

## I. Request

1. The Commission for Constitutional Affairs, Rights, Freedoms and Guarantees, of the Assembly of the Republic, requested on January 5, 2023 the National Data Protection Commission (CNPd) to issue an opinion on Proposed Law No. 55/ XV/1,a (GOV), which "Creates the legal regime applicable to the control and supervision of critical personnel for the safety of civil aviation in the exercise of functions under the influence of alcohol, narcotics or psychotropic substances".

2. The CNPD issues an opinion within the scope of its attributions and competences as an independent administrative authority with authoritative powers for the control of the processing of personal data, conferred by articles 57, paragraph 1, letter c); 58, paragraph 3, letter b); 36, no. 4, all of Regulation (EU) 2016/679, of April 27, 2016 - General Regulation on Data Protection (hereinafter, RGPD), in conjunction with the provisions of articles 3; 4th No. 2; 6, n.º 1, letter a), all of Law n.º 58/2019, of August 8, which implements the RGPD in the internal legal order (LERGPD).

## II. Analysis

3. Proposal for Law No. 55/XV/1 (hereinafter, Proposal) creates, as expressed in its statement of reasons, "a clear and adequate legal regime, which provides legal security to its addressees and to the supervisory authorities and which clearly defines the rules applicable to the control and supervision of personnel with critical functions for the safety of civil aviation, including the tests to be carried out, the equipment used and the definition of the blood alcohol level from which the examinee is considered to be under the influence of alcohol".

4. Accordingly, it is stated in paragraph 1 of article 1 that "This law approves the regime applicable to the control and supervision of personnel critical to the safety of civil aviation in the exercise of functions under the influence of alcohol, narcotics or psychotropic substances", adding paragraph 2 that "This law also amends the Penal Code, approved in annex to Decree-Law No. 400/82, of September 23, in its current wording (Penal Code) ".

5. Its legal design includes the following chapters: I - General provisions (articles 1 and 2); II - Norms relating to the supervision

of the exercise of functions under the influence of alcohol, narcotics or psychotropic substances (Articles 3 to 21); III - Powers of pilots in command of aircraft (articles 22); IV - Obligations to inform the National Civil Aviation Authority and the latter to its counterparts (articles 23 to

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25th); V - Administrative offense regime (articles 26 to 29); VI - Protection of Personal Data (Articles 30 to 36); VII -

Amendment to the Penal Code (Article 37); VIII - Complementary and final provisions (Articles 39 to 41)

6. This Proposal assumes a clear and accentuated relevance with regard to the protection of personal data, as it covers both data relating to health and data relating to the practice of administrative offenses and crimes, identifying the respective holder.

7. Bearing in mind the scope of the Proposal, we are confronted, in addition to the provisions of fundamental data protection rights, both national (articles 26.º, n.º 1 and 2; 35.º both of the Constitution), and of the European Union (Articles 7 and 8 of the Charter of Fundamental Rights of the European Union - CDFEU), with a specific regulatory framework that includes: i) the RGPD and the LERGD; ii) Law No. 37/2015, of May 5, which transposed into the internal national legal order the Framework Decision of 2009/315/JHA, of the Council of Europe of February 26, 2009, on the organization and the content of the exchange of information extracted from the criminal record between Member States, the last national diploma being amended by Law No. 14/2022, of February 2;

iii) Law No. 59/2019, of August 8, which approved the rules relating to the processing of personal data for the purposes of prevention, detection, investigation or repression of criminal offenses or the execution of criminal sanctions, which transposed the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016;

iv) Law No. 45/2004, of August 19, which establishes the legal regime for carrying out medico-legal and forensic expertise, in

particular Article 25, No. 2, regarding the conservation of biological samples .

8. From this legal framework, we can extract the following legal framework relevant to the assessment of this Proposal: a) The processing of personal data must be processed in strict respect for the rights, freedoms and guarantees of natural persons, in particular the right to protection of personal data (legality); b) Personal data are: i) Subject to lawful, fair and transparent processing (lawfulness, loyalty and transparency); ii) Collected for specific, explicit and legitimate purposes, and cannot be processed in a way that is incompatible with those purposes (purpose limitation)] iii) Adequate, relevant and limited to the minimum necessary to pursue the purposes for which they are processed (minimization of data )] iv) Accurate and updated whenever necessary, and all reasonable measures must be taken to ensure that inaccurate data are erased or rectified without delay (accuracy of data)] v) Retained in a way that allows the identification of data subjects only during the period necessary for the purposes for which they are processed (conservation limitation); vi) Processed in a way that guarantees their security, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organizational measures (integrity and confidentiality); c) The controller must verify and adopt the measures that allow him to prove that the processing of personal data is carried out in accordance with the principles set out (responsibility).

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9. This Proposal sets out normative concerns with this legal framework in its Chapter VI, headed "Protection of personal data", establishing the RGPD and the LERGD as the applicable regime (article 30), the confidentiality of data (article 31, °), conservation of biological samples (Article 32), indicating the entity responsible for processing the data, that is, the National Civil Aviation Authority - ANAC (Article 33), collection and conservation of data to be carry out in accordance with the principles of purpose limitation and accuracy (Article 34, paragraph 1), conservation limitation (Article 34, paragraph 3), restricted access to information (Article 35). ), listing a catalog of security rules for the processing of information, with ANAC responsible for ensuring compliance (Article 36).

10. A first note deserves the option expressed in the Proposal (cf. articles 5 and 15) to legitimize police authorities and ANAC

(through its workers in the exercise of inspection, inspection or auditing functions) to carry out the tests for detecting the state of influence by alcohol, narcotics or psychotropic substances on personnel with critical functions for the safety of civil aviation. To point out, from the perspective of the protection of personal data, that such a political-legislative option fits in paragraph g) of paragraph 2 of article 9 of the RGPD, in view of the public interest of security foreseen and framed by this Proposal for law, with a set of procedural and substantive guarantees of the rights of data subjects, as well as of processing security, which appear, *prima facie*, adequate for the purpose of legitimizing the processing of personal data.

11. However, some of the provisions of the Proposal still need to be revised from the perspective of their compliance with the legal data protection regime.

12. With regard to these security rules set out in the aforementioned Article 36, the reference in paragraph d) to the existence of any automated data processing systems ("automated data processing systems, if any") is highlighted. At no point in the Proposal is it explicit what such systems are.

13. The CNPD does not question the possibility of using automated information processing systems, whenever they involve the processing of personal data and directly imply, or support, decision-making that affects the legal sphere of data subjects .

14. However, the RGPD prevents, as a rule, individual decisions from being taken based exclusively on automated data processing, subject to the conditions set out in the RGPD, as follows from recitals 71 and 72, as well as from the provisions of article 22. in this regard, see also the guidelines of the Working Group on Article 29 for Data Protection, on automated individual decisions and the definition of profiles for the purposes of Regulation (EU) 2016/679, approved on February 6, 2016 2018, accessible at <https://ec.europa.eu/newsroom/article29/items/612053/en>.

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15. All the more so as decisions of a sanctioning nature are at stake here, with direct repercussions on the rights and lives of data subjects.

16. Thus, the CNPD recommends clarifying the meaning with which the expression automated data processing systems is used in Article 36. And, if it has the meaning of an automated system of analysis of personal data (relating to personnel with critical functions for the safety of civil aviation) that produces a sanctioning decision or that proposes this decision-making content, the CNPD warns that the use of a such a system depends on its explicit authorization by law, accompanied by legislative provision of specific guarantees adequate to safeguard the rights of data subjects, under the terms imposed by paragraph b) of paragraph 2 and paragraph 4 of article 22. ° of the RGPD - all aspects that this Proposal omits, thus not legitimizing the automated processing system of personal data.

17. With regard to access to personal data, regulated in article 35 of the Proposal, it is important to reconsider the hypothesis of the admissibility of a third party requesting access to personal data in the interest of its holder.

18. Article 35(1) of the Proposal seems to have the intention of simplifying the exercise of the right of access to personal data which is recognized to the respective holder by Article 35(1) of the Constitution of the Portuguese Republic and by article 15 of the RGPD, assuming that it is not the person who does so directly, provided that the third party proves to have made the request on behalf of or in the interest of the third party. However, the wording adopted supports an interpretation that goes beyond proof by means of a power of attorney or declaration of representation, which may have the effect of extending the holder's right of access to third parties under the guise of defending his interests. The CNPD therefore recommends clarifying the wording of paragraph 1 of article 35 of the Proposal.

19. The CNPD also recommends changing the wording of paragraph 2 of article 34, as it does not understand what one might mean by "The data relating to the offenses committed can only be processed after the condemnatory decision issued in the case administrative offense becomes final or, when there is a judicial challenge to it, after the final decision becomes final" (our *italics*).

20. The processing of personal data relating to offenses is carried out during the course of the administrative offense proceedings, from the beginning - otherwise, it would not be possible to conclude that an offense has been committed -, so that statement does not make sense - this, in the assumption that the data relating to offenses committed by natural persons are not anonymized and therefore are personal data (cf. Article 4(1) of the RGPD). Eventually, it will be desired to provide for a

limitation on carrying out certain operations on personal data while the decision does not become final, but clearly the expression processing of personal data is not being used in its proper sense, which is the technical- provided for in Article 4(2) of the GDPR.

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### III. Conclusion

21. Under the terms and on the grounds set out above, the CNPD recommends:

The. clarification of the meaning with which, in Article 36 of the Proposal, the expression automated data processing systems is used; and, if it has the meaning of an automated system of analysis of personal data (relating to personnel with critical functions for the safety of civil aviation) that produces a sanctioning decision or that proposes that decision-making content, the CNPD alerts to the fact that its use must be authorized and regulated by law, with specific guarantees adequate to safeguard the rights of data subjects, under the terms imposed by paragraph b) of paragraph 2 and paragraph 4 of article 22 of the RGPD;

B. clarification of the wording of paragraph 1 of article 35 of the Proposal, as it supports an interpretation that goes beyond proof by means of a power of attorney or declaration of representation, which may have the effect of extending the right of access by the holder to third parties under the appearance of defending its interests;

w. amendment to the wording of paragraph 2 of article 34, as the concept of processing personal data is not being used in its proper sense, which is provided for in paragraph 2) of article 4 of the RGPD.

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