National Data Protection Commission

OPINION/2021/66

I. Order

1. The Minister of Justice asked the National Data Protection Commission (CNPD) to issue an opinion on the Draft Decree-Law No. 960/XXII/2021, which creates the National Anti-Corruption Mechanism (MENAC) and approves the Regime General on the Prevention of Corruption.

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 44 in conjunction with the provisions in paragraph 2 of article 30 and paragraph 1 of article 43, all of Law n.° 59/2019, of 8 August, which transposed Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016.

II. Analysis

3. The Draft Decree-Law in question is based on the National Anti-Corruption Strategy 2020-2024, approved under the terms of Resolution of the Council of Ministers No. creation of a general regime for the prevention of corruption'. To this end, it creates the National Anti-Corruption Mechanism (MENAC), an “independent administrative entity, with legal personality governed by public law and powers of authority” and approves the general regime for the prevention of corruption (RGPC) - cf. Article 1 of the Project.

4. The pronouncement of the CNPD focuses only on the rules of this Draft Decree-Law that provide for or imply processing of personal data, or are directly related to them, to assess their compliance with the rules on the processing of personal data for the purposes prevention, detection, investigation or prosecution of criminal offences, approved by Law no.

i. National Anti-Corruption Mechanism

5. From the perspective of the protection of personal data, it is important to pay attention to the attributions of MENAC provided for in paragraphs f) and h) of paragraph 3 of article 2 of the Project. At issue is the attribution of collecting and organizing information on the prevention and repression of certain criminal offenses, listed therein, as well as the attribution of creating

databases and operating a communication platform that facilitates the exchange of information between public institutions with responsibility for regarding the prevention and suppression of corruption and related offenses, the Monitoring Committee is responsible for creating the aforementioned database, in accordance with Article 13(c) of the Project.

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6. It begins by pointing out that the provision for the creation of databases is not the object of any other regulatory rule, leaving the nature of the data in question to be clarified and, assuming that such databases include personal data, which categories of personal data here can integrate. The generic and broad character of this provision does not fulfill the guiding function for MENAC that is expected of the law, nor does it include any guarantees of citizens' rights in a context of data processing that has a restrictive burden on their legal sphere.

7. Bearing in mind that Article 5(2) of Law No. 59/2019 requires the law that legitimizes the processing of personal data to provide, in addition to the purposes and purposes of the processing, of the personal data subject to processing, the CNPD recommends defining at least these elements that characterize the aforementioned “databases” referred to in point h) of paragraph 3 of article 2 of the Project.

8. In addition, article 24 of the Project amends article 5 of Decree-Law No. 276/2007, of 31 July, last amended by Law No. 114/2017, of 29 December - diploma approving the legal regime for inspection activity on the direct and indirect administration of the State -, adding a new paragraph 4 that recognizes to inspection services "the right of free access to the databases of public legal entities, carried out preferably directly and remotely”.

9. Not meeting the need for this specific provision in view of the duties of collaboration and provision of information and the determination that there is reciprocal access to information between the inspection services and between them and all public

entities (n. 1 and 3 of article 5), there is still doubt about the need for unrestricted access to the databases of public legal entities and in the foreseen terms - "directly and remotely".

10. In fact, the connection seems to come from here, either by creating a temporary and limited access to a certain database, or by connecting to an endpoint, via VPN or exposed, or by web services, from MENAC to all legal persons public, which cannot fail to raise concern in terms of the security of the connections and the personal data stored therein. There also seems to be the possibility of accessing personal data and the databases of public legal entities without delimiting the respective object and without demonstrating the need for such access in each case. Such a solution represents a restrictive measure of the fundamental rights of data subjects (to the reservation of privacy and the protection of personal data) that is not revealed, nor is it demonstrated in the abstract, as a necessary and not excessive measure, as there are other solutions. of access that also safeguard the intended purpose with less impact on the fundamental rights of citizens.

11. Furthermore, there are highly sensitive databases in relation to which there is no need for direct and remote access - and, in any case, it proves to be excessive - on the part of that inspection authority, as is the case, from the outset, with the databases relating to the health of users of the national health service. It is recalled that the data in question are specially protected, pursuant to article 9 of the General Data Protection Regulation and also pursuant to paragraph 1 of article 6 of Law No. 59/2019, by that access to such information must be specifically provided for by law and permitted by law only to the extent that it is strictly necessary.

12. Thus, to ensure compliance with the principle of proportionality, in particular, in terms of the need for access, the CNPD recommends that the provision of direct and remote access to databases be reconsidered, in the new paragraph 4 of the article 5 of Decree-Law No. 276/2007, of 31 July, and that, in order to ensure the principle of proportionality, in terms of the need for access, as well as the essential auditability of MENAC's own activity, it is specified in the legal norm that access to the databases must be done in a contextualized way, with an indication of the process in the context of which the inspection is

carried out.

13. Since the aforementioned legal precept refers to a protocol the definition of the conditions for access and treatment of information, paragraph 5 of article 4 of the General Regime for the Prevention of Corruption (RGPC), attached to the Draft Decree -Law in question, provides that in accessing data and documents that are already in the possession of bodies and entities of the Public Administration, MENAC uses "the Platform for Interoperability of Public Administration, or using the mechanism provided for in no. Article 4-A of Law n.0 37/2014, of 26 June, in its current wording». But before highlighting the doubts raised by this provision, it is still important to make a comment regarding paragraph 5 of article 5 of Decree-Law No. 276/2007.

14. Thus, it is noted that the amendment introduced in paragraph 5 in the projected version of article 5 (corresponding to paragraph 4 in the current version of the diploma), regarding the exemplification of the conditions of access and treatment of information, needs clarification. Indeed, it is unclear what is meant by 'categories of authorized holders'. It is recalled that the current wording of the standard mentions “the categories of data subjects and data to be analysed”. As the new paragraph 5 then highlights "the nature and category of the data that can be consulted", the question remains as to whether, by categories of authorized data subjects, it is intended to refer to the categories of data subjects to be analyzed or the categories of professionals, within MENAC, authorized to access information - in which case it is essential to adopt mechanisms that allow the individualization of each of the professionals with access permission, i.e., individualized credentials.

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15. Therefore, for reasons of legal certainty and certainty, the CNPD recommends the revision of paragraph 5 of article 5 of

Decree-Law no. 276/2007 in order to clarify the exemplification of the conditions of access and treatment of information.

ii. General Regime for the Prevention of Corruption

16. As mentioned above, paragraph 5 of article 4 of the General Regime for the Prevention of Corruption (RGPC), annexed to the Draft Decree-Law under consideration here, provides that "MENAC can access the data and documents that are already in the possession of Public Administration bodies and entities, using the Public Administration Interoperability Platform, or using the mechanism provided for in article 4-A no. of June, in its current wording'.

17. It is recalled that paragraph 2 of article 4-A of Law no. 37/2014, of 26 June, introduced by Law no. 71/2018, of 31 December, determines that ' [oj citizens holding a citizen card or CMD can, through secure authentication, obtain data contained in the databases of Public Administration bodies to be made available on authentication.gov." And that paragraph 3 of the same article explains that "[the] availability or access of personal data under the terms of the previous paragraphs by public entities constitutes a right of the data subject to allow the exercise of the portability right provided for in article 20.0 of the General Regulation of Data Protection.».

18. However, this last reference raises the greatest perplexity, as it is not understood to what extent the citizen's card or digital mobile key (CMD) held by each citizen can serve here as an instrument for MENAC access to the personal data contained in the Public Administration databases for the purpose of fulfilling the attributions of that entity. It should be noted that article 4-A of Law No. 37/2014 will have the purpose of speeding up, in the interest of the citizen, the obtaining of documents or information relating to himself and not facilitating the access of an administrative authority to the personal data of the 3rd.

19. It remains to be explained, therefore, whether it is intended to ask or suggest to workers or holders of administrative bodies that are being inspected to allow access to their data through the respective citizen card or CMD, since surely the mechanism regulated in Law No. 37/2014 does not allow inspectors to access third-party personal data. And if this is the first hypothesis that that rule intends to reflect, it is not seen how, in the context of the inspection activity which may result in potentially unfavorable consequences for the data subjects, it can be considered that, without other guarantees, consent can here assume any legal relevance.

20. Furthermore, the mere provision that access to data and documents in the possession of administrative entities can be done through the Public Administration Interoperability Platform says nothing about the terms of the processing of personal data in which such access translates when it covers information relating to identified or identifiable natural persons.

21. If it can be understood that Decree-Law No. 276/2007 does not precisely define the relevant databases and categories of personal data relevant to the inspection activity of the different inspection services, a diploma who has a specific purpose, in the context of the prevention of certain criminal offenses, it cannot fail to delimit, depending on the declared purpose, the relevant databases that can be inspected and the categories of personal data relevant within the scope of the inspection activity to be carried out by MENAC.

22. Allowing such access to take place without, at the legislative level, defining the rules relating to the processing of personal data, omitting the essential elements of such processing, is an omission or incompleteness that irremediably undermines the transparency and predictability that legal rules that prescribing interference with the fundamental rights of citizens always has to ensure. Citizens have the right to be generally informed - even if not regarding the concrete treatment, when the information could harm the purpose pursued with the inspection activity - about the data processing that public entities can carry out and, specifically, which administrative bodies, under what conditions and which categories of personal data they can access. It is this right to information about the processing of your personal data by the Public Administration that, in the first place, Article 35 of the Constitution of the Republic recognizes for every citizen, every human person.

23. This is also why Article 5(2) of Law No. 59/2019, referred to above, requires the legislative act providing for the processing of personal data to list such data. In fact, normative densification is a requirement of the rule of law principle as a means of providing predictability to citizens regarding restrictions on rights, freedoms and guarantees arising from legal norms, which the present Bill does not seem to fulfill.

24. Bearing in mind the predictability function that rules restricting fundamental rights must fulfill, by virtue of the principle of the rule of law, and specifically the requirements set out in Article 5(2) of Law No 59/ 2019, the CNPD recommends, specifying in paragraph 5 of article 4 of the General Regime for the Prevention of Corruption (RGPC), attached to the Draft Decree-Law under consideration, the specification of databases and data personal data that may be subject to such access.

25. It is also important to point out a provision that this Bill of Law includes regarding the notification regime - the article 25(3) of the RGPC is being considered here. There it is established that it is considered the domicile of the

addressee «[the] that appears in the tax administration database as a tax domicile». Whereas today, pursuant to paragraph 2 of article 13 of Law no. 7/2007, of 5 February, last amended by Law no. 32/2017, of 1 June, the tax domicile coincides with the domicile declared for the purposes of civil identification, the reason for this provision is not reached, and therefore its elimination is recommended.

III. Conclusion

26. On the grounds set out above, and taking into account that this Draft Decree-Law provides for various processing of personal data, including the creation of databases and access to existing databases in public legal entities through the Mechanism National Anti-Corruption (MENAC), the CNPD believes that it is essential to regulate the main elements of these treatments, at least indicating the personal data being processed and the databases susceptible to access, as required by paragraph 2 of article 5 of the Law 59/2019, of 8 August, and stems from the requirement of predictability and legal certainty of the restrictive rules of fundamental rights in a democratic State of Law.

27. Thus, the CNPD recommends:

The. the specification in this Bill of the personal data that integrate or may integrate the “databases” to be created by MENAC referred to in paragraph h) of paragraph 3 of article 2 of the Project;

B. the specification in paragraph 5 of article 4 of the General Regime for the Prevention of Corruption (RGPC), attached to the Draft Decree-Law under consideration here, the specification of the databases of public legal entities and the personal data that can be accessed by MENAC.

28. To ensure compliance with the principle of proportionality, in particular, in terms of the need for access, the CNPD recommends that:

The. the provision, in the new paragraph 4 of article 5 of Decree-Law no. 276/2007, of 31 July, of direct and remote access by MENAC to the databases of public legal entities is reconsidered;

B. also to ensure the essential auditability of the activity of MENAC itself, it is specified in the legal norm that access to

databases must be done in a contextualized way, indicating the process in the context of which the inspection is carried out.

29. Finally, the CNPD recommends reviewing subparagraph a) of paragraph 3 of article 25 of the RGPC, as the reason for its prediction is not achieved, in view of the statute of paragraph 2 of article 13 of Law No. 7/2007, of 5 February, last amended by Law No. 32/2017, of 1 June.

CWPD

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