

CNPD

National Data Protection Commission

OPINION/2021/59

I. Order

1. The Budget and Finance Committee of the Assembly of the Republic asked the National Data Protection Commission (CNPD) to issue an opinion on Bill No. 678/XIV/2.3 (PSD), which “Approves the legal framework supplementary measure to prevent and combat unauthorized financial activity and consumer protection».

2. The CNPD issues an opinion within the scope of its powers 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, subparagraph b) of Article 58(3) and Article 36(4), all of Regulation (EU) 2016/679, of 27 April 2016 - General Data Protection Regulation (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 No. 58/2019, of 8 December August, which enforces the GDPR in the domestic legal order.

II. Analysis

3. The purpose of this Bill of Law is to establish a complementary framework for preventing and combating unauthorized financial activity and consumer protection, by amending the Advertising Code.

4. With direct relevance to the protection of personal data, it is important to highlight that the Draft Law imposes, in its article 5, on notaries, lawyers and solicitors a duty to communicate monthly information about third parties to Banco de Portugal, with the following scope: information on public deeds, authenticated private documents or documents with a signature recognized by them in which they intervene in the scope of their activity regarding the conclusion of civil loan agreements by third parties, with or without guarantee, as well as confessional declarations of debt , and also public deeds or authenticated private documents concerning the transfer of ownership of immovable property, in the event that a previous owner has become it again in the land registry, except when this fact results from the execution of a real estate leasing contract .

5. Considering the objective and subjective scope of this duty of communication and the categories of data provided for in paragraph 3 of article 5, it is concluded that compliance with it implies a processing of personal data of great scope (even if it

may cover information also concerning legal persons) - cf. Article 4, points 1) and 2) of the RGPD) - without the need for this treatment, with such amplitude, for the purpose of controlling financial activity to be evident.

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6. In fact, it is not demonstrated in the explanatory memorandum that is part of the Bill that the processing of personal data is the only measure or the least harmful measure of other interests and rights that are felt in the specific case for the prevention and combat financial activities by unauthorized entities.

7. Furthermore, the provision of such a duty implies the centralization of all this information in Banco de Portugal, in a database to be created specifically for this purpose, imposing on this administrative entity the definition of electronic communication channels and the creation of a system user registration (all notaries, lawyers and solicitors) - cf. no. 3 [which, strictly speaking, should be no. 4] of article 5 of the Bill.

8. The simple description of the web of personal data communications resulting from article 5 of the Draft Law makes it understood that this is a large-scale processing of personal data, consisting of several operations with multiple controllers (as many as to the monthly communication of data, in addition to the Bank of Portugal) and with a wide universe of data subjects, which makes it possible to intuit the dimension of its impact on the rights and interests of data subjects.

9. In the absence of the respective impact study on data protection¹, it is important to consider the scope of the processing, in particular calling on the instruments already available to safeguard against the risks of intervention by unauthorized entities and the proportionality judgments of the national legislator in parallel situations.

10. Therefore, considering that Banco de Portugal provides a public register of entities authorized to carry out financial activities, precisely so that anyone, and therefore anyone who, in the exercise of certain professional activities, has to carry out legal acts with financial relevance under the legally defined terms, can verify whether it is before an authorized entity, and also

taking into account that the reporting duties to Banco de Portugal that fall on financial institutions are delimited according to their financial relevance, the CNPD understands that here too the balance between the different interests and rights in question justifies the delimitation of the duty of communication only to documents related to civil loans that present a certain value to be defined in the law (singularly or, eventually, in the set of several operations carried out in the near future).

11. Also because, under the terms provided for in article 5 of the Project, the duty to communicate personal data covers a set of information that appears to be irrelevant to the supervisory functions

1 The CNPD recalls that, pursuant to paragraph 4 of article 18 of Law no. 43/2004, of 18 August, requests for an opinion on legal and regulatory provisions in preparation must be sent to the CNPD accompanied by the respective data protection impact study.

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of financial activities, since many of these legal acts relating to the civil loan do not even show signs of intervention by a third party in the illicit exercise of a financial activity; in these terms, it could even be said that the excess of information would harm the supervisory activity of Banco de Portugal.

12. Thus, given the lack of demonstration of the need for a web of processing of personal data provided for in Article 5 with such a wide universe of data controllers and, therefore, with such a wide universe of affected data subjects, the CNPD recommends reconsidering the proposed solution, in order to delimit the duty of communication in terms of a certain value, otherwise such rule does not meet the criterion of necessity required by any restrictive legislative measure of rights, freedoms and guarantees (in the case , the right to the protection of personal data, enshrined in article 35 of the CRP), always proving to be excessive, in accordance with paragraph 2 of article 18 of the CRP.

13. In addition, the aforementioned article 5 does not regulate the processing of personal data to be carried out by notaries, lawyers and solicitors, first omitting that the fulfillment of that duty of communication on a monthly basis implies the creation of a database - not regulating important elements of this processing, such as the data retention period -, limiting itself to referring the regulation of the centralized database to rules to be defined by the person responsible for the centralized processing of the data: Banco de Portugal - which corresponds to a legislative option empty of guiding content for the data controller himself.

14. Even if Article 6(3) of the GDPR does not impose on Member States a duty to define more precisely the terms of data processing, suggesting only that definition, the rule of law principle calls for densification of norms of this type as a means of providing predictability to citizens regarding the duties arising from legal norms and restrictions on rights, liberties and guarantees, which Article 5 of the Bill does not seem to fulfill.

15. The CNPD thus allows us to recall that the function of the law is to guide the conduct of organizations, which is all the more important the greater the impact of such conduct on the rights, freedoms and guarantees of citizens - which here, taking into account the very wide universe of holders of personal data and the multiple processing operations is significant.

16. Finally, attention is drawn to the fact that this article 5 of the Draft Law implies, for the universe of those responsible for the processing operation in which the monthly communication of personal data (notaries, lawyers and solicitors), the obligations arising from the GDPR, which also represents an increased responsibility regarding the safety of the imposed treatment, in addition to a financial burden

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significant, which should not be forgotten in the considerations that the legislator must make within the scope of this legal framework.

III, Conclusion

17. On the grounds set out above, in particular in view of the apparent disproportionality of a large-scale web of personal data processing to achieve the intended purpose, the CNPD recommends reviewing the imposition solution, in article 5 of the Draft of Law, to notaries, lawyers and solicitors of the duty of monthly communication to Banco de Portugal of personal data, in the sense of, at least, delimiting this duty according to the value of civil loans; It also recommends the definition in the law of the main aspects of this treatment, otherwise it will not fulfill the functions of guiding conduct and providing predictability to restrictions on rights, freedoms and guarantees.

Lisbon, May 17, 2021

Filipa Calvão (President, who reported)