National Data Protection Commission

OPINION/2021/54

I. Order

1. The Commission on Transparency and the Statute of Deputies of the Assembly of the Republic asked the National Data Protection Commission (CNPD) to issue an opinion on Bill No. 169/XIV/1,a (PAN), which « Determines the declaration of affiliation or connection to "discrete" organizations or associations in terms of declarative obligations (second amendment to Law No. Law, presented by the PSD Parliamentary Group.

2. 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, 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 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 December August, which enforces the GDPR in the domestic legal order.

3. The CNPD notes that this is the first draft legislation that the Committee on Transparency and the Statute of Deputies submits to its consideration, despite other draft legislation that provide for the processing of personal data having already been considered in the specialty by this Parliamentary Committee - and which, by the way, are not limited to the universe of deputies of the Assembly of the Republic - and the RGPD, as well as the national law that implements it, provide for consultation of the CNPD as a prior and mandatory procedure in the legislative procedure whenever it is at stake is the provision or regulation of processing of personal data.

4. The present opinion will focus, in the first place, on the Bill and only then consider the Replacement Proposal.

II. Analysis

i. Bill No. 169/XIV/1.a (PAN)

5. The purpose of the Bill under consideration is to determine the declaration of affiliation or connection to organizations or associations of a discreet nature, in terms of declarative obligations of holders of political positions and high public offices.

6. For this purpose, it provides for a single amendment to the articles of Law No. 52/2019, of 31 July, amended by Law No.

69/2020, of 9 November, specifically introducing a new No. 4 in the Article 13, pursuant to which '[a]

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declaration referred to in number 7 also includes an optional field that allows the mention, even if negative, of affiliation or connection with associations or organizations that require their adherents to provide loyalty promises or that, due to their secrecy, do not guarantee the full transparency about the participation of its members."

7. At the same time, in the Annex referred to in paragraph 1 of article 13, a new field entitled Affiliation or connection to associations or organizations of a discreet nature is introduced, with the possibility of answering Yes/No and indicating the Nature of the organization or association. There, it is stated that this field is optional, adding that "In case of a positive answer in the first heading, the nature of the entity to which you are affiliated or associated must be specified in the heading "Nature of the organization or association" ».

8. The reason invoked for the proposed change is related to the assessment that 'the existence of a merely optional requirement to declare activities likely to generate incompatibilities and impediments, without establishing clear and concrete guidance on the issues to be declared , has translated into a real invitation to indifference on the part of the declarant and a focus of opacity in relation to membership in organizations that, due to their structure and functioning, could undermine the independence of the holder of political office and high public office and collide with his impartiality". It is therefore intended to densify the category of acts and activities likely to generate incompatibilities and impediments provided for today in paragraph 3 of article 13 of Law No. 52/2019.

9. Now, in light of the purpose of strengthening the transparency of holders of political and high public positions that, in this way, it is intended to achieve, it is important to verify whether the measure now proposed complies with the principle of proportionality and the principle of minimization of data governing any processing of personal data. Let's see.

10. Firstly, it should be noted that the treatment provided for here concerns information relating to identified natural persons (cf. points 1) and 2) of Article 4 of the GDPR) and, specifically, the dimensions of their private life that reveal religious or philosophical convictions, as it is directly aimed at Masonic organizations and the prelature of Opus Dei and others with similar

characteristics - dimensions that Article 9(1) of the GDPR fits into the special categories of personal data, to prohibit its treatment, although it admits it in the limited circumstances of paragraph 2 of the same article, which, incidentally, are also specially provided for in paragraph 3 of article 35 of the Constitution of the Portuguese Republic (CRP).

11. While it is true that national law may consider it to be the treatment necessary for the pursuit of an important public interest, which may include the control of the independence and impartiality of holders of political and high-ranking public offices in the exercise of their respective functions, it is less true that, for

that the processing of this data proves necessary for the pursuit of such purpose must, from the outset, prove to be adequate or suitable, i.e., able to achieve the intended purpose - cf. Article 9(2)(g) and Article 5(1)(c) of the GDPR. And the judgment of suitability and necessity must, in the context of specially protected personal data, be particularly rigorous, as it is not permissible for the collection, analysis or consultation of such information to be carried out under conditions that promote discrimination against data subjects.

12. However, the new paragraph 4 of article 13, by providing for the provision of information regarding the affiliation or connection with "discrete" organizations or associations, 'which require their members to provide pledges of fidelity or which, due to their secrecy, do not ensure full transparency on the participation of their members», does not allow us to conclude that they are suitable for guaranteeing the intended purpose. In fact, when the affiliation or connection to organizations or associations marked by their secrecy or discretion as to belonging to them is at stake, any declaration in one or the other sense cannot be verified.

13. In fact, the declarative obligations carried out under Law No. 52/2019 do not aim to achieve transparency at any cost for the fundamental rights of their holders, having to be directly useful for the realization of the purposes that the principle of public transparency does. In fact, all other information subject to the declaration obligation is subject to a control of its verification, by a public body - since 2019, it is expected that this task will be assumed by the Transparency Entity. Not so when it comes to the declaration of information that, by its nature, cannot be verified, making personal data available on an electronic platform whose accuracy cannot be confirmed or invalidated.

14. In these terms, it is concluded that the provision of the declaration of information regarding the affiliation or connection to organizations or associations marked by their secrecy or discretion is not apt or suitable to achieve the intended purpose of guaranteeing independence and impartiality, as there is no how to confirm or disprove any statements made; and the apparent transparency that this is intended to promote - and which would be reduced to exposing information on the private life of holders of political and high-ranking public offices, without the verifiability of the accuracy of such information - would imply an inappropriate (and gratuitous) restriction , in the sense of its uselessness) of the fundamental rights to respect for private life and the protection of personal data, enshrined in Articles 26 and 35 of the CRP and Articles 7 and 8 of the Charter of Fundamental Rights of European Union (Charter), in breach of Article 18(2) of the CRP and Article 52(1) of the Charter.
15. The appeal in the norm now designed to the optional nature of the declaration does not allow to overcome this lack of adequacy in the processing of personal data. This is because, even if an attempt were made to bring the processing of personal data back to the consent of the data subject, under the terms of subparagraph a) of paragraph 2 of article 9 of the

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RGPD, the verification of the adequacy and necessity of personal data for the pursuit of the purpose envisaged by the rule would always have to be mentioned here, as required by subparagraph c) of paragraph 1 of article 5 of the RGPD. And, as we have seen, due to the nature of the information in question, it is not clear how its collection and consultation or analysis can be considered appropriate in the context of the objectives of Law No. of treatment.
16. But even the request for the consent or consent of the holder to make this information available prevents the circumstance that such willingness to make it available is not free, in the sense required by subparagraph 11) of article 4 of the RGPD, because (as will be better explained, infra, in points 18 and 19), the freedom to declare whether or not to be connected or affiliated with such organizations is here strongly conditioned by the very likely judgments of inference or deduction that

whoever, having the opportunity to declare that he does not belong or is affiliated with such organizations, does not do so is because it belongs to or is affiliated.

17. Moreover, it is not clear that the independence of this declaration in relation to the obligation to declare other situations that are likely to generate incompatibilities or impediments, namely «Participation in association [...] iii) of subparagraph c) of no. 3 of article 13 of Law no. 52/2019, there is a real increase in the guarantees of independence and impartiality, except when considering the foreseen possibility of "mention, even if negative , affiliation or connection with associations or organisations', which would make it possible to deduce membership of such organizations if this field is not filled in. However, in this part, the legal provision implies a high risk of discriminatory impact on data subjects who choose not to fill in this field, when it is optional to fill in this field, a risk that is manifestly excessive.

18. In fact, the wording of the provision here proposed admitting a negative statement regarding such affiliation or connection is likely to generate judgments and discriminatory treatment on those who, not belonging or having any connection to organizations of this type and in full enjoyment of the faculty that the Bill wants to recognize you to fill in this field or not to fill it, choose not to do so; that is, the circumstance of predicting a negative response to the connection or affiliation in organizations of this type is likely to generate hasty conclusive judgments as to the membership of such organizations by those who choose, in their own right, not to indicate " No".

19. To that extent, the optional nature stated in the Bill would become a de facto declarative obligation, reducing the apparent freedom or optional faculty of declaration to the de facto need for a declaration to prevent judgments and discriminatory treatment. And this is a result that Article 9 of the GDPR

prohibits, which is why such a legal provision would be in breach of Article 9(1)(g) of the GDPR, due to insufficient guarantees of the rights of data subjects.

20. In short, remembering that personal data relating to religious or philosophical beliefs are especially protected by the CRP

and the European data protection regime, the proportionality judgment on their treatment is particularly demanding, the CNPD understands that the processing provided herein is not suitable for the pursuit of the purpose of guaranteeing the independence and impartiality of holders of political positions and high public offices due to the unverifiable accuracy of the information declared, representing a measure that, in the name of an apparent public transparency, restricts fundamental rights to the respect for private life and the protection of personal data in violation of the principle of proportionality, with the aggravating factor of being liable to generate discrimination against those holders who choose not to fill in the aforementioned field.

ii. Replacement Proposal (PSD)

21. Regarding the Proposal to Replace the Draft Law, presented by the PSD Parliamentary Group, it translates into the introduction of a new paragraph in paragraph 2 of article 13 of Law no. 52/2019, providing " mention of affiliation, participation or performance of any functions in any entities of an associative nature, exercised in the last three years or to be exercised cumulatively with the mandate».

22. The Proposal thus alters the nature of the declaration - in relation to the Bill - providing for the obligation to issue it and expands the universe of organizations, now becoming relevant the affiliation, participation or performance of any functions in which entities associative in nature.

23. It is important, in the first place, to point out that the option of including this obligation in the set of declarative obligations provided for in paragraph 2 of article 13 eliminates, from the outset, item iii) of subparagraph c) of paragraph 3 of article 13 of Law No. 52/2019, which refers to the obligation to register the «Participation in professional associations or representatives of interests», as well as in most of subparagraph a) of the same paragraph 3. that it would always be justified to revise these paragraphs to prevent normative repetitions that, as a rule, do not contribute to legal certainty and certainty.

24. In any case, to the extent provided for, such reporting obligation covers activities and interests that are irrelevant for the purpose of determining possible situations of incompatibilities and impediments, therefore, implying a processing of personal data with a scope that goes beyond in very adequate and necessary for the purposes of guaranteeing the independence and impartiality of holders of political and high public offices.

25. In fact, here, any associations to which the holder is, for whatever reason, connected, end, as will happen, for example, with associative entities where the holder develops any sporting, recreational or cultural practice daily or weekly, a circumstance that exposes the life of such holders in terms that even make it possible to reveal their regular location and habits, without this directly or indirectly revealing, in terms of being able to condition them, for the independent and exempt exercise of their public functions.

26. To that extent, such a provision violates the principles of proportionality and the minimization of personal data, also enshrined in Article 5(1)(c) of the GDPR.

27. Furthermore, if in this way it is intended to encompass membership in entities of an associative nature such as the rule of the Bill that is intended to replace, this Proposal deserves the same conclusion on the inadequacy of such provision for the intended purpose, on the grounds set out above.

28. In these terms, it can only be concluded that the imposition of the proposed declarative obligation is disproportionate, in view of the unnecessary and excessive restriction of fundamental rights to respect for private life and the protection of personal data, enshrined in articles 26 and 35. ° of the CRP and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (Charter), in breach of Article 18(2) of the CRP and Article 52(1) of the Charter.

III. Conclusion

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

i. It provides for the processing of specially protected personal data, pursuant to paragraph 3 of article 35 of the CRP and article 9 of the RGPD, which is not adequate or suitable for the pursuit of the purpose of guaranteeing independence and impartiality. of the holders of political positions and high public positions for the unverifiable accuracy of the information declared, representing a measure that, in the name of apparent public transparency, restricts the fundamental rights to respect for private life and the protection of personal data in violation of the principle of proportionality ;

ii. In particular, when it allows the "mention, even if negative, of affiliation or connection with associations or organizations that require their adherents to provide loyalty promises or that, due to their secrecy, do not guarantee full transparency on the participation of their associates», there is a high risk of discrimination for holders who, in the enjoyment of the faculty

recognized by the Bill, choose not to fill in this field in the declaration, transforming the apparent

freedom or declarative faculty in a de facto need to declare to prevent judgments and discriminatory treatment;

30. The Replacement Proposal provides, with a mandatory nature, for the processing of personal data which, as it extends to any connection with any associative entity, is liable to expose the private life of the holders in terms that even allow revealing their regular location and their habits, without that activity or connection to an association being directly or indirectly, in terms of potential conditioning, for the independent and exempt exercise of the respective public functions, constituting an unnecessary and excessive restrictive measure of the fundamental rights to respect for the privacy and the protection of personal data.

Approved at the meeting of May 11, 2021

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