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NATIONAL DATA PROTECTION COMMISSION

OPINION/2020/125

I. Order

Caixa Geral de Aposentações, I.P. (CGA) submitted to the National Data Protection Commission (CNPd) a draft protocol to be signed with the Directorate-General for National Defense Resources (DGRDN) within the scope of the execution of the rights provided for in the Former Combatants Statute, approved by the Law No. 46/2020, of August 20th.

The request made and the present opinion fall within the attributions and competences of the CNPD, as the national authority for controlling 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 8 August (which aims to ensure the execution , in the domestic legal order, of the GDPR).

II. appreciation

The purpose of the protocol under consideration is to define the terms and conditions under which the parties share personal data necessary for the issuance, by the DGRDN, of the former combatant's card, and also of the widow or widower's card of a former combatant, as well as of those who were to reside in a de facto union with the former combatant on the date of his death, in compliance with the provisions of paragraph 4 of article 7 of the Former Combatant's Statute. The communication of personal data constitutes a processing of personal data, within the meaning of Article 4(2) of the GDPR.

a) Lawfulness of treatment

Law No. 46/2020, of 20 August, approved the Statute of the Former Combatant, published in Annex I of this legal diploma, providing for various measures of a social and economic nature applicable to former combatants. This Statute established, in article 4, the issuance of cards to all former combatants who are covered by its article 2, as well as the issuance of the card to widows or widowers or to anyone residing in a de facto union, judicially recognized, at the time of the death of the former combatant, under the terms of article

7 of the aforementioned Statute, with a view to simplifying its relationship with the Public Administration.

In order to issue this card, the DGRDN needs to have access to personal data relating to people who have been qualified as former combatants by the Ministry of National Defence, or to those of their surviving spouses, including those who were in a de facto relationship.

It should be noted that with regard to the latter, paragraph 4 of article 7 of the Statute provides that "[for] the purposes of administrative simplification when issuing the widow or widower's card, the pension processing entities inform the status of surviving spouse to the DGRDN".

The CGA, as an entity that processes benefits to former combatants and their respective widows and widowers, including persons residing in a de facto union with former combatants, qualified as such by the Ministry of National Defence, is in a position to provide the personal data that the CGA DGRDN needs to fulfill the legal duty of issuing these cards.

Therefore, this processing of personal data, which takes the form of consulting the data necessary for the issuance of a former combatant's and widow's or widower's card, has as a condition of lawfulness the fulfillment of a legal obligation, provided for in subparagraph c) of no. 1 of article 6 of the RGPD, and compliance with paragraph 3 of article 6 of the RGPD has also been partially verified.

b) Principles applicable to processing

Pursuant to clause 3.a of the draft agreement, the CGA annually transmits to the DGRDN an updated list of former combatants, surviving spouses or persons residing in a de facto union with former combatants qualified by the Ministry of National Defence, containing the following personal data: 1 - data relating to the updating of the lists of former combatants covered by article 2 of the Former Combatant's Statute: name, civil identification number, tax number, date of birth and updated address of the former combatant, indication of the benefit awarded to the former combatant following the application of Laws No. 9/2002, of 11 February, No. 21/2004, of 5 June, and No. 3/2009, of 13 January; 2 - data relating to the surviving spouse, or who resided

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in a de facto union with the former combatant, qualified as such by the Ministry of National Defence: civil identification number and tax number of the former combatant, civil identification number, tax identification number and address of the surviving spouse or of anyone residing in a union of fact with the former combatant, indication of the benefit attributed to the surviving spouse or to anyone residing in a de facto union with the former combatant at the time of his/her death, arising from the application of Laws n° 9/2002, of February 11, n.° 21 /2004, of June 5th, and No. 3/2009, of January 13th (Cf. Clause Two).

It is considered that the personal data transmitted are adequate and necessary to fulfill the purpose of the treatment, in compliance with the principle of data minimization, according to point c) of paragraph 1 of article 5 of the RGPD. However, regarding the NIF data, insofar as it is intended exclusively for the processing of tax and customs information, its treatment in this context seems to be unnecessary and excessive in view of the purpose of this data processing. Thus, the CNPD recommends a reconsideration of the need to process the tax number of the former combatant as well as the tax identification number of the surviving spouse or of anyone residing in a de facto union with the former combatant, in compliance with the aforementioned data minimization principle. .

In turn, the protocol is silent on the period of conservation of the files sent, so the CNPD recommends the inclusion of a clause that regulates the period of retention of data in compliance with the principle of limitation provided for in subparagraph e) of no. 1 of article 5 of the GDPR.

Regarding the principle of integrity and confidentiality, clause 3.a provides that "the aforementioned list, in Excel format, will always be sent in a "protected environment", through the encryption of the computer files to be transmitted or another security procedure that the parties , by agreement, they will consider more effective, taking into account the protection of the personal data of natural persons". The agreement, however, does not clarify the means of transmission of the files that is used, nor does it define the interlocutors of each entity responsible for sending and receiving the same (minimizing the risk of receiving false data that would cause the issuance of of cards for those who are not entitled). The agreement should also provide for the sending of the password separately, by an alternative method, (for example the file is sent by e-mail the password by SMS), as well as limiting the number of people with access to the files received. The text is still silent on the monitoring of cards issued on the basis of this communication and does not refer to the necessary implementation of alarms for situations in which there is a number of

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cards considered out of the ordinary. Thus, the CNPD recommends that these measures be expressly enshrined in the text of the agreement, and for that purpose, the third clause should be reformulated or, alternatively, the inclusion of a new provision that expressly enshrines them.

Finally, it should be noted that paragraph 2 of clause three admits the possibility for the parties to change the procedure if there is "another security procedure that the parties, by agreement, will consider more effective, taking into account the protection of the personal data of natural persons". However, this change in procedure, insofar as it represents a revision of the protocol under analysis, will imply a new pronouncement by the CNPD.

c) Rights of holders

It is noted, first of all, that the epigraph of clause eight does not reflect its content, insofar as the body of the rule does not regulate the exercise of rights by data subjects, but only enshrines the duty of mutual assistance to which the parties undertake to make it possible to fulfill the obligations of the person responsible towards the data subjects.

Here it is foreseen that "In the context of the implementation of this protocol, the Parties provide mutual assistance, through the necessary technical and organizational measures, to allow them to comply, in an expeditious manner, with their respective obligations to respond to requests made by the holders of personal data , for the purposes of exercising your rights, namely the right of access, rectification, elimination, limitation of treatment, data portability and opposition to treatment.»

This duty of mutual assistance will also exist to ensure compliance with the parties' obligations under Articles 32 to 34 of the GDPR, and for this purpose, each Party must notify the other of the occurrence of a personal data breach. , within 24 hours after becoming aware of it. These provisions reflect the content of points e) and t) of paragraph 3 of article 28 of the GDPR applicable to subcontractors. The same can be said of clause ten of the Protocol, which is limited to reproducing subparagraph h) of paragraph 3 of the same article.

It is strange that a Protocol concluded between two independent entities, which are responsible for the processing of data in question, without any relationship that can be framed in the light of the provisions of the RGPD, comes to claim for the granting parties

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a legal regime that the GDPR reserves for subcontractors. The CNPD therefore suggests the reformulation of clause eight, emphasizing the need for the agreement to regulate the fulfillment of the obligation provided for in article 19 of the RGPD, of notifying the recipient of the rectification or erasure of personal data or limitation of treatment to which it has been proceeded, which clearly applies in this context in which there is transmission of personal data.

Therefore, clause eight must be amended to include an expedited means of communicating to the other controller (CGA or DGRDN), as recipient of the information, any request for rectification, erasure or limitation of processing by the data subject. .

d) International data transfer

Finally, a reference to clause six, which conditions the international transfer of data processed under this agreement to third countries to the prior written consent of the other party, once again reflecting the content of subparagraph a) of paragraph 3 of the Article 28 of the GDPR.

As a preliminary note, it should be noted that the need to regulate international transfers within the scope of this Protocol is not met, since the data processing provided for therein is limited to the sharing of information between the CGA and the DGRDN for the purpose of issuing the old card combatant and the widow or widower card of a former combatant, as well as those who were living in a de facto union with the former combatant at the time of his death. Thus, the CNPD recommends the elimination of this sixth clause from the text of the agreement.

However, if it is intended to maintain this clause, it is emphasized that, in order for the transfers of personal data to a third country, provided for herein, to be in accordance with the provisions of the GDPR, it is necessary that, whenever about that third State, it is not an adequacy decision has been taken by the European Commission, pursuant to article 45 of the GDPR, there is a collaboration agreement that presents adequate guarantees and that the enforceable and effective rights of the data subjects are provided for, as well as effective corrective measures , under the terms imposed by Article 46 of this Union diploma, which the clause refers to.

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ill. Conclusion

With the introduction of the changes identified above, the CNPD considers that there are no impediments to the conclusion of the protocol for the exchange of personal data between Caixa Geral de Aposentações and the Directorate-General for National Defense Resources.

Presented at the plenary session of October 21, 2020

Filipa Calvão (President)