National Data Protection Commission

OPINION/2021/26

I. Order

1. The Committee on Budget and Finance of the Assembly of the Republic asked the National Commission for Data Protection (CNPD) to comment on the Draft Law No. 606/XIV/2.a (PSD Parliamentary Group) - «Approves the legal regime for the declassification of contracts or other documents that compromise the State or other entities included in the budgetary perimeter in fundamental sectors".

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, 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 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 n° 58 /2019, of 8 August, which enforces the GDPR in the domestic legal order.

II. Analysis

3. The Bill in question seeks to define the legal regime for the «declassification of contracts entered into by the State or other entities included in the budgetary perimeter in the transport sectors, including railways and airports, communications, energy, water and banking, that imply the commitment or use, directly or indirectly, even temporarily, of public resources», and also includes the documents and information inherent to those contracts (cf. Article 2 of the Bill).

4. It is intended that the declassification of contracts and other documents - which are classified as confidential or confidential - can be approved, by a simple majority, by the Plenary of the Assembly of the Republic, through a resolution, which must define the content of the documentation that must be made public, as well as the respective justifications, according to the principle of overriding interest, which takes into account the right of taxpayers to information (cf. paragraphs 2 and 3 of article 3 of the Draft Law) .

5. And the effect resulting from this declassification is, under the terms of paragraph 3 of article 5 of the Bill, that the documentation and information becomes public.

i. The disclosure of personal data contained in contracts and other documents and information to those inherent

6. It is understood that the basis of the solution envisaged in this Bill, which aims to subject contracts that involve public expenditure to public scrutiny, is the principle of public transparency.

7. The effect resulting from the declassification, of making public and accessible by anyone the information contained in the contracts that imply public expenditure does not give rise to reservations, from the perspective of the protection of personal data, insofar as such availability is made under the same terms as the which is currently foreseen for public contracts, which already safeguards the principles of minimizing personal data and the need to know, as principles implementing the principle of proportionality (cf. articles 127 and 465 of the Public Contracts Code and article 27 of Law No. 58/2019, of 8 August).

8. A different question arises regarding the documents and information inherent to those contracts, referred to in paragraph 2 of article 3 of the Bill. Regarding the set of information and documentation that is inherent to those contracts, it appears that the Project does not reflect an effective balance between the constitutional values at stake, within the framework of the democratic rule of law in which we operate, and which even seems to forgetting the provisions of article 268 of the Constitution of the Portuguese Republic (CRP), which, by enshrining the right of access to administrative archives and records, safeguards the legal norms that protect people's privacy.

9. From the outset, and as far as it is relevant for the purposes of the assessment by the CNPD, it must be noted that this information and documentation may contain information relating to individuals, as is expressly provided for in paragraph 5 of article 3. ° of the Project; there it is stated that the intended declassification "may include the disclosure of the name of natural persons [...] who have caused losses, the use or commitment of public funds, directly or indirectly [...], as well as the contractual conditions that may exist, with the exception of the details of the civil or tax identification numbers, the domicile address and personal contacts'.

10. This information may also be covered by bank secrecy, and which article 4 of the Project definitively excludes. It is well known that the banking secrecy regime is also based on protecting the privacy of banking institutions' customers. far beyond that relating to the patrimonial situation of natural persons1, also revealing their habits (location) and frequency preferences of types of establishments, etc.

1 Regarding this dimension, see judgment no. the knowledge of their active and passive movements reflects a large part of the particularities of the economic, personal or family life of the respective holders. Through the investigation and analysis of bank accounts, it becomes possible to penetrate the strictest zone of private life. In fact, it can be said that, in modern society, a current account can constitute "the personal biography in numbers". Is this Court in a position to state that the citizen's economic situation, reflected in his bank account,

11. To that extent, the disclosure, to any person who wishes to access that information, of personal data (even with the exclusion of certain identification and contact data) necessarily implies a restriction of the protection of personal data recognized by the CRP, in Article 35, as well as the restriction of the privacy of the persons covered in this way (even if, above all, in its patrimonial aspect), with the consequent restriction of the fundamental right to respect for private life, enshrined in Article 26. of the CRP - being certain that such fundamental rights, thus restricted, are also enshrined in the Charter of Fundamental Rights of the European Union (hereinafter the Charter), in articles 7 and 8.

12. It should be noted, in this regard, that the provision of personal data revealing the dimensions of private life constitutes a measure that has a high impact on the legal sphere of the respective holders.

13. It should be noted that the provision of making available the name of natural or legal persons who have caused losses, the use or commitment of public funds, directly or indirectly (since greater than a certain amount) obviously has a stigmatizing effect. Added to this is the difficulty of delimiting the universe of people who belong to such a defined category: are they people who have been the subject of final and unappealable judicial decisions in which this fact is clearly demonstrated? Since it was not, and the law would have to make it explicit so that there is no doubt, the dissemination of this type of information has the

effect of promoting popular judgments, obviously inadmissible in a democratic State of Law.

14. In this way, it can only be concluded that the provision of information with personal data, with the scope declared in paragraph 5 of article 3 of the Project, represents a restrictive legislative measure of the rights, freedoms and guarantees enshrined in Articles 26 and 35 of the CRP (and in Articles 7 and 8 of the Charter), which is unnecessary and excessive, in direct violation of the principle of proportionality (cf. Article 18(2)) . of the CRP).

15. Furthermore, the indeterminacy and imprecision in the definition of the information or documents covered ("documents and information inherent to those contracts"; "individuals or legal entities that have caused losses, use or commitment of public funds, directly or indirectly"2) reinforces the conclusion of the disproportionality of such a provision. The CNPD allows itself to recall that, within the scope of restrictions on rights, freedoms and guarantees, it is an inherent requirement of the Rule of Law that measures

including the active and passive operations registered therein, is part of the scope of protection of the right to privacy of private life condensed in article 26(1) of the Constitution, with banking secrecy emerging as an instrument to guarantee this right ».

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laws guarantee the predictability of such restrictions, so that the legislator is required to define the precise and exact extent of the restriction and, therefore, of its object, which is clearly not the case here.

16. Also in this regard, it is important to pay attention to the provisions of paragraph 3 of article 3 of the Bill, where it is defined that the declassification resolution must define the content of the documentation or information that must be made public, as well as the justifications, according to the principle of the prevailing interest, which takes into account the right of taxpayers to information.

17. The appeal to the principle of the prevailing interest will have its inspiration in the procedural rules relating to decisions to restrict the duties of secrecy, but, strictly speaking, what is at stake, as always happens in the weighing of rights and values constitutionally enshrined , is the application of the principle of proportionality. Furthermore, it should be noted that this rule is not neutral, as it carries one of the interests to be considered (the alleged right of taxpayers to information), omitting the other interests or rights constitutionally protected.

18. Finally, the CNPD draws attention to the rule of law enforcement in time enshrined in Article 8 of the Bill. This rule provides for the availability of personal data contained in contracts and in the documents and information inherent to them existing on the date of entry into force of the diploma, therefore, in relation to personal data contained in previously concluded contracts and other documents thus covered. At the very least, it must be considered whether this restrictive legislative measure of the rights, freedoms and guarantees already mentioned here does not operate retroactively, in contradiction with the prohibition contained in paragraph 3 of article 18 of the CRP.

ii. The resolution of the Assembly of the Republic

19. It is also important to point out a final aspect directly related to the legal regime for the protection of personal data.

20. At issue is the fact that Article 3(2) of the Project provides that the concrete and individual decision to declassify contracts and other documents takes the form of a resolution of the Assembly of the Republic, approved in Plenary.

21. Without intending to question this solution, the CNPD does not fail to point out that decisions of this nature represent the material exercise of the administrative function and, as materially administrative acts, are subject to the principles and rules provided for in the Code of Administrative Procedure (cf. n. Article 2(1) and Article 148).

22. Furthermore, the fact that it corresponds to a materially administrative decision concerning personal data subjects that decision directly to the rules of the GDPR, as well as to the control of the competent national authority under Article 55 of the GDPR.

23. In fact, as the Court of Justice of the European Union concluded in its judgment of 9 July 2020 (C-272/19), in a case

involving a decision by a parliamentary committee of the German State of Hesse, the activity carried out by the parliamentary committee, although indirectly contributing to the development of the sovereign functions of the Member State, materially corresponds to the administrative function and is not excluded from the scope of application of the GDPR.

24. Thus, under the terms of the regime provided for in the Bill, the Plenary of the Assembly of the Republic would act as responsible for the processing of personal data and, as such, subject to the obligations of the RGPD. Which does not fail to cause perplexity, when considering the principle of separation of powers. In fact, it has a paradoxical result, in the Portuguese constitutional framework, the Plenary of the Assembly of the Republic and the resolutions it takes within the scope of this draft diploma are subject to control by an administrative entity, whatever it may be.

III. Conclusion

25. On the grounds set out above, the CNPD understands that:

The. The availability of essential information on contracts involving public expenditure does not raise reservations from the perspective of the protection of personal data, insofar as it occurs under the same terms as that which is currently provided for public contracts;

B. The legal provision for the provision of personal data contained in documents or information associated with those contracts or agreements referred to in article 2 of the Draft Law, as well as «the name of natural persons who have caused losses [...]» under the terms in which it is regulated, it constitutes a restriction of the rights, freedoms and guarantees enshrined in articles 26 and 25 of the CRP (rights to reserve private life and protection of personal data), manifestly disproportionate, in violation of n. 2 Article 18 of the CRP, which appears to be, at the very least, to be considered if this restriction does not operate retroactively, in violation of the prohibition contained in paragraph 3 of the same article.

26. The CNPD also draws attention to the effects arising from the provision that the declassification of the aforementioned legal acts and other documents, for the purpose of making them available, takes the form of a resolution by the Assembly of the Republic. Such a resolution constitutes a materially administrative decision, which, for

to affect personal data, translates a processing of personal data, which implies that the Plenary of the Assembly of the Republic assumes the capacity of responsible for such treatment and, to that extent, is subject to the obligations and administrative control provided for in the RGPD. Considering the paradoxical result, in terms of the separation of state powers, of such a forecast, the CNPD recommends reconsidering this solution.

Approved at the February 23, 2021 meeting

Filipa Calvão (President)