persons who [...} cannot be subject to a price increase or exclusion of guarantees from insurance contracts;

b) No health information regarding the clinical situation that [...]

20. Also with regard to the periods after which certain processing of personal data is prohibited, Article 4-A(8) refers to 'a reference grid that allows defining the terms and deadlines referred to in the previous number for each pathology or disability», determining the publicity of the same by the State on the relevant websites, without specifying which are the relevant sites. For reasons of legal certainty and certainty, it would be desirable to densify this indeterminate concept at the legislative level - relevant internet sites -, not least because it can be justified that this publicity duty does not fall exclusively on state bodies, but also on other administrative entities that do not formally form part of the legal person State.

21. Also with regard to deadlines, paragraph 11 of the same article prohibits the collection by credit institutions or insurers in a pre-contractual context of medical information regarding the situation that gave rise to the aggravated health risk, provided that they have elapsed since the end of the contract. of the therapeutic protocol ten years or, in case the pathology occurred before the age of twenty-one, five years.

22. In addition to the recommendation made above in point 20 making sense here (in order to replace the expression "medical information" by health information), paragraph 11, as well as paragraph 7, present a difficulty regarding its feasibility.

23. In fact, the collection and analysis of information regarding the clinical situation of people who seek credit institutions and insurance companies is a practice that these entities have adopted, for a long time, for the purpose of risk management in credit and insurance activities. In this regard, the CNPD insists that this practice continues without the proper legal framework, in view of paragraphs 1 and 2 of article 9 of the GDPR and in the face of silence

of Law No. 58/2019, of August 8, and other legislation relating to insurance contracts and insurance and reinsurance activity regarding the provision and regulation of the processing of personal data relating to health by insurers, its definition being urgent at the legislative level/ It could thus be possible, through this Bill, to fill this gap, regulating in detail the conditions for such data processing, in terms of access.

24. However, considering that, in the near future, the appropriate legal framework will be approved, the CNPD has difficulty understanding how people respond, in the pre-contractual context, to the questionnaires presented by such institutions regarding their past clinical situation and present, without revealing the situation that gave rise to the aggravated health risk and, above all, how to ensure that any failure to provide this information complies with the deadlines defined in paragraph 7(b) and in paragraph 11.

25. It is strange that the legislator regulates the ban on access to customer health information within a certain time limit by these entities, without regulating any form of confirmation of the expiration of that period, not specifying how to control the veracity of the applicants' statements in this regard.

26. In fact, either the institutions would have to collect this clinical information and confirm the expiration of the applicable deadline, but, once verified and confirmed, they would be prohibited from using this personal data regarding the past clinical situation of their potential clients, or they would have to the intervention of a third entity that would be responsible for carrying out this verification.

27. The CNPD recommends, therefore, that the solutions provided for in Nos. 7 and 11 be accompanied by the essential normative densiication in the Bill itself, regulating which personal data can be processed and the ways of verifying the presuppositions of the right to oblivion, otherwise those rules will not be enforceable and, thus, the content of the right to oblivion that one wants to create will be emptied.

III. Conclusion

28. On the grounds set out above, the CNPD recommends reconsidering the legislative option set out in no. 1 and no. 15 of

article 4-A of Law No. 46/2006, of 28 August, added by the of Law, so that

1 See, for example, Opinion 20/2018, of May 2, 2018, where it says "The CNPD notes the absence in the RGPD of a direct basis for the lawfulness of the processing of health data within the scope of insurance contracts and the need definition of a legal regime: specific to this treatment, warning from the outset that the mere legal provision for the treatment is not sufficient », available at https://www.cnpd.pt/decisoes/historico-de-decisoes/7veam2018&tvpe=4&ent =

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ensure that the legal regime regarding the guarantee of the right to be forgotten in question is defined in a suitable legal instrument to fulfill the intended purpose.

29. Specifically regarding the relevant deadlines for the purpose of guaranteeing the right to be forgotten, the CNPD recommends that the solutions provided for in paragraphs 7 and 11 of article 4-A be accompanied by the essential legislative densification of the personal data that can be processed and the ways of verifying the presuppositions of the right to be forgotten, under penalty of those rules not being enforceable and, thus, emptying, in fact, the content of the right to be forgotten that one wants to create.

30. For reasons of legal certainty and certainty, the CNPD also recommends:

a) Harmonization of the terminology used, in particular in subparagraph c) of paragraph 2, with the data protection legislation;

b) Revision of the wording of paragraph 7, also using the concept of health information instead of medical information (and still in paragraph 11);

c) The densification of the undetermined concept «relevant internet sites» and the specification of the public entities linked to the duty of publicity of the reference grid, in paragraph 8.

Lisbon, June 9, 2021

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