

National Data Protection Commission

OPINION/2021/10

I. Order

1. The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees asked the National Data Protection Commission (CNPD) to issue an opinion on Bill No. 237/XIV/1.a, which amends the medical procreation regime assisted, allowing post-mortem insemination to carry out the clearly established parental project (seventh Amendment to Law No. 32/2006, of 26 June), presented by the Parliamentary Group of the Left Bloc.

2. The CNPD issues an opinion within the scope of its attributions and competences as an independent administrative authority with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57, in conjunction with subparagraph b) of paragraph 3 of article 58, and with paragraph 4 of article 36, all of Regulation (EU) 2016/679, of 27 April 2016 - General Regulation on Data Protection (hereinafter GDPR), in conjunction with the provisions of article 3, paragraph 2 of article 4, and paragraph a) of paragraph 1 of article 6, all of Law n° 58 /2019, of 8 August, which enforces the GDPR in the domestic legal order.

II. Analysis

3. The Bill introduces amendments to articles 22 and 23 of Law no. 32/2006, concerning post-mortem insemination and the determination of the paternity of the child born as a result of its use.

4. In the wording now designed for Article 22, the legality of post-mortem insemination, as well as post-mortem embryo transfer, is made dependent on a parental project clearly established in writing before the father's death.

5. Such provision lacks regulation, under penalty of unenforceability or very difficult enforceability. In fact, it is important to define the conditions that ensure that the aforementioned written declaration (which formalizes the parental project) fulfills the intended purpose, taking into account the death, in the meantime, of one of the authors of the declaration. First of all, requirements regarding the authentication of the written declaration, as well as rules regarding the entity to which it must be presented. Moreover, for reasons of legal certainty, a centralized register of this type of declaration should be considered.

6. Note that the application of article 22 implies the processing of personal data, so it must at least determine who is responsible for the treatment and the other requirements that ensure that the purpose of the treatment is fulfilled, as these data are subject to the GDPR regime, as determined by paragraph 1 of article 17 of Law n.º 58/2019, of 8 August.

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7. It is also important to consider the application, in this context, of the provisions of paragraph 2 of article 17 of Law no. the deceased has designated or, in the absence of designation, by his heirs. In particular, to consider the possibility that an heir (for example, a child from a previous marriage or other relationship) comes to exercise the right to erase or erase personal data within the scope of this processing (e.g., pursuant to point a) of the Article 17(1) of the GDPR).

8. In addition to the difficulties that the very application of paragraph 2 and paragraph 3 of article 17 of Law no. expression of the data subject's will regarding the post-mortem processing of his/her personal data, which makes it impossible or very difficult for the controller and heirs to know if any will has been expressed, it is essential that, in this change in the regime of post-mortem insemination, it is determined whether, and if so under what terms, the regime provided for in those precepts of article 17 of Law No. 58/2019 applies.

III. Conclusion

9. Based on the arguments set out above, the CNPD recommends that article 22 be densified, specifying the requirements relating to the authentication of the written declaration that formalizes the parental project, as well as the rules regarding the entity to which it owes the same. be submitted, and other essential elements of the processing of personal data.

10. In particular, it is recommended that this regime be articulated with the regime of the exercise by the heirs of the deceased person of the rights provided for in the RGPD, in particular the right to the elimination or erasure of personal data.

Approved at the meeting of January 26, 2021

Filipa Calvão (President)