

I. Order

The Office of the Minister of Justice asked the National Data Protection Commission (CNPD) to issue an opinion on the draft Decree-Law establishing the Public Support System for Conciliation in Over-indebtedness (SISPACSE) and establishing the rules on its organization and functioning. The project also creates the figure of the SISPACSE conciliator and regulates the access rules and the exercise of the conciliation activity.

The request made and the present opinion fall within the attributions and powers of the CNPD, as the national authority for the control of the processing of personal data, in accordance with the provisions of subparagraph c) of paragraph 1 of article 57 and n. 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. , in Article 4(2) and Article 6(1)(a), all of Law No. 58/2019, of August 8 (which aims to ensure the execution , in the domestic legal order, of the GDPR).

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

II. appreciation

The project under analysis aims to establish a public system of alternative dispute resolution, of voluntary membership, which aims to enable the debtor and their creditors to contract solutions for disputes arising from arrears and non-compliance with pecuniary obligations with the participation of all. interested parties supported by a conciliator qualified to use techniques that promote this contractualization. It should be noted that the intervention of the SISPCSE is limited to the moment prior to the use of other means of credit protection, such as the use of the special revitalization process, the special process for payment agreement or the insolvency process, being

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Its use is prohibited in relation to situations covered by the Action Plan for the Risk of Default and the Extrajudicial Procedure for Regularization of Situations of Default, provided for in Decree-Law no. 227/2012, of 25 October.

The present draft Decree-Law also creates the figure of the SISPACSE conciliator and regulates the access rules and the exercise of the conciliation activity.

Under the terms of paragraph 2 of article 3 of the project, the management of SISPACSE is the responsibility of the Directorate General for Justice Policy (DGPJ) which must organize public lists of conciliators.

The debtor of obligations of a pecuniary nature may request the DGPJ to intervene by SISPACSE through a specific form available on the DGPJ website, being responsible for indicating his creditors, the value, origin, due date of the credits as well as the respective guarantors, if any (see Article 4(2)).

Thus, the processing of personal data relating to different categories of data subjects, that is, concerning debtors, creditors and guarantors, is at issue. Regarding these last two categories of subjects, the processing of these data is necessary for the pursuit of the legitimate interests of the debtor (third party) not prevailing, in this case, the rights of the data subjects, so the legal basis lies in subparagraph f) of paragraph Article 6(1) of the GDPR.

Attention is drawn to the fact that Article 4(2) specifies the personal data that are required in the form. However, the collection and conservation of personal data comply with the principles of purpose and data minimization, so only identification and contact details of creditors and guarantors strictly necessary for the purpose in question should be collected - cf. Article 5(1)(b) and c) of the GDPR. It is therefore recommended to specifically list the personal data to be processed, also for reasons of procedural transparency.

It should be noted that in relation to creditors and guarantors, personal data are not collected from the respective holders, so, assuming the application of subparagraph c) of paragraph 5 of article 14 of the GDPR, the provision of appropriate measures with a view to protecting the legitimate interests of data subjects.

In turn, given the sensitivity of the information that the debtor makes available (which involves, in addition to information on debts, also the relationships between debtors and creditors, as well as debtors and guarantors) through the mandatory completion of the

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referred to form, it is important that adequate security measures are adopted to ensure the confidentiality of the data, namely the encryption of the information stored in the database.

On the other hand, the diploma, in paragraph 2 of article 5 and paragraph 6 of article 6, provides for the possibility of the information session addressed to the debtor and respective creditors, as well as the conduct of the subsequent negotiation process be carried out “through a technological means indicated by the conciliator, which must have real-time transmission of

sound and video”.

However, the fact that it is up to the conciliator to choose a system through which the information session is carried out and the subsequent negotiation process is carried out, could translate into an increase in risks for the security of the transmitted data, in the case of the chosen platform not guarantee their confidentiality or integrity, compromising the privacy of the holders (conciliator, debtors, creditors and guarantors). It is the responsibility of the DGPJ, as data controller under article 12 of the project, to guarantee the security of communication between the parties, so it is suggested to consider this legislative option, admitting the need to validate the system's choice made by the conciliator, or, alternatively, the provision of a platform for the purpose that does not jeopardize the privacy of all those involved in the communication.

Pursuant to paragraph 4 of article 5, "the conciliator notifies the debtor and creditors to attend the information session by telephone or through any other means that guarantees the recognition of the communication by the addressee, each of these communications must be preserved in a lasting way, either through a sound recording system or through a written record that allows tracking of all changes." Article 6(3) also provides that the notification to creditors of the existence of the SISPACE procedure and the holding of the information session be made through a telephone contact for which the creditor must give consent. Note that in the absence of consent, the creditor is notified by registered mail with acknowledgment of receipt. However, the inviolability of the home and correspondence (as well as other means of private communication, such as electronic communications) is a fundamental right enshrined in the Constitution in paragraph 1 of article 34 of the CRP. Law no.

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41/2004, of 18 August, transposing into the national legal system Directive no. 20002/58/EC of the European Parliament and of the Council, of 12 July, on the processing of personal data and the protection of privacy in the sector of electronic communications provides, in paragraph 1 of article 4, that companies that offer electronic communications networks and/or services must guarantee the inviolability of communications, and the respective traffic data, carried out through public communications networks and electronic services accessible to the public. However, this general principle of confidentiality yields to the prior and express consent of users (see Article 4(2) of the same law). Thus, the basis for the lawfulness of these data processing is found in point a) of paragraph 1 of article 6 of the GDPR.

Considering now a fundamental principle of data processing, the limitation of retention provided for in subparagraph e) of

paragraph 1 of article 5 of the RGPD, it is worth mentioning the need to define, in the draft Decree-Law, maximum periods of conservation of the personal data being processed, not being enough, for its implementation, the mere reference to the RGPD and to Law 58/2019, of 8 August.

Finally, article 12 refers to the Ordinance of the Member of the Government responsible for the area of justice for the regulation of the provisions of this draft Decree-Law. The CNPD recalls the obligation to consult this entity within the scope of the procedure aimed at drawing up an Ordinance, under the terms of paragraph 4 of article 36 of the RGPD.

III. Conclusion

Based on the above grounds, the CNPD recommends:

- 1 - The reformulation of paragraph 2 of article 4, densifying the personal data contained in the form in relation to creditors and guarantors;
- 2 - The enshrinement in article 4 of security measures with a view to ensuring data confidentiality, namely the encryption of information stored in a database;
- 3 - The weighting of the option expressed in paragraph 2 of article 5 and paragraph 6 of article 6 of the draft Decree-Law in order to guarantee the security of communication between the parties; and

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- 4 - The definition in the draft Decree-Law of maximum periods for the conservation of personal data being processed.

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