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National Data Protection Commission

OPINION/2022/37

I. Order

1. The Budget and Finance Committee of the Assembly of the Republic sent the National Data Protection Commission (CNPD), for an opinion, Draft Law No. 4/XV/1.i. * 3 (GOV) - Approves the State Budget for 2022.

2. The request made and the present opinion fall within the attributions and powers of the CNPD, as the national authority to control the processing of personal data, in accordance with the provisions of subparagraph c) of paragraph 1 of article 57 and in the 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 .°, in paragraph 2 of article 4 and in paragraph a) of paragraph 1 of article 6, all of Law n.° 58/2019, of 8 August (which aims to ensure the implementation, in the domestic legal order, of the GDPR).

3. The assessment of the CNPD is restricted to aspects of the regime relating to the processing of personal data, that is, operations that focus on information concerning natural, identified or identifiable persons - cf. lines 1) and 2) of article 4 of the RGPD -, focusing on the precepts that provide for or imply processing of personal data.

II. Analysis

4. The Draft Law on the State Budget for 2022 does not introduce significant novelties with regard to the processing of personal data, so this opinion will mainly focus on rules that reproduce provisions of previous State Budget laws, which, on the other hand, their impact on the fundamental rights of citizens, deserve the repeated attention of the CNPD.

5. It is underlined that what stands out here are only those provisions that are in clear contradiction with the constitutional principles and the rules of law of the European Union by which the norms that provide for the processing of personal data must be guided, and which, for That's right, justify the CNPD's insistence on each Bill that it is called upon to consider.

i. The mere prediction (without regulation) of interconnections of databases of public entities

with other entities

6. In this context, one cannot fail to highlight the persistent legislative technique of, in the Draft Law on the State Budget, providing for processing of personal data that involves considerable risk for citizens without accompanying this forecast with the definition of the main elements of such treatments

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and appropriate measures to mitigate or prevent the risk. The option of referring the definition of the object and scope of the processing of personal data to the regulatory plan and, in particular, to protocols between entities, implies bringing to the discretion of administrative entities, without the minimum (binding) guidance of the law, treatments that imply the restriction or risks of further restriction of the fundamental rights of citizens, which is not at all compatible with the principle of the democratic rule of law and with the requirements arising from it of predictability of legal restrictions on the fundamental rights of citizens.

7. In fact, there are several provisions in this Law Proposal, as was the case with previous proposals1, where the legislator provides for data and database interconnections under the responsibility of different public entities and also between public and private entities, without specifying, in some cases, the purpose of these personal data processing operations or the databases covered and, in other cases, without even identifying the public entities, services or public bodies whose databases are the object of that operation.

8. It should be noted that the CNPD is not considering the political-legislative option underlying such provisions, but rather the terms in which such option is implemented in this legislative plan.

9. It is undeniable that the generalization of interconnections and reciprocal access to information contained in databases held by public entities, and by some private entities, entails risks for the rights, freedoms and guarantees of citizens. At stake are the risks associated with the de facto possibility of interrelationship of all information relating to each individual citizen2, which not only impact on their privacy (restricting it), but also on their freedom and freedom to personality development (restricting or conditioning them) and identity, constitutionally recognized to each citizen, especially the risk of discriminatory treatment, which in each historical moment is renewed under different guises - just remember how, even today, nationality and place of

birth have proved to be factors of discrimination in Europe.

1 Cf. Opinion 2020/4, of January 14, accessible at

https://www.cnpd.pt/decisoes/historico-de-decisoes/?vear=2020&tvDe=4&ent=&onri=?

2 As in previous opinions, the CNPD has highlighted, in this interconnected web of databases, from any identifying element - e.g., the civil identification number, the tax identification number or the electronic address - it is possible to list the entire information on each citizen held by the Portuguese Public Administration and even on the private entities covered by these provisions.

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10. These risks have been accentuated in recent times, clearly showing the fragility of many of the information systems that integrate sensitive citizen data and the challenges that interconnections pose for the integrity of these data.

11. Understanding the objective of efficient management of information and streamlining administrative procedures, especially in the field of the social economy and the provision of care to people in need, and the usefulness, for this purpose, of sharing information on citizens held by the State and by other public legal persons, as well as by private entities, the CNPD does not discuss, as this is not its function, the option of restricting fundamental rights arising from the provision of these treatments.

12. What the CNPD points out and considers unacceptable in a Rule of Law is the generic and open provision of such interconnections and accesses, without, at the legislative level, defining, at least, who are the public entities or services responsible for such operations. of processing of citizens' personal data, which databases of those responsible are the object of such operations and what are the exact purposes of this treatment. This is a minimum of normative density that cannot fail to be demanded of the national legislator in the context of matters that have a direct impact on rights, freedoms and guarantees - cf. Articles 2 and 165(1)(òj) of the Constitution of the Portuguese Republic (CRP).

13. It is insisted: the determination of the extent and intensity of the relationship of the personal information of the citizens, in particular when it respects their private life, revealing dimensions that the constituent legislator and the legislator of the Union

specially wanted to protect, cannot be left in the hands of the Public Administration without minimally precise legal commands.

14. The continued option for open legislative norms that delegate to the administrative bodies very broad decision-making powers regarding data processing that have direct repercussions on the most fundamental dimensions of the citizen - generically providing for the possibility of relating all personal data held by the Public Administration - puts in crisis the first guarantee of the constitutional regime of fundamental rights, which is to reserve to the law the definition of restrictions and conditions of rights, freedoms and guarantees (cf. paragraph 2 of article 18 and subparagraph b) of paragraph 165(1) of the CRP). And it undermines the essential function of a legislative norm, which is to assure citizens of predictability regarding future restrictions and conditioning of their fundamental rights.

15. It is in light of these concerns that the CNPD highlights here, among the rules that provide for interconnections of personal databases, article 217 of the Draft Law, which does not identify the public entities covered, nor the databases of data object of the interconnection.

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16. As the CNPD has already stated with regard to a similar rule introduced in previous State Budget laws, any interpretative effort in the sense of, based on the diplomas referred to in paragraph 1 of this article and in particular the purposes stated therein, to reveal the list of public entities and bodies whose databases are covered here, fails in the face of predictions such as the one relating to the purposes of interconnection with the databases of Santa Casa da Misericórdia de Lisboa (cf. subparagraph c) of no. 1 of article 217 .°) or the one referring to the National Strategy for the Integration of Homeless Persons 2017-2023 (cf. subparagraph e) of paragraph 1 of article 217), in which the quantity and variety of attributions mentioned in the Resolution of the Council of Ministers raises the fear of crossing all the databases of the Central Public Administration.

17. Furthermore, article 217 refers the definition of the various elements of processing to protocols to be concluded between the entities - which, remember, are not identified in the standard (only private entities are specified) -, thus abandoning , the broad administrative discretion to define the scope and scope of the treatment and the databases and personal data subject to the same.

18. The CNPD therefore reiterates the recommendation to densify Article 217 of the Draft Law, at least through the specification of the public entities covered and the databases subject to interconnection.

19. Another example of an open reference to protocols for the definition and regulation of data processing can be found in paragraph 6 of article 98 of the Draft Law, concerning the National Strategy for the Integration of Homeless People 2017-2023.

20. Here, however, with the aggravating factor of legitimizing, in no. 4 of the same article, the collection and analysis of special or sensitive data, relating to sexual orientation and other personal dimensions that deserve special protection under the terms of no. 1 of article 9 of the GDPR, without, strictly speaking, the same legal rule providing for any measures to protect this sensitive personal information and adequately guarantee the fundamental rights of the citizens covered, as required by subparagraph b) of no. 2 of article 9 of the GDPR.

21. Thus, in order for paragraph 4 of article 98 of the Draft Law to have a minimum capacity to base the processing of personal data necessary to guarantee accommodation and housing, in compliance with paragraph 1 and n. 2 of article 9 of the GDPR, as well as subparagraph b) of paragraph 2, it is recommended, at least, the imposition of the adoption of measures that guarantee the confidentiality of the information and that restrict access to the information and to a small number of people, as well as the prohibition of reusing that information for any other purposes.

22. It is also important to pay attention to Article 113 of the Draft Law, by using an imprecise concept to characterize the processing of personal data that it provides, indefinitely extending the scope of the same processing indefinitely and beyond what is necessary.

23. In fact, by regulating the direct consultation, in the context of the executive process, by the IGFSS, IP, and ISS, IP of an

extensive list of databases, including the database of the Tax and Customs Authority, article 113 of the Draft Law refers to access to “other similar records and files”. The CNPD has already commented on a similar provision introduced in previous State Budget laws, essentially maintaining its understanding.

24. Not being able to find any other records and archives whose constitution and maintenance aim to fulfill a registration function in the public interest - which do not correspond to those already listed in that norm -, and whose access may constitute a suitable means for complying with the As a function of those public entities, the CNPD recommends the elimination, in paragraph 1 of article 113, of such reference, which indefinitely and unnecessary extends the processing of personal data.

ii. Publicity on the open network of the debtor list

25. Under the heading “Contributory Transparency Measures”, article 109 of the Draft Law renews the imposition of disclosure of lists of taxpayers in debt to social security, provided for in previous State Budget laws.

26. The CNPD has commented on this processing of personal data (cf. Opinions No. 38/2005, 16/2006, 43/2016, 54/2018, 79/2019 and, finally, 2020/4), always underlining the impact that the dissemination of this information on the Internet has on people's private lives, in terms that are clearly excessive, if not unnecessary, for the intended purpose.

27. The option for the online disclosure of information regarding each person has an impact that is not limited to the purpose of this publication - which will be to make known to the parties involved in contractual relationships that the possible counterparty currently has debts to Social Security -, prolonging up for the future. In fact, the information made available on the Internet will remain far beyond what is necessary to fulfill the purpose of its publication, in a logic of dissemination and perpetuation of personal information, given that this context facilitates the collection, aggregation, crossing and subsequent use of this information for the most diverse purposes. In fact, the dissemination of personal data on the Internet allows and easily enables the aggregation of information about people, namely the establishment of profiles, which are likely to serve as a means of unfair discrimination against people, as they allow their use very much for

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in addition to the period of time in which the law dubiously considered it necessary to stigmatize people with Social Security debts.

28. In particular, taking into account that there are means available today to fulfill the same purpose with much less impact, avoiding the perpetuation of stigmatization of people.

29. The CNPD therefore insists that it is time to rethink this rule, with a view to the adequate harmonization of the public interests pursued and the fundamental rights of data subjects.

III. conclusions

30. In the terms developed above, and recalling the risks to the fundamental rights of citizens associated with the multiplication of interconnections of personal data between the information systems of different public entities and other private entities, which demand their precise delimitation at the legislative level - and not at the broadly discretionary administrative level, through agreements between administrative entities and between these and private entities -, the CNPD recommends:

The. the densification of article 217 of the Draft Law, at least through the specification of the public entities covered and the databases subject to interconnection, in compliance with the constitutional requirements of predictability of restrictions on rights, freedoms and guarantees;

B. the revision of paragraph 4 of article 98 of the Draft Law, imposing the adoption of special safeguards for sensitive information, related to sexual orientation, of homeless citizens, especially measures that guarantee confidentiality and restrict what is strictly necessary and to a reduced number of people access to information, as well as the prohibition of reusing that information for any other purposes;

ç. the deletion, in paragraph 1 of article 113, of the reference to 'other similar registers and archives', which indefinitely and unnecessarily extends the processing of personal data provided for therein.

31. The CNPD once again recalls the manifest disproportionality of the forecast for the publication of the lists of debtors to Social Security, recommending the reconsideration of such forecast or, at least, the adoption of measures to mitigate its impact at a time when technological developments provide solutions less stigmatizing.

Approved at the meeting of May 3, 2022

Filipa Calvão (President)