

,O.

NATIONAL DATA PROTECTION COMMISSION

OPINION/2020/50

I. Order

The Human Capital Operational Program Management Authority (PO CH), submitted to the National Data Protection Commission (hereinafter CNPD), for an opinion, the Protocol to be granted with the Directorate-General for Education and Science Statistics (DGEEC), the Social Security Institute, I.P. (ISS, IP) and Instituto de Informática, I.P. (II,IP), “which underpins and regulates the joint processing of personal data between the public entities involved, aimed at obtaining result indicators covered by operations financially supported by the PO CH’.

The CNPD issues an opinion within the scope of its powers 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, in conjunction with subparagraph b) of paragraph 3 of article 58, and with paragraph 4 of article 36, all of Regulation (EU) 2016/679, of 27 April 2016 - General Regulation on Data Protection (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 August, which enforces the GDPR (hereinafter, Law of Enforcement) in the domestic legal order.

AV. D. CARLOS I, 134 - Io | 1200-651 LISBON | WWW.CNPD.PT | TEL: +351 213 928 400 I FAX: +351 213 976 832

Process PAR/2020/22 1v.

II. Protocol object

This protocol outlines the processing of personal data in order to determine the result indicators required in all programs supported by the European Structural and Investment Funds (ESIF)¹, where OP CH2 fits.

In Portugal, Decree-Law no. 159/2014, of 27 October, successively amended, lastly by Decree-Law no. operational and rural development programs financed by the European Structural and Investment Funds, for the 2014-2020 programming period.

Since its article 6 contains a general principle of orientation towards results that reflects the need to verify the operation for the achievement of the achievement and result indicators of the specific objective and investment priority. This specification of indicators must be provided for in specific regulations, in accordance with paragraph 3 of the aforementioned article.

The Regulation Establishing Common Standards on the European Social Fund (established in Ordinance No. 60-A/2015, of 2 March, successively amended, lastly by Ordinance No. 382/2019, of 23 October) is aimed precisely at translate this principle into verifiable indicators. Article 18(1) provides that In relation to apprenticeship courses, professional courses, technological specialization courses, higher professional technical courses, education and training courses and adult and secondary vocational courses,

1 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013, successively amended, lastly by Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020, lays down common provisions relating to the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund, which lays down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund. Article 27(4) provides that Each priority establishes indicators, and the corresponding targets, expressed in qualitative or quantitative terms, in accordance with the specific rules of the Funds, to assess the progress made in the implementation of the program. in terms of meeting the objectives that serve as a basis for monitoring, evaluating and reviewing performance. The 2014-2020 partnership agreement between Portugal and the EU describes, in point 1.3.5, the thematic objectives for the Capital domain Human (available at [http://www.qren.pt/np4/np4/?newsId=42Q9&fileName=PARTNERSHIP AGREEMENT.pdf](http://www.qren.pt/np4/np4/?newsId=42Q9&fileName=PARTNERSHIP%20AGREEMENT.pdf)).

2 The PO CH is provided for in subparagraph iii) of subparagraph a) of no. 1 of article 2 of Decree-Law no. 159/2014, of 27 October.

Process PAR/2020/22 2

v NATIONAL COMMISSION £. DATA PROTECTION

only operations that aim to achieve at least 50% employability of trainees within the six months following the end of the course in question are financed, which must be included in the results to be contracted with the beneficiaries. As for its paragraph 2, it is specified that, For the purposes provided for in this article, employability is measured by verifying the payment of Social Security contributions, through the competent bodies, and the continuation of studies by verifying with the body with delegated competence for education and science statistics.

In turn, the Specific Regulation for the Domain of Human Capital³, in its article 17, alludes, once again, to the concept of result

indicators, this time specially designed for this domain, detailing, in paragraph 2, matters such as the percentage of graduates or students transferred to training offers or vocational courses supported by PO CH.

To operationalize the verification of these result indicators, the PO CH Management Authority, the Directorate-General for Education and Science Statistics (DGEEC) and the Social Security Institute, I.P. (ISS.I.P.) and Instituto de Informática, I.P. (M.I.P.). Among all, the protocol under analysis will be signed, specifying that the first three entities participate as responsible for the treatment and the II, I.P. as a subcontractor. DGEEC also participates in the additional condition of subcontractor to the Managing Authority of the PO CH.

Two annexes were attached, the first referring to the variables (among which personal data are listed) that will be used for the processing operations and the second reproducing the Impact Assessment on Data Protection that the entities carried out, under the terms of article 35 of the GDPR.

J Established in Ordinance No. 60-C/2015, of 2 March, successively amended, lastly by Ordinance No. 159/2019, of 23 May.
AV. D. CARLOS [, 134-Io! 1200-651 LISBON | WWW.CNPD.pt 1 TEC +351 213 928 400 | FAX: +351 213 976 832

Process PAR/2020/22 2v.

III. appreciation

As already noted, the Management Authority of OP CH4, the DGEEC and the Social Security Institute, I.P. assume joint responsibility for processing the data necessary to determine the result indicators of the programs supported by the ESI Funds. This qualification is understood in view of the specific responsibilities of AG POCH, as provided for in paragraph 1 of article 19 of Decree-Law, no. 137/2014, of 12 September^{5 6}. Also the DGEEC and the Instituto da Segurança Social, I.P., logically appear to be responsible, given that national legislation, namely the Regulation Establishing Common Standards on the European Social Fund, as already mentioned above, determines that, for the purposes of determining the results, employability measures through verification of the payment of contributions to Social Security], through the competent bodies, and the continuation of studies by verification with the body with delegated competence for education and science statistics/7]..

As for Instituto de Informática, I.P., its status as a subcontractor is explained by the auxiliary mission of Instituto de Segurança Social, I.P., which derives from the powers conferred on it by subparagraphs a) and f) of paragraph 2 of article 3 . of Decree-Law No. 196/2012, of 23 August.

The DGEEC also appears as a subcontractor in relation to the AG of the PO CH, since it will receive the data of the

beneficiaries of the operations financially supported in the execution of the PO CH and, with them, will proceed to the identification of who effectively continued or concluded its

4 That, pursuant to paragraph 8 of article 19 of Decree-Law No. 137/2014, of 12 September (successively amended, lastly by Decree-Law No. 127/2019, of 29 September August), assumes the nature of a mission structure, as provided for in article 28 of Law no. December 22.

3 Where it is prescribed that The managing authority is the entity responsible for the management, monitoring and execution of the respective OP or PDR.

6 Cf. Article 3(2)(a) of Decree-Law No. 83/2012, of 30 March, amended by Decree-Law No. 167/2013, of 30 December.

7 In this case, the DGEEC, pursuant to paragraph 2 of article 2 of Regulatory Decree no. 13/2012, of 20 January.

Process PAR/2020/22 3

■ NATIONAL COMMISSION

■ DATA PROTECTION

studies, converting such information into completion or continuation rates that will be returned to the PO CH AG.

• Treatment cycle

The purpose of the processing is provided for in paragraph 1 of article 2: "The processing of data covers operations carried out by jointly responsible persons and subcontractors, on personal data intended to obtain result indicators covered by operations financially supported in the execution of the Human Capital Operational Program, PO CH, and which includes completion rates, continuation of studies and employability for the types/ogies identified in Annex I of this Protocol, which is an integral part of it."

The data processing cycle will begin with the provision, by the PO CH AG to the DGEEC, of a list of participants/trainees (individuals) to be considered for the calculation of the indicators. In turn, that Directorate-General proceeds with the compilation of information on enrolled students and graduates, as well as the identification [djo universe of participants/trainees who did not continue their studies, by operation, after which it requests, annually, information on the respective situation of employment to the Social Security Institute and the Instituto de Informática, I. P. (...) which are responsible for carrying out the operations and processing corresponding to the verification of compliance with the benefits due to Social Security. Finally, and after these operations, the DGEEC sends the results obtained to the PO CH AG, in a pseudonymized form^{8 9 10}, which allow

the latter to assess the necessary result indicators.

The personal data relating to the different treatments provided for in the protocol, as well as the information on these treatments, must be kept in accordance with Article 132 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council, in

8 Cf. Article 3(5)(a) of the Protocol.

9 Cf. subparagraphs b) and c) of the same article.

10 Since the pseudonymization process is addressed in the Impact Assessment on Data Protection attached to the protocol, which will be mentioned in the section on security measures.

Av. D. CARLOS I, 134 - 1o | 1200-651 LISBON | WWW.CNPD.pt | TEL: +351 213 928 400 | FAX: +351 213 976 832

Process PAR/2020/22 3v.

July 18, 2018. It admits two different conservation periods¹¹: for loans with amounts up to 60,000 euros, the period is three years, counting from the payment of the outgoing or, in the absence of such payment, counting from the transaction, for amounts greater than that amount, the term is five years.

Despite the fact that Article 9(3) of the protocol indicates that each controller sets the retention period on a case-by-case basis and justifiably, it seems to us that, given the legal provision of the article referred to in Article 132, there is no real autonomy for the determination of these deadlines, respecting what is specified therein.

* Personal data

The personal data necessary to guarantee the purpose of the treatment are provided for in article 10 of the protocol, although there is only reference to Annex I thereto. Looking at the aforementioned annex, a set of variables can be observed divided into two groups: formative variables and variables of Higher Education Scholarships and Advanced Training.

In the group of the first we find the following data: no. identification document; document type (only in formative variables); Name; birth date; genre; NISS [This direct identifier may not be filled in]; TIN; [This direct identifier may not be filled in]; employment situation (Status at the start of the operation - Adult Education and Training courses only).

As for personal data in the group of variables for Higher Education and Advanced Training Scholarships, the following are listed: identification document no.; Name; Birth date; Genre; NISS [This direct identifier may not be filled in]; TIN

" There is, however, the possibility that the information will be kept for a longer period, under the terms of paragraph 2 of the

same article, when it refers to records and [...] documents relating to audits, appeals, disputes, the filing of complaints regarding legal commitments, or investigations by OLAF, [which] are kept until the conclusion of such audits, appeals, disputes, complaints or investigations. In the case of records and documents relating to OLAF investigations, the retention obligation applies after the investigations have been notified to the addressee.

Process PAR/2020/22 4

NATIONAL COMMISSION

, DATA PROTECTION

There is also a third group which details the personal data processed between DGEEC and Instituto de Informática (II), namely: NIF; [This direct identifier may not be filled in]; NISS; [This direct identifier may not be filled in]; Name; Birth date; Document Type; Document number; Genre.

The annex points to a segregation of these data sets from another one called “Business data”, among which are the “type of grant”, “participant’s actual start date”, “Scholarship holder status”, “Employment status” It is important to emphasize that, while this information can be and is used in conjunction with the aforementioned sets, contributing, allowing or complementing the identification of the data subjects concerned, they must also follow the same regime of use and protection applicable to other data. personal.

Regarding this set of “business data” one cannot fail to notice critically the mention of “gender” as appearing in them. If the logic that seems to govern the distinction between personal data and other data is precisely to separate two universes that (supposedly) do not touch, the inclusion of the data “gender” in a category that does not constitute personal data seems incomprehensible.

A final note for the optional or hypothetical nature of sending various personal data listed¹². The essentiality of the communication of these data must be evaluated in the light of the purpose of the treatment, knowing what determines the principle of data minimization, registered in subparagraph c) of paragraph 1 of article 5 of the RGPD, regarding this requirement.

- Security measures

Pursuant to paragraph 1 of article 6, the parties undertake to adopt the technical and organizational measures necessary to ensure the encryption of files and communications, as well as the pseudonymisation of personal data processed under the

terms of this

12 Those marked with the mention [This direct identifier may not be filled in].

AV. D. CARLOS I, 134' lo I 1200-651 LISBON I WWW.CNPD.pt ! TEL: +351 213 928 400 | FAX: +351 213 976 832

Process PAR/2020/22 4v.

Protocol. These are, moreover, the main measures for mitigating the privacy risk envisaged.

The document, however, does not mention, in a clear or detailed way, the procedures of configuration and transmission of information between entities, referring only to rules and regulations¹³, which, in itself, is considered vague.

This matter is further discussed in the Impact Assessment on Data Protection (AIPD), attached to the process, which, from the outset, refers to point-to-point encryption, using strong symmetric keys and the use of a second means of communication. in sending the password, measure appropriate to the risk of the processing operations in question.

Also regarding what is provided for in the AI PD, precautions are revealed regarding the registration of personal data processing operations, as well as the training and information of those involved in this activity, which could be included in the text of the protocol. Likewise, the segregation of the computer network regarding the registration, treatment and storage of files, whose nominal access should be allowed exclusively to technicians assigned to that activity(ies), constitutes another measure whose transcription into the text of the protocol would be relevant.

Finally, with improvements related to security control in physical access being identified and planned, according to table 3 of the AIPD, without objectively clarifying which physical spaces are involved, the question arises as to what type of improvements will be necessary. and how important they are in the general framework of treatment safety. Its breakdown and possible timing would be relevant elements in the management and containment of risks for the protection of personal data.

13 Cf. no. 5 of article 6. The parties must implement the measures defined by the international standard ISO/IEC 27001:2013 and/or by RCM n^o 41/2018, of 3/28, as well as community standards, legislation and specific national recommendations on information security.

Process PAR/2020/22 5

NATIONAL COMMISSION

■ DATA PROTECTION

® Rights of data subjects

Contrary to what its title indicates (Rights of data subjects), article 7 of the protocol does not regulate any rights of data subjects, limiting itself to repeating the obligations that the RGPD sets out for any controller.

Currently, the wording of paragraph 1 of the article is as follows: Each of the grantors, in relation to their own or joint competences, for the purposes of the protocol, assumes responsibility for ensuring the effective exercise of the rights of data subjects, as well as of the information duties referred to in articles 13.0 and 14 of the RGPD, through the public availability of data protection and privacy policies, the use of accessible and efficient communication channels, with clear information and contact details of the person responsible for the treatment and the respective data protection officer (DPO), or other means that are appropriate within the scope of the processing operations.

Apparently, the intention of the signatories of the protocol (responsible for the treatment) is to regulate the processing of personal data, in accordance with the provisions of Article 26(1) of the GDPR¹⁴. However, if that is the case, it is not enough to reproduce the text of the GDPR or to say that it is through the public availability of data protection and privacy policies, the use of accessible and efficient communication channels, with clear information and contacts of the person responsible for the treatment. and the respective data protection officer (DPO), or other means that are appropriate within the scope of the processing operations that fulfill the obligations provided for in the GDPR.

What Article 26 of the Regulation aims at (and its recital 79 explains) is the effective delimitation of responsibilities between the various controllers, so that, from the outset, the data subject knows, as precisely as possible, who is responsible for responding to him when he intends to exercise his rights and, at the same time, to which

14 Where the joint controllers are expected to determine, by mutual agreement and in a transparent manner, their respective responsibilities for compliance with this regulation, namely with regard to the exercise of the data subject's rights and the respective duties to provide the information referred to in Articles 13 and 14, unless and to the extent that their respective responsibilities are determined by Union law or the law of the Member State to which they are subject.

Av. D. CARLOS I, 134 - 1o | 1200-651 LISBON | WWW.CNPD.PT | TEU+351 213 928 400 | FAX:+351 213 976 832

Process PAR/2020/22 5v.

prevent supervision from being rendered useless and any measures adopted by the supervisory authority unfeasible.

This objective is not met in the text of the protocol, although it is recognized that the various provisions of the same help to organize the role of each of the signatory entities. In any case, if it is mandatory to provide the essence of the agreement (...)

to the data subject, it is important that it concentrates on the fundamental aspects that allow the full exercise of the rights of data subjects by virtue of mere consultation of that document.

Article 7(2) of the protocol is limited to stating that, in cases such as the one regulated by this instrument, in which personal data are processed in a way that goes beyond the initial purpose for which they were initially collected (the so-called misuse of purpose), those responsible must comply with Article 14(4) and Article 6(4) of the GDPR.

Paragraph 3 points to a less logical and understandable conclusion. It is admitted that it says that there are no special categories of data or data related to criminal convictions and infractions, since none of the personal data listed in Annex I corresponds to such categories. What can no longer be accepted is the statement according to which the data processing operations covered by the protocol do not configure large-scale processing operations...

Indeed, the purpose of the processing of personal data that guides and underlies the protocol under analysis is to ensure the verifiability of the result indicators of the programs financed by the ESIF. And this purpose can only be achieved if all data subjects participating in the “operations” or “training offers” are considered, since there is no provision, in European or national legislation, for any method of partial analysis or sampling.

Since the definition of large-scale processing is not provided for in the GDPR, we use the guidelines of the European Data Protection Committee (CEPD)

Process PAR/2020/22 6

r

NATIONAL COMMISSION

, DATA PROTECTION

as to Data Protection Officers* 15, to support our understanding. Section 2.1.3 recommends some guiding criteria to determine whether or not large-scale processing is involved: the number of data subjects affected -as a concrete number or as a percentage of the population concerned; the volume of data and/or the scope of the different data elements being processed; the duration, or permanence, of the data processing activity; the geographic scope of the processing activity.

However, these treatments concern all the trainees of the operations and training offers financed by the FEEI in the context of the PO CH, which certainly encompass a very considerable number¹⁶ of people, cover a significant set of personal data of the beneficiaries, relating to the entire national territory . Thus, it is not foreseeable how treatments subject to the discipline of the

protocol can fail to be classified as large-scale.

- Aspects to be clarified

When comparing the protocol with the AIPD that assessed the risks for the protection of personal data processed, there are some points of inconsistency that should be clarified.

First of all, the mention, in Annex II of the IAPD, in the table relating to legal controls, to consent is strange. Since there doesn't seem to be any timing in the treatments

15 Available at https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=612048.

15 This assertion is based on the known figures in the DGEEC publication "Education in Numbers - Portugal 2019", available at <https://www.poch.pt/pt-pt/Candidaturas/Documents/DGEEC.pdf>.

On the PO CH page (<https://www.poch.pt/pt-pt/Noticias/Paginas/noticia.aspx?nid=40>) express mention is made of this statistical report, noting that No 2017/2018 academic year, 204,713 students were enrolled in Scientific-Humanistic courses, 116,722 in Vocational Education, 23,113 in EFA courses, 21,869 in Learning Courses and 18,998 in the process of Recognition, Validation and Certification of Competencies. with the exception of the offers of Scientific and Humanistic courses, the others are supported by the PO CH within the scope of the European Social Fund.

Also the publication on the European Commission's report on the 2014-2020 ESFs, on the CH PO page (<https://www.poch.pt/pt-pt/Noticias/Paginas/noticia.aspx?nid=32>), is clear in this aspect: In Portugal, and with data reported as of September 30, 2018, PO CH supported close to 400 thousand trainees, in a total investment of around three billion euros.

Av. D. Carlos I, 134 -1

1200-651 LISBON | WWW.CNPD.PT | TEL: +351 213 928 400 | FAX: +351 213 976 832

Process PAR/2020/22 6v.

of personal data under evaluation in which consent is requested from the data subjects, even because there is a legal obligation to provide and analyze this information, this note is deemed unreasonable.

This apparent misunderstanding is reinforced by the reference, on the same page, to the information to be provided to the data subjects, which again states that Data subjects are informed through the choice provided for in the consents (...) of the respective subcontractors or jointly responsible entities by treatment. And it appears, again, on page 21, in the opinion of the

Data Protection Officer (EPD) regarding the rights of holders¹⁷, in addition to appearing in the verification table for an acceptable IAPD

- points 14 and 15.

In fact, the apparent contradiction between these passages regarding consent and the true basis of the legality of the treatments is exposed in the EPD's assertion that, in the set of these treatments, the right to data portability is inapplicable¹⁸, which is understandable.

Another point that causes some strangeness is the one concerning the conclusion that the right of access is inapplicable, which appears in the aforementioned verification table for an acceptable IAPD

- point 16. In this same point, reference is made to the opinion of the EPD, which makes no mention of this right. Since, in the table, access and portability rights appear on the same line, it is believed that there may have been some lapse in this assessment. Without prejudice to any revisits that this table deserves, it is recognized that this departure is not provided for in the text of the protocol.

Also worthy of some attention is, in turn, what the EPD states regarding the non-existence of international transfers, in a non-anonymized form in the draft protocol under evaluation. The first note concerns the meaning that follows from this phrase, 17 Regarding the rights of data subjects, they are guaranteed through consent mechanisms or privacy statements by DGEEC and its subcontractors (entities that provide training - schools, IES, training centers), and contractual clauses by the PO CH...

18 Cf. page 21 of the AIPD - The overall assessment for an acceptable AIPD.

Process PAR/2020/22 7

NATIONAL COMMISSION

DATA PROTECTION

does it mean that there are no such transfers, or just that they are not identified in the protocol?

In any case, and this is the second note, it was not possible to identify, in the text of the protocol, any mention of international transfers. And it will be relevant to clarify whether they exist and, if they exist, to detail them; if not, expressly state it in the protocol text, suggesting this change.

III. Conclusion

The protocol to be concluded between AG PO CH, DGEEC, ISS, IP and II, IP, aims at a set of treatments of considerable

complexity, either by the number of entities involved, or by the volume of data used, or, still, by the number of data subjects covered.

The existence of an impact assessment on data protection is welcomed, although some of its details may merit revisiting.

As for the text of the protocol, and because it seeks to safeguard, at the same time, subcontracting and joint responsibility relationships, it is crucial that it properly reflects the global requirements referred to in the GDPR.

Thus, and based on the above grounds, the CNPD recommends:

1. Clarification, in clause 5.a, no. 1, point a), of the Protocol, of the categories of personal data processed, as well as the scrupulous compliance with the principle of data minimization, avoiding the use of information that is not essential;
2. The insertion, in the protocol text, of the following elements:

The. the procedures for configuration and transmission of information between entities;

B. the implementation of precautions regarding the registration of personal data processing operations, as well as the training and information of those involved in this activity;

AV. D. CARLOS I, 134 - r I 1200-651 LISBON I WWW.CNPD.pt I TEL:+351 213 928 400 I FAX:+351 213 976 832

Process PAR/2020/22 7v.

ç. the need for segregation of the computer network regarding the registration, treatment and storage of files, whose nominal access should be allowed exclusively to technicians assigned to that activity(ies).

3. The breakdown and possible timing of improvements related to security control in physical access to the means and facilities dedicated to the processing of personal data;

4. Transparent regulation of how the rights of data subjects will be implemented by each of the entities;

5. The revision of paragraph 3 of article 7, correcting the statement according to which, in the context of the protocol, there are no large-scale data processing;

6. The express mention of the existence (and respective regime) or non-existence of international data transfers;

7. In view of some of the most equivocal aspects detected in the IAPD, their eventual review and correction.

Approved at the meeting of May 6, 2020

ilipa Calvão (President)