NATIONAL COMMISSION

OF DATA PROTECTION

OPINION/2019/78

Request

The Directorate-General for Justice Policy (DGPJ) requests the National Data Protection Commission (CNPD) to issue an opinion on the review of European Union legislation applicable in civil and commercial matters to the transnational service of judicial and extrajudicial documents (Regulation (EC) No 1393/2007) and cooperation in the field of taking evidence (Regulation (EC) No 1206/2001).

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, no. Article 4(2) and Article 6(1)(a), all 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

The process of reviewing European legislation on the transnational service of judicial and extrajudicial documents (Regulation (EC) No 1393/2007) and cooperation in the field of taking evidence (Regulation (EC) No 1206/2001), both confined to civil and commercial matters, is intended, according to the European Commission, to enhance the use of electronic and interoperable means, bringing modernity and greater speed to the circulation of information of a judicial nature that both regulations address.

Accompanying the request for an opinion from the DGPJ was also followed by the opinion of the European Data Protection Supervisor (hereinafter EDPS) on these same instruments that intend to review the existing legislation. Remember that, according

with Article 52(2) of Regulation (EU) 2018/1725, this authority is responsible for ensuring that the fundamental rights and freedoms of natural persons, in particular the right to data protection, are respected by the institutions and by the bodies of the Union.

Despite being two different regulations, both share identical innovations and challenges, which, moreover, is corroborated by the fact that the legislative impulse is taking place in parallel. For this reason, the issue of personal data protection will also be addressed jointly.

The. Relevant changes in terms of data protection • Digitization of procedures

What is envisaged with the proposed legislative changes is the digitization of procedures aimed at both the sending of judicial and extrajudicial summons and notifications, and the transnational collection of evidence, only in civil and commercial matters. This should occur with the adaptation of the national information systems linked to those procedures and belonging to each of the Member States, in a logic of interoperability between the various EU countries. It is intended that an additional technological solution be implemented that allows this same interoperability, provided by the European Commission, although totally independent of it.

To that extent, the desired objective of connecting the various national systems should be based on a logic of direct access between authorized and responsible persons centered on the Member States.

Note, in this matter, what is provided, without distinction, either in Regulation (EC) No 1393/2007 or in Regulation (EC) No 1206/2001, the first in Article 1, no. 4, al. b), and, in the second, in article 1, paragraph 3, al. b): “decentralized computer system means the network of information technology systems and the access points of the interoperable communications infrastructure, which operate under the individual responsibility and management of each Member State, allowing the exchange

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secure and reliable, at a cross-border level, of information between national IT systems"1. This definition is very indicative of the commonality of objectives, but also of concepts and philosophy that permeates the two European legislative initiatives. In addition to this note of similarity between the two regimes, this definition itself clarifies the roles reserved for the agents involved in the definition, structuring and use of the aforementioned decentralized computer system, this point having substantial consequences for the delimitation of the universe of issues related to data protection, a point to which we will return in this opinion.

• Update of legislative references

Another relevant note regarding the personal data protection discipline included in the two regulations is the updating of the legislative references. As is well known, the EU undertook a significant reform of data protection legislation, which culminated in the approval of several relevant instruments. Among these, Regulation (EU) 2016/679, of the European Parliament and of the Council, of 27 April 2016, on the protection of individuals with regard to the processing of personal data and the free movement of such data stand out. and which repeals Directive 95/46/EC (General Regulation on Data Protection or GDPR), applicable in all Member States since 25 May 2018, and Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the institutions and bodies and agencies of the Union and on the free movement of such data, and repealing Regulation (EC) no. 45/2001 and Decision No 1247/2002/EC, applicable since 22 November 2018. However, the proposed wording of Article 22(4) of Regulation (EC) No 1393 /2007 and the added Article 21-A2 of Regulation (EC) No 1206/2001, are precisely intended to update the references to the new European regulations on this subject, without forgetting to mention Directive 2002/58/EC, on privacy in electronic communications.

1 Free translation of the original English text.

2 This regulation only mentioned data protection in recital 18.

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What this update seems to imply is the (understandable) need to structure the operation of the new decentralized computer system around the rules provided for both in the RGPD and in Directive 2002/58/EC, since the full applicability of the RGPD to the universe of recipients of these new regulations - especially to the judges - does not seem to us to be peaceful in the face of the Portuguese legal system, a point to which we will return in a moment. Furthermore, both recital 4b) and Article 18b, al. e), of the proposed revision of Regulation (EC) No 1393/2007, or recital 3 b) and article 20 b, al. e), of Regulation (EC) No. 1206/2001, rightly declare that the design and structuring of the system must comply with the GDPR and Regulation (EU) 2018/1725, namely the principles of data protection by default and from design3.

• Responsible for the treatment

Although the concrete operationalization of the new decentralized computer system depends on a delegated act of the European Commission, with responsibility for the design and conception of the same being established, it is in the sphere of the Member States that responsibility for the processing of personal data will continue to reside. The European Commission should therefore be assigned the role of subcontractor4.

Looking specifically at each of the drafting proposals for the different regulations, it is observed that, in the case of Regulation (EC) No 1393/2007, recital 4(a) and Article 3(a)(a) 5, expressly designate the transmitting agencies, receiving agencies and central agencies5 of the Member States as individuals under the GDPR. Already in the proposed wording of the revision of

Regulation (EC) No 1206/2001, recital 3 a) and Article 6(5) attribute

3 Provided for in Article 25 of the GDPR and in Article 27 of Regulation (EU) 2018/1725.

4 These concepts are defined in Article 4, paragraphs 7 and 8 of the GDPR and in Article 3, paragraphs 8, 9 and 12, of Regulation (EU) 2018/1725.

5 These entities are provided for in articles 2 and 3 of the current Regulation.

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to courts, central bodies and other authorities in the Member States the role of controllers, again under the GDPR.

There is no doubt, therefore, that the courts (rectius, judges) will, for the purposes of the different regulations, be called upon to intervene as controllers, either as issuers of notifications or summons issued by them, or in their decisive action in the domain of taking evidence.

In Portugal, Law No. 34/2009, of 14 July, amended by Law No. 30/2017, of 30 May, establishes the legal regime applicable to the processing of data referring to the judicial system6, defining, in article 23, who should be considered responsible for the processing. All to say that this national regime will always have to be interpreted in accordance with the European Regulations and, here, specifically the RGPD, in the fair measure of the principle of the primacy of EU law.

B. The EDPS opinion and joint supervision of the future decentralized system

Although the competence of the European Data Protection Authority (EDPS) and the CNPD encompasses different plans, the concerns expressed in the opinion of the former regarding the definition as detailed as possible of the security and resilience of the new system7, as well as the need to proceed to an impact assessment on data protection8 prior to the start-up of the

system, deserve our underlining. Such an impact assessment must be carried out at the national level, without prejudice to the obligations incumbent on the European Commission, where the Portuguese State must guarantee that this happens in the national systems that may be involved in this interoperability scheme, even if, within the framework of respect by the competences of the entities specifically involved in the management of these systems. It would, however, be counterproductive, impractical and even illogical to depend on

6 As well as making the second amendment to Law no. 32/2004, of 22 July, which establishes the statute of the insolvency administrator.

7 Cf. paragraphs 14 and 15, in Point 2.2.1 of the EDPS opinion

8 Cf. paragraph 21, in Point 2.3 of the same

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each “controller”, as understood in these new regulations, to verify, on a case-by-case basis, the adequacy and preparation of national systems to ensure a qualified and secure response to future liaison requirements with other Member States.

Still relevant to the framework of the CNPD's powers is what the EDPS emphasizes regarding the need to guarantee a policy for the allocation of profiles for access to the system that is as restricted as possible9, which is why the concern to ensure this restriction on a concrete level is emphasized here. . Here, too, the usefulness of an impact assessment on data protection is undeniable, making it possible to competently anticipate which universe(s) of entities/people actually need to access the decentralized system that will come to be implemented.

ç. Joint supervision of the future decentralized system

Finally, a note on the difficulty that may arise in the future for entities that must ensure the regulation of data protection practices in the context of these regulations. As we stand, at national and European level, the regulations under review should ensure a more efficient transmission of (largely personal) data between different Member States. This foreseeable evolution suggests the need for national authorities to be called upon to monitor the regularity of these systems and compliance with the personal data protection rules for which they are responsible. As we have already explained, this could become problematic if, among other issues, the scope of what is meant by jurisdictional function is not clarified, so it is important, from the outset, to be cautious, from the legislative point of view (in the future revision of the legal regime applicable to the processing of data relating to the judicial system) the possible legal certainty.

On the other hand, given that two different plans are at stake - national and European - to which equally different supervisory authorities correspond - the EDPS for the European Commission and the CNPD for the national entities involved10 - will be decisive

9 Cf. paragraph 22 in Point 2.3. of the EDPS Opinion.

10 With the exception of cases in which this competence is excluded.

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the total clarification of concepts and responsibilities foreseen in the final wording of the regulations, preventing gaps or spaces of conflict between those who have the power and the duty to ensure the legality of the treatments and ensure the application of corrective measures essential to guarantee the effectiveness of the rights of the holders of the data. And this clarification

must take into account, at the highest level, the harmonious interconnection of the different territorial and material spheres of competence.

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III. conclusions

• The proposed amendments to Regulation (EC) No. 1393/2007 and Regulation (EC) No. 1206/2001 envisage strengthening the digitization of the means of exchanging information between the responsible entities in the various Member States. As this information concerns especially problematic and complex matters, such as those relating to judicial and extrajudicial notifications and summons, as well as the taking of evidence, all in the civil and commercial context, special accuracy is required on the part of the European legislator, but also of the different Member States, in the consideration of the risks linked to the operationalization of a decentralized system that makes it possible to achieve that desideratum. In this regard, the CNPD closely follows the concerns and recommendations expressed by the EDPS in its opinion 5/2019, of 13 September, regarding system security and the need to restrict the allocation of access profiles. The indispensability of carrying out an impact assessment on data protection prior to the operationalization of the system appears as an obvious step in the correct preparation of the connection of existing national systems to the new decentralized system.

• The CNPD also recommends that the Portuguese State take due account of the points of intersection between these renewed regulations and the national legislative context, namely with regard to the

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compatibility of Law No. 34/2009, of July 14, amended by Law No. 30/2017, of May 30, which establishes the legal regime applicable to the processing of data referring to the judicial system with the GDPR, as well as ensuring a unitary and coherent view of the applicable data protection legislation.

• Finally, the CNPD believes that it is very important to ensure an effective and operational supervisory framework, so the clarification of the roles of the EDPS (under Regulation 2018/1725) and of the national control authorities (in the light of article 55 of the GDPR), regarding the inspection of the decentralized information system, is a decisive factor.

This is our opinion.

Lisbon, November 22, 2019

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