

## I. Order

1. The Secretary of State for Justice submitted to the National Data Protection Commission (hereinafter CNPD), for an opinion, the Draft Ordinance that regulates the electronic filing of documents drawn up by a notary and other documents filed in notaries and their respective availability through permanent notarial certificate.

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, RGPD), 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 no. 58/2019, of 8 August, which enforces the GDPR in the domestic legal order.

## II. Analysis

3. The Draft Ordinance under analysis regulates the electronic filing of documents drawn up by a notary and other documents filed in notaries and their respective availability through a permanent notarial certificate, as well as the electronic submission, by notaries, of acts to the Registry of the Central Registries.

4. The legal framework of this draft regulation is, on the one hand, article 3 of the Statute of the Order of Notaries, approved by Law no. Order of Notaries, the adoption of measures that promote the reorganization of electronic archiving systems of notarial documents so that they can, in legally admitted cases and in accordance with applicable legal obligations, be consulted through a permanent notarial certificate, whose consultation does not require the exhibition of the original document, under the terms of the decree to be approved by the member of the Government responsible for the area of justice, and, on the other hand, the provisions of article 43-B of the Land Registry Code, pursuant to which documents that contain facts subject to

registration are filed electronically, under the terms to be defined by order of the member of the Government responsible for the area of justice.

5. Essentially, this Project provides for three types of operations that correspond to or imply the processing of personal data, namely:

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i. Electronic archiving of documents drawn up by a notary and other documents filed in notaries;

ii. The availability of the permanent notarial certificate;

iii. Sending, in a file, the data on the acts performed to the Central Registry Office.

i. Eletronic archive

6. Starting with the electronic file, in paragraph 1 of article 4 of the Draft Ordinance, it is stipulated that the electronic platform, to be used for the electronic file of notarial documents and other documents filed in notaries and for the permanent notarial certificate , is made available and managed by the Portuguese Notary Public, specifying in paragraph 2 of article 18 that this is the entity responsible for processing personal data, for the purposes of paragraph 7) of article 4 of the GDPR.

7. In this regard, it is only noted that, if the Notary Society has the support of a third party in the development and management of the electronic platform, namely, for the technological part, as responsible for data processing, the Order is bound to comply with the obligations provided for in article 28 of the GDPR, namely to ensure compliance and the establishment of all necessary measures to maintain the security of personal data against any illegal access or unauthorized treatment, in addition to ensuring that the persons involved are somehow obliged to a commitment to confidentiality.

8. In paragraph 2 of the same article, it is established that 'notaries and workers duly authorized to perform notarial acts

authenticate themselves on the electronic platform using qualified digital certificates that prove their professional quality or other means of identification that offers similar security guarantees'.

9. Regarding this provision, it is important to pay attention to two aspects of the regime. The first concerns the use of other means of identification that offer similar security guarantees, including the use of a citizen's card - the CNPD insists that the use of this means of identification, civil by nature and principle, can only be used to effects of attesting professional attributes in full conditions of freedom to issue the legally required authorization of the citizen's card holder - cf. article 2 and paragraph 1 of article 18-A of Law no. 7/2007, of 5 February, last amended by Law no. 32/2017, of 1 June. What is important to remember especially when the holders are notary workers

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notary, since, as is well known, the asymmetry of labor relations hardly offers conditions for the expression of a free consent of the worker.

10. The second aspect to be highlighted concerns the authentication mechanism on the electronic platform. In fact, even if such a mechanism is foreseen, the Ordinance Project does not define how notaries and workers, duly authorized to perform notarial acts, are accredited on the platform, as being able to access documents in the physical archive of a particular notary office. . In other words, it is important to ensure that the legitimacy granted to these users for interaction on the electronic platform does not exceed the limits defined in paragraph b) no. 1 of article 10 of this Draft Ordinance. Thus, it is essential to define in this article or in another provision of this Draft Regulation, how the purpose underlying the provisions of subparagraph b) no. of access profiles to the platform, taking into account the need to:

- i. Prevent access to documents that are outside the scope of the professional exercise of a given user of the platform, namely those that are filed by a notary where he does not perform duties; and
- ii. Ensuring that the user can only add or exclude access to documents depending on the registry office where he is performing his duties.

11. Still on the subject of access profiles to the electronic platform, it is important to remember the need to contextualize access by professionals and entities provided for in paragraph 2 of article 10 of this Draft Ordinance. In fact, the regulatory

norm is not enough to provide for the possibility of consultation by the different authorities and bodies listed therein within the scope of their attributions or purposes or even within the scope of their competences, and the context of the exercise of the powers or competences must be expressly required, for reference to the number of the judicial or administrative process within which such consultation takes place.

ii. Permanent notary certificate

12. With regard to the personal data being processed, in addition to those contained in the database of the electronic file of notarial documents (cf. article 6 of the Draft Ordinance), article 12 provides for the processing of contact data (email address and mobile phone number) for the purpose of requesting a permanent notarial certificate.

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13. In this regard, it is important to know whether notaries and workers who are accredited in the digital file will have access to the contact details of the applicant for a non-face-to-face request, made through the website [www.notarios.pt](http://www.notarios.pt) or if they will only be able to send notifications through the platform electronically, not viewing or having the possibility to compile such contact details.

14. The draft ordinance indicates that requests for a permanent notarial certificate can be made through the website, but it does not explain whether these requests will be distributed by the notary offices through an algorithm that identifies the respective registry office or attended centrally by the Order of Notaries. In accordance with the principles of proportionality and the minimization of personal data, especially in terms of the need to know, there should not be a global work queue, with applicants' data and their documents, accessible to all notaries - cf. Article 5(1)(c) of the GDPR.

15. It is recalled that access to documents in the electronic file by notaries (and their respective workers accredited for the

purpose) is defined, in this Project, by the rule of parallelism in relation to access to documents contained in the physical file. However, this parallelism is not made explicit with regard to data relating to online requests, which reinforces the need to define the same rule for these requests.

### iii. Participation of acts to the Central Registry Office

16. Considering now that the participation of acts will be done by sending an electronic file, by the notaries to the Conservatória dos Registos Centrais, under the terms provided for in article 187 of the Notarial Code, it involves the communication of personal data provided for in no. 3 of article 6 of this Project.

17. Since article 21 of the Draft Ordinance refers the regulation of the processing of personal data to a protocol signed between the Notary Society and the IRN, the CNPD points out that, in this context, it is not possible to assess the impact on the protection of data from this communication. It is limited, therefore, to point out that:

The. The text of the protocol must, prior to its execution, be submitted to the CNPD for consideration, pursuant to Article 36(4) of the GDPR and Article 18(4) of Law No. 43/ 2004, of 18 August, last amended by Law No. 58/2019, of 8 August, as it will contain binding rules for the parties on the processing of personal data and effectively in the legal sphere of citizens;

B. In the aforementioned legal instrument, it is important to regulate:

i. Protocol for sending the file(s): whether it is manual or automatic file transfer;

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ii. The username/password and/or other authorization mechanisms installed in the infrastructure of the controller and the recipient will be used;

iii. How access to the file is managed: personal and non-transferable or institutional (e.g. sending by email);

iv. Whether the file will have some type of cipher to guarantee the confidentiality and integrity of the data contained therein;

v. What are the audit mechanisms for accessing the file in its repository on the side of the controller, given that Article 20 indicates a record of access to the platform, but does not include reference to the same mechanism in the file for the Central Registry of the IRN

iv. Common rules regarding the processing of personal data

18. The Draft Ordinance also includes a set of provisions which define common rules for the different processing of personal data.

19. First, consider Article 18 of the Project. In paragraph 1, the two purposes of the electronic platform are defined, specifying that the information contained therein cannot be used for any other purposes incompatible with these. The final part of this provision, as it is written, adds nothing to what follows from subparagraph b) of paragraph 1 of article 5 and paragraph 4 of article 6 of the GDPR, therefore the doubt remains of the relevance of its prediction.

20. The CNPD recalls that, according to the jurisprudence of the Court of Justice of the European Union, when the collection of personal data is based on the consent of the holder or for the pursuit of one or more purposes provided for by law (as is here the case), only by specific legal determination can personal data be reused for different purposes (cf. Planet49 judgment, of 10/1/2019 - 0 673/17). For this reason, the CNPD understands that the provision in the regulatory norm that "the information contained therein cannot be used for any other purposes incompatible with these" is likely to generate misunderstandings as to the application of subparagraph b) of paragraph 1 of article 5 . and Article 6(4) of the GDPR, recommending their elimination.

21. Also with regard to article 18, it does not reach in relation to which processing of personal data may make sense to exercise the right of opposition, since the treatments in question here are based on legal provision or in the context of contractual relationships with the data subject. of data legally framed, not

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seeming to fulfill the presuppositions of paragraph 1 of article 21 of the RGPD, and the protection of the rights of third parties whose data are the object of processing is ensured in specific legislation.

22. Finally, with regard to paragraph 5 of article 18, the CNPD recalls that the anonymization of personal data, which the aforementioned precept seems to have in view, must be done with a guarantee of non-re-identification, which, in the days of today, with the set of information available online, it is increasingly difficult to reach.

23. Regarding the rules relating to auditing and inspection, the CNPD recommends the express indication of the period for keeping the records (logs) of access to the platform, referred to in Article 20 of the Draft Ordinance, a period that must be of

two years, as well as the obligation incumbent on the person responsible for the processing of its regular analysis.

### III. Conclusion

24. On the grounds above, the CNPD recommends reviewing the Draft Ordinance regarding the following aspects of the regime:

- i. The delimitation and contextualization of the profiles of access to the electronic platform, in the terms defined above in points 10 and 11;
- ii. Clarification of the terms in which the receipt and processing of the request for a permanent notarial certificate is processed, in order to guarantee compliance with the principles of proportionality and data minimization, as explained above in points 13-15;
- iii. The reconsideration and elimination of some of the rules common to the different processing of personal data provided for in article 18 of the Project, in particular the final part of paragraph 1 and the reference to the right of opposition in paragraph 3;
- iv. The provision, in article 20 of the Project, of a period of storage of records (logs) of access to the platform (the period of two years is recommended) and the obligation of regular analysis of records by the controller;

25. The CNPD also recalls that the protocol to be signed under the terms of article 21 of the Project must be submitted to this entity for the issuing of the respective opinion, and the protocol must provide for the processing elements listed above, in point 17. .

Lisbon, April 13, 2021

Filipa uaivao (President, who reported)