NATIONAL COMMISSION

DATA PROTECTION

OPINION 2019/24

I. Order

The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees sent, for an opinion, to the National Data Protection Commission (CNPD) the «Proposals to amend Law no. of the National Data Protection Commission (Article 62-A)» presented by the Parliamentary Group of the Socialist Party.

The document subject to the opinion is entitled “Proposals to add to the Draft Law No. 120/XIII/3.a (GOV)”, comprising two articles: Article 62-A concerning Law No. 43/ 2004, of 18 August, however amended by Law No. 55-A/2010, of 31 December, and Article 62-B, which amends Law No. 26/2016, of 22 August.

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as an independent administrative entity with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and by paragraph 4 of article 36 of Regulation (EU) 2016/679, of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of paragraph 1 of article 21, ° and no. 1 of article 22, both of Law no. 67/98, of 26 October, amended by Law no. 103/2015, of 24 August (Personal Data Protection Law - LPDP).

II. Consideration of the proposal to add article 62-A: amendment to the Law on the organization and functioning of the CNPD

The CNPD welcomes the initiative to review its organization and functioning law, as it is essential for the activity it carries out, in the new legal framework for data protection, the restructuring of support services and the recognition of a set of powers necessary for the proper and effective management thereof.

Indeed, the application of the General Regulation on Data Protection - Regulation (EU) 2016/679, of 27 April 2016 (hereinafter RGPD) -, as well as the new regime resulting from the Directive on the processing of personal data in the sector

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police and judicial (Directive (EU) 2016/680), whose transposition is awaited, imply a radical change in the matrix of the activity of regulating the processing of personal data, with the transformation of the prior control function into an exceptional task, and its replacement by the guidance function, which now takes on a particular importance, with the main part of the CNPD's intervention now being centered on the supervision and application of sanctions. However, such a change must be accompanied by the resizing and adaptation of the organic structure of this Commission, as well as the creation of effective conditions of independence, which largely depends on the revision of Law No. 43/2004, of 18 August .

Despite the fact that the present proposal provides for some of the essential conditions for the restructuring of the CNPD, it falls short of what is necessary in some respects. It is on these aspects that we will focus next, leaving some specific observations on issues of coherence of the regime for the end. 1

1. Recognition of administrative and financial autonomy to the CNPD

The attribution of administrative and financial autonomy to the CNPD, expressed in the wording proposed for paragraph 1 of article 2 of Law n.° 43/2004, is a solution that cannot fail to be welcomed. This is, in fact, an old claim of the Commission, justified in part by the fact that the CNPD has its own revenue in its budget, but above all by the need to make its functional and organic independence reflect in the scope of financial management. Naturally, this autonomy does not affect the maintenance of the different financial legality control mechanisms already provided for in the Portuguese legal system for the independent administrative entities that work with the Assembly of the Republic.

Simply, the recognition of administrative and financial autonomy was not accompanied by the corresponding restructuring of the CNPD, namely in the forecast of the obligation of a single auditor, for the independent monitoring of the accounts, as required by paragraph 1 of article 12 of Law no. .° 8/90, of February 20, which sets the bases for public accounting.

In fact, from the perspective of the CNPD, it would be preferable to formally assume the legal recognition of legal personality under public law to the CNPD, as a consequence of this

autonomy regime, which best matches the GDPR recognition of full judicial personality1. And so it is also justified to distinguish within this entity, as an autonomous body (and not directly confused with the CNPD legal person), the collegiate body that holds the competences and powers that the RGPD recognizes to the national supervisory authority. It should be noted, moreover, that in paragraphs h) and i) of article 27 of the Proposal there is an express differentiation of two organic structures, referring to a single regulatory and supervisory board.

Thus, in line with the provision of the administrative and financial autonomy regime in article 2, the CNPD recommends the introduction of an article providing for the existence within the CNPD of a single inspector, his powers and the terms of his appointment in independence conditions. The liberty is taken to suggest the following wording of that article:

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1- The single supervisor is the body responsible for controlling the legality and efficiency of the CNPD's financial and asset management and for consulting the CNPD in this area.

2- The single auditor is a statutory auditor, appointed by the Assembly of the Republic, by resolution, and who takes office before the President of the Assembly of the Republic.

3- The term of office of the single supervisor lasts for five years, non-renewable, remaining in office until the effective replacement.

4- The single supervisor is remunerated at an amount corresponding to 25% of the base remuneration earned by the members of the CNPD regulatory council.

5 - In particular, it is incumbent upon the sole auditor:

a) Monitor and control the financial and asset management of the CNPD:

b) Periodically examine the financial and economic situation of the CNPD and verify compliance with the regulations governing its activity;

c) Issue a prior opinion within a maximum period of 10 days on the acquisition, encumbrance, lease and disposal of movable assets;

d) Issue an opinion on any matter submitted to it by the CNPD;

e) Inform the competent authorities of the irregularities that it detects. 1

1 Cf. Article 9 of Law No. 8/90, of February 20th.

Also as a consequence of the regime of autonomy provided for in article 2, paragraph 1 of article 20 of Law n° 43/2004 must be revised, changing the reference to the enjoyment of "administrative autonomy" to enjoy administrative and financial autonomy.

Also with regard to this article, it is important to remember that the independence of the CNPD must be guaranteed vis-à-vis all those involved in the processing of personal data, whether they are natural persons, generally as data subjects, or public bodies and companies that carry out the treatments. Therefore, it is essential to ensure this independence also in relation to the body that directs the entire central administration of the State, within which many and very impactful processing of personal data takes place: the Government2. In this sense, one of the ways to achieve this independence is not to make the ministerial authorization subject to expenditure by the CNPD, keeping this prior control of financial legality in the hands of the President of the Assembly of the Republic, as already provided for in the Budget Law. of State of 2019 (LOE), in paragraph 3 of article 254.

Thus, the CNPD recommends that a new number be introduced in article 20, suggesting the following wording, which repeats the provisions of that provision of the LOE:

/4 management of the CNPD budget, including appropriations not included in the budget of the Assembly of the Republic, is subject to the regime applicable to the budget of the Assembly of the Republic, and the regime provided for in paragraph 10 of article 60.0 of the L ei No. 71/2018, of December 31.

2 In this sense, the Court of Justice of the European Union has specifically ruled - cf. the judgments of 16 October 2012, C-614/10, and of 9 March 2010, C-518/07, accessible at http://curia.europa.eu/juris/document/document.isf?docid =130265&mode=req&pagelndex=1&dir=&occ=firs t&part=1&text=&doclang=PT&cid=7906887_____ and http://curia.europa.eu/juris/document/document.jsf?text:::&docid=79752&pagelndex=0&doclang=PT&mode =lst&dir=&occ=first&part=1&cid::::5303372, respectively.

2. Composition of the CNPD and the statute of its members

One aspect of the regime that raises serious reservations in terms of compliance with current European and national legislation concerns the composition of the CNPD.

Article 3(1) defines the composition of the CNPD, maintaining the number of members provided for in Article 25 of Law No. 67/98, of 26 October, but with innovation in relation to the competence for its designation.

In fact, the provisions of the GDPR require changes in the way in which the CNPD members are “appointed”, as it defines which national bodies may have the competence to choose them. Article 53(1) of the GDPR recognizes such power only for the Parliament, Government, Head of State or an independent body responsible for appointment under national law. In this new European legislative framework, the proposal that is now being considered maintains the appointment of two members by the Government and the three members (president and two members) elected by the Assembly of the Republic now add one more member.

While this change in no way contradicts the provisions of the GDPR, the provision that the seventh member is “a person appointed, from among its members, by the Commission for Access to Administrative Documents” (CADA) clearly and objectively contradicts the provisions of Article 53(1) of the GDPR. It is clear that the CADA does not constitute 'an independent body entrusted with the appointment under national law'. Not because it is not an independent body, but rather because it does not have in its attributions the function of selecting personalities for this type of bodies, which is what the GDPR clearly has in view with that provision.

In fact, limiting the choice of personality to CADA members would always raise a new contradiction with the requirements imposed by the RGPD, especially in paragraph 3 of article 54, when read in conjunction with the regime of incompatibilities and impediments of holders of high public offices, i.e., Law No. 64/93, of 26 August, last amended by Organic Law No. 1/2011, of 30 November.

In that rule, it is determined that «Members of the supervisory authority [...], during their term of office, may not perform any

activity, remunerated or not, that is incompatible with them.» Now, since CADA is made up of personalities who carry out other remunerated activities (e.g. deputies and lawyers, in addition to

presidents of local authorities) - cf. 26/2016, of August 22, it is not seen how the law can admit that such personalities are appointed to a position that has the nature of a high public office (contrary to what happens with CADA) and which, for that reason, is subject to the prohibition of cumulation of remunerated professional functions, with the exception of higher education and research (cf. subparagraph c) of paragraph 1 of article 3 and article 7 . of Law No. 64/93, of August 26).

Moreover, for the same reason, this way of designating the CNPD member would always be, per se, in contradiction with the national law that provides for the regime of incompatibilities and impediments for holders of high public offices.

Finally, and in an attempt to understand the raison d'être of this legislative proposal, it is important to clarify that the reciprocity of appointment of members between these two independent bodies has no substantive justification.

In other words, since it is CADA's responsibility to ensure compliance with Law No. national legislator to include a member of the CNPD in the composition of this body is evidently based on the contribution that the perspective of the CNPD, taking into account its attributions, can have within the meetings of that body when the assessment of access to personal data is at stake.

On the other hand, the opposite does not seem to make sense, when interpreting that legal diploma as having removed from the CNPD the competence to know about the access to personal data that integrate administrative documents, as it is not within CADA's attributions to monitor other types of processing of personal data3, nor recognize that its members, as such, have a special ability to express their views on them.

3 In other words, it is not the responsibility of CADA to assess other types of personal data processing operations, such as the collection, conservation, pseudonymization or publication of personal data, nor, regarding the operation that takes the form of access to data personal data, to comment on access to personal data held by private entities (not covered by article 4 of Law no. a specific legal regime for access to administrative documents.

Therefore, subparagraph d) of paragraph 1 of article 3 must be deleted and another form of designation of the seventh member of the CNPD that is in accordance with national law and European Union law must be defined. Or, alternatively, the number of members of this Committee should be reduced, similar to what has happened with most regulatory bodies in recent years.

Still on the subject of the composition of the CNPD, it is worth mentioning the novelty of the terms of office of its members being renewable twice. Considering the duration of each mandate (five years, which was the result of Law no. 67/98, of 26 October), the possibility of its renewal twice allows members to remain in this entity for fifteen years. As this is an option that does not contradict the limits imposed by the GDPR - which only defines the minimum term of office, setting this limit at 4 years (cf. subparagraph d) of paragraph 1 of article 54) -, it is not this novelty, which may have been inspired by the CADA regime, cannot be overlooked. It is important, however, to point out that the practical result of providing for this possibility of renewal twice is quite different in both contexts. As the terms of office of CADA members are only three years, CNPD members will be able to remain long beyond the 9-year period to which they are limited.

The CNPD takes this opportunity to underline the importance of updating its members' statutes with regard to remuneration. It is recalled that, in accordance with the provisions of article 9 of Law No. 43/2004, the chairman of the Commission is remunerated in accordance with the table of indicia and the regime established for the post of director-general, and it is up to the other members a remuneration equal to 85% of that.

First of all, it should be noted that, of all the independent administrative bodies that work with the Assembly of the Republic, the CNPD seems to be the only one in which the president and members earn such low remuneration (among the bodies whose members actually earn by virtue of the functions performed there with continuity). In fact, most of those entities have as president, by legal determination, councilor judges, therefore with substantially higher remuneration; and the president and members of the Entity

Regulatory Agency for Social Communication have a remuneration similar to that of public managers, a company of group A.

Secondly, considering the nature of the CNPD's role, there appears to be no similarity in situations that support the equalization of remuneration to that of directors-general and deputy directors-general (all of whom are lower hierarchical in the hierarchy of ministries). In fact, unlike the director-general, the president of the CNPD has the same financial responsibility as the minister (cf. subparagraph g) of paragraph 1 of article 19 of Law n° 43/2004) , and the extent and nature of the sectors of activity regulated by the CNPD justify reinforced guarantees of independence. With special emphasis since May 2018: the value of the maximum limits provided for in the RGPD for the fines that the CNPD may apply is likely to generate greater external pressure on its members, so, similarly to what happens with the members of the councils of the regulatory authorities, it is justified to ensure sufficient conditions of exemption in the performance of mandates.

Thus, it would be advisable to revise Article 9(1) of Law No. 43/2004, in order to make the remuneration status of its members more in line with and adequate to the dignity and independence that the exercise of such a function require.

3. Competencies related to the management of human resources and the workers' regime

In relation to the powers recognized by the CNPD, it is important to specify in this law a competence that is essential to fully comply with the SIADAP (Integrated System of Management and Performance Assessment in Public Administration) regime.

In fact, the CNPD, by virtue of its organic structure, cannot directly and fully apply the regime provided for in Law no. has awaited the approval of a law that will adapt that regime to its services, as, in fact, imposed by Law no. , in conjunction with subparagraph f) of paragraph 1 of article 48 of Law no. 3/2004, of 15 January).

In the absence of such a law and it being essential that the CNPD manager and workers are evaluated for their performance under conditions similar to those of the other

workers in the exercise of public functions, it is necessary for this Committee to recognize the regulatory competence to adapt the SIADAP regime, in compliance with legal limits.

Thus, the CNPD recommends that the proposed wording for paragraph 3 of article 22 be changed, adding at the end of the precept as well as the regulation for the evaluation of workers.

Still with regard to the management of human resources, the CNPD points out that, in the context of the mobility regime, it is most useful to make up for their insufficiency, a provision similar to that contained in the CADA organization law (Law No. 10/2012 , of 29 February): the dispensability of the agreement of the service of origin for mobility whenever it operates on the initiative of the worker. In fact, this provision is also admitted for the ministries, based on a ministerial decision, in the General Law on Work in Public Functions. Such a provision would allow the CNPD to unblock situations of impasse in the recruitment of new workers, all the more important when people with specialized knowledge in the context of the matters dealt with by this entity are involved, which is essential to guarantee the effective and efficient pursuit of the their assignments.

Thus, the CNPD suggests that a new number be introduced in article 30 of Law No. 43/2004 with the following content:

For the performance of functions in the CNPD support services within the scope of mobility mechanisms, when these operate on the initiative of the worker, the agreement of the service of origin is waived.

It is also important to note the importance for the CNPD of restructuring the services, in the terms proposed here, in order to better correspond to the functions that the RGPD assigns to it.

However, it is difficult to guarantee the efficiency and agility of decision-making procedures while the services are subject to a single manager. The CNPD's activity is increasingly diversified, requiring therefore an effective coordination of the different service units, being neither efficient nor effective that the coordination of

five units of service fall on the same person. Just think of the very different nature of the activity developed by the Inspection Unit and the activity of the Public and International Relations Unit, and their importance in the framework of the new legal regime. The function of supervising data processing, which will be one of the main activities of the CNPD, requires a careful articulation of the workers involved in it (jurists and specialists in the field of technology), while the intervention in the procedures of cooperation and coherence with the other authorities of control of the European Union and within the European Data Protection Committee calls for permanent monitoring. That a single person is responsible for guaranteeing the

coordination of each of these units and the others (Rights and Sanctions, IT and Administrative and Financial Support), as well as the articulation between all of them, appears to be a herculean task, which can never be carried out fully.

For these reasons, the CNPD recommends the provision in this diploma of the creation of an intermediate figure to ensure the coordination of each unit, suggesting the following wording of an autonomous number to be inserted in article 22:

Each unit has a coordinator, whose recruitment criteria are established in the CNPD regulation, appointed on a service commission for three-year periods, renewable by order of the president, after consultation with the CNPD, and who is entitled to the base remuneration of his or her category of origin. plus an 8% supplement on this value.

4. Miscellaneous provisions

Finally, it is important to point out a set of provisions of the Proposal under consideration that, from the perspective of the CNPD, deserve a specific review, for reasons of consistency with other legal provisions.

Thus, first of all, it is recommended that paragraph 3 of article 16 be amended in order to take into account, for the purposes of the duty of publicity, other regulations for which the CNPD is competent to issue. The CNPD's regulatory competence also derives from the RGPD and covers different matters - for example, the CNPD approved and published an administrative regulation on the list of personal data processing subject to impact assessment on the protection of personal data, in compliance with the provided for in Article 35(4) of the GDPR.

To that extent, it is suggested that the wording of paragraph 3 of article 16 becomes the following:

Administrative regulations are also published in the 2nd series of the Diário da República, including those relating to the setting of fees and those issued under the provisions of paragraph 3 of article 22.0

In relation to article 20, it is only noted that the introduction of subparagraph g) in paragraph 2 seems to repeat the prediction of subparagraph d) of the same number, suggesting the replacement of the wording of this subparagraph by that proposed in the new subparagraph g).

Finally, for reasons of consistency with the legislative changes made in the meantime with regard to public administration, it is recommended to replace the reference to the staff "table" with a staff map in subparagraph d) of paragraph 1 of article 19, in paragraph 4 of article 22 and in the title and paragraph 1 of article 30.

III. Consideration of the Proposal for the amendment of article 62-B

Within the scope of the competence recognized by subparagraph b) of paragraph 3 of article 58 of the RGPD, the CNPD pronounces, albeit briefly, on the proposal to add article 62-B, by which intends to amend article 6 of Law No. 26/2016, of 22 August, a law that approves the regime for access to administrative and environmental information and the reuse of administrative documents.

It envisages defining a new regime for accessing nominative administrative documents (that is, administrative documents containing personal data) when the personal data in question do not correspond to special categories of data (those provided for in Article 9(1) of the GDPR) nor are they related to the intimacy of private life, to establish free access to such documents; it is recalled that this regime is currently only provided for access to administrative documents without personal data (cf. article 5 of Law no. 26/2016, of 22 August).

It cannot be overlooked that this change is displaced both in time, in mode, and in content.

As for time, it is not clear why an alleged clarification is now being introduced in the regime of access to administrative documents. The diploma that is the subject of amendment was approved several months after the publication of the GDPR and

took into account the provisions of its rules, as it could not fail to be, considering that such European legislation was already in force at that time.

This change, by the way, only seems to introduce noise in an aspect of the regime that was not raising doubts as to its application, given the clarity with which the national legislator defined the nominative documents, including all administrative documents with personal data (cf. b) of Article 3(1) of Law No. 26/2016).

As for the method, it is, at least, surprising that in the context of the GDPR enforcement law it is intended to legislate on the content of the Law on Access to Administrative Documents.

As for the content, the reason why the presumption that the request for access to nominative documents is based on the right of access to administrative documents when those types of personal data are not in question is unfathomable.

It is recalled that, although the GDPR, in Article 86, recognizes that each Member State has the power to define the compatibility between administrative transparency and the right to the protection of personal data, it does not fail to impose a conciliation between that value and this fundamental right. And this conciliation is certainly not present when, by means of a legal presumption, the right to the protection of personal data is annihilated whenever data relating to the intimacy of private life and the data provided for in paragraph 1 of article 9 are not at stake. . of the GDPR.

The criterion for determining the application of the GDPR and therefore the recognized protection of personal data is not that of these categories of data: all personal data are, from the outset, protected, so the process of harmonizing the different rights and fundamental values in tension has to be achieved by applying the principle of proportionality. In this case, it is not possible to see where the weighting of the need and the judgment of non-excess are in the legislative option of free access to personal data. In fact, the specific fundamental value that would always justify the lack of protection of individuals with regard to their information cannot be removed from the proposed rule - there is certainly no basis for enshrining, in the abstract, a legal right of access to administrative documents that always overrides the fundamental right to the protection of personal data.

To better illustrate what is being said, it should be noted that the presumption that is intended to be introduced here erases or denies the right to protection of personal data when the access by any third parties to administrative documents with personal data such as the address or contact details of citizens, as well as information regarding the assets of any citizen, or even working hours, remuneration and justification of absences that do not involve information on health concerning any worker.

This solution appears, therefore, to be disproportionate, as it is excessive, not allowing a specific assessment of the situations in which such access may be justified, which seems to violate the provisions of paragraph 2 of article 18 of the Constitution of

the Portuguese Republic. .

IV. Conclusion

The CNPD welcomes the initiative to revise its organization and functioning law, considering, however, for the reasons set out above, that the proposed changes are not sufficient to ensure full compliance with the functions that the RGPD imposes on the national authority to control data processing. personal data.

1. Thus, in order to effectively guarantee its independence, regarding the statute of autonomy and composition, the CNPD recommends:

i. Consistent with the provision of the administrative and financial autonomy regime, the provision for the existence of a single supervisor and the definition of the respective powers, as well as the terms of their appointment under conditions of independence;

ii. In order to effectively guarantee the independence of this Committee and compliance with the rules of financial legality, the introduction of a rule similar to Article 254(3) of the 2019 State Budget Law, which subjects expenditure to prior control of financial legality of the President of the Assembly of the Republic;

iii. The elimination of subparagraph d) of paragraph 1 of article 3 and the definition of a way of appointing the seventh member of the Commission that is in accordance with national law and the law of the European Union;

iv. The revision of paragraph 1 of article 9 of Law n.° 43/2004, in order to make the remuneration status of the members of the Commission more in line with and adequate to the dignity and independence that the exercise of such a function requires.

2. Regarding the CNPD's powers in the field of human resources management, it advises the provision of regulatory competence to specifically adapt the SIADAP regime, as well as the provision of the dispensability of the agreement of the service of origin for the mobility of workers whenever the operate on their own initiative.

3. With regard to the organization of services, it considers that the proposed restructuring into five units is appropriate for the development of its activity within the framework of the new GDPR, but considers it essential for their management to create an intermediate figure to ensure coordination of each unit, under penalty of the sole director of the CNPD not being able to

efficiently and effectively ensure the articulation of the different tasks of the Commission.

4. It also alerts to the need to revise the wording of some rules, for reasons of coherence of the regime (intra-legal and with other legal rules), among which the article 20(1) stands out here, where administrative and financial autonomy must be specified.

Finally, under the powers conferred by the RGPD, the CNPD emphasizes that the solution proposed in article 62-B violates paragraph 2 of article 18 of the Constitution of the Portuguese Republic, by denying in the abstract, without taking into account the circumstances of the case and the concrete interest in access, the right to the protection of personal data whenever administrative documents that do not contain special data and those relating to the intimacy of private life are at stake.

Lisbon, May 2, 2019

Filipa Calvão (President)