OPINION/2019/61

I. Order

The Office of the Minister of Justice sent the National Data Protection Commission (CNPD), for consideration, the draft Decree-Law amending the Corporate Income Tax Code, approved by Decree-Law no. 442-B/88, of 30 November, in its current wording, of Decree-Law No. 42/2001, of 9 February, in its current wording, which creates the sections of the executive process of the solidarity and security system and defines the special rules of that process, and of Decree-Law no.

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as the national authority for controlling the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and paragraph 4 of article 36 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of article 3 and point a) of paragraph 1 of article 6 of Law no. 58/2019, of 8 August.

The assessment of the CNPD is limited to the rules that provide for or regulate the processing of personal data.

II. appreciation

1. This draft diploma is issued under the legislative authorization contained in article 266 of Law No. 71/2018 of 31 December, which approved the State Budget Law for 2019. However, this authorization only covers the exemption of the Social Security Fund for Lawyers and Solicitors (CPAS) from corporate income tax (IRC), and does not provide for the regime for collecting debts to the CPAS.

In fact, even though that exemption and this last measure have a common purpose - to guarantee and reinforce the sustainability of the CPAS - and the right or power of the CPAS to collect the debts of its beneficiaries is indisputable, it is clear that the authorization

of the Assembly of the Republic does not cover changes to the CPAS debt collection regime. And yet, such authorization would, in this case, be necessary.

Indeed, article 3 of the Project, which amends article 2 of Decree-Law No. 42/2001, of 9 February, introduces a novelty in the system for collecting debts to the CPAS, extending to it the process of execution for debts to social security, with the consequent provision of a new processing of personal data in article 5 of the same Project - the communication of data between the CPAS and the IGSFF, I.P. In fact, in Article 5, two articles are added to Decree-Law No. 42/2001 of 9 February, one of which (specifically, Article 18a(1)) provides for 'the communication and interoperability between the IGSFF, I.P., and the CPAS, namely for the purposes of debt participation and subsequent communications or notifications to those relating to the CPAS».

However, the Project, by providing for the power of coercive execution, not only introduces a restriction, in terms of debt collection, to the fundamental right of property of the debtor beneficiaries, but also provides for a new processing of personal data that allows the realization or effectiveness of such restriction, thereby compressing or restricting the fundamental right to data protection. To that extent, and pursuant to Article 165(1)(b) of the Constitution of the Portuguese Republic (CRP), as the rights provided for in Articles 35 and 62 of the Basic Law are at stake (this last, as a right analogous to rights, freedoms and guarantees, pursuant to Article 17 of the CRP), the Government cannot directly, by means of a decree-law, impose such restrictions.

In other words, even if the right or power of the CPAS to collect debts is indisputable and the need to provide mechanisms for guaranteeing them is admitted, the processing of personal data necessary for a coercive collection process has, in accordance with the subparagraph b) of paragraph 1 of article 165 of the CRP, to be provided for in law of the Assembly of the Republic or in decree-law authorized by this sovereign body.

In this way, the CNPD warns of the lack of sufficient legislative basis for the prediction and regulation of the processing of personal data - data communication - related to the power and the process of coercive collection of debts, provided for in article 5 of the Project, in violation of the Constitution.

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2. Notwithstanding the foregoing, it should be noted that the purpose of communication and interoperability between the

IGSFF, I.P., and the CPAS, provided for in paragraph 1 of article 18-A of Decree-Law No. 42/2001, of February 9, introduced by article 5 of the Project, must be determined therein, and the introduction of the adverb is not admissible, in particular if this rule intends to constitute the legal basis for the lawfulness of data processing, under the terms and for the purposes provided for in Article 6(1)(c) of the GDPR.

In fact, a careful reading of the first part of paragraph 3 of article 6 of this European Union diploma leads to the conclusion that the law must, at least, define the purpose of the treatment, so the merely illustrative indication of a purpose or more purposes removes any power from a legitimizing source of the processing of personal data for different purposes.

The CNPD therefore recommends the elimination of the adverb “namely” from paragraph 1 of article 18-A of Decree-Law n.° 42/2001, of 9 February, introduced by article 5 of the Draft .

3. Still on the subject of article 18-A of Decree-Law No. 42/2001, of February 9, introduced by article 5 of the Project, now regarding paragraph 2 of that article, it is noted the remission of the regulation of data processing to a protocol between the two public entities involved in the data communication operation.

Firstly, the CNPD recalls that the protocols, insofar as they correspond to legal acts of public entities that define binding rules for the parties regarding the processing of personal data, and insofar as such rules affect the legal sphere of the holders of the personal data being processed, have the nature of an administrative regulation. To that extent, under the terms of Article 36(4) and Article 57(1)(c) of the GDPR, they must be subject to prior assessment by the CNPD.

So that there is no doubt as to this duty, the CNPD suggests its clarification in the text of the article.

Second, the CNPD underlines that the provision, in Article 7 of the Project, that “the definition of the procedures that prove necessary for the application of the provisions of Articles 3 and 5 of the present diploma is of no use is ordinance of the members of the Government responsible for the area of justice and social security', when the practice has

revealed the tendency for these ordinances to limit themselves to repeating the provision, already contained in the law, of data communication and interoperability of information systems of public entities, referring to the exact definition of the procedures to be adopted for the protocol.

This transfer or delegation of regulatory powers, which by legal imposition are the responsibility of the Government or its members, to public bodies directly involved in the processing of personal data (via protocol), appears to be a way of defeating this objective of the law.

Added to this is the fact that such reference, in the ordinances, to protocols can be interpreted by the public bodies concerned as a means of avoiding consultation with the CNPD within the scope of regulatory procedures, when there seems to be no doubts about the regulatory nature of the protocols.

III. conclusions

The CNPD warns that a government decree-law is not a sufficient legislative basis for the prediction and regulation of the processing of personal data - communication of data - related to the power and procedure of coercive collection of debts, provided for in article 5 . of the Project, under penalty of violation of subparagraph b) of paragraph 1 of article 165 of the Constitution.

As for the provisions of Article 18-A of Decree-Law No. 42/2001, of February 9, introduced by Article 5 of the Project, and on the grounds set out above, the CNPD especially recommends:

i. The elimination of the adverb “namely” from paragraph 1 of that article;

ii. The clarification in paragraph 2 of the same article of the duty to subject the protocol to be concluded between the IGSFF, I.P., and the CPAS to a prior opinion of the CNPD, given the regulatory nature of its content.

Lisbon, September 24, 2019

Maria Cândida Guedes de Oliveira (Rapporteur)