National Data Protection Commission

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OPINION/2021/12

I. Order

1. The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees asked the National Data Protection Commission (CNPD) to issue an opinion on Bill No. 572/XIV/2.a, which determines the circumstances in which it is post-mortem insemination is permitted and amends Law n.0 32/2006, of 26 June, on medically assisted procreation, presented by the Parliamentary Group of the Portuguese Communist Party.

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 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 n° 58 /2019, of 8 August, which enforces the GDPR in the domestic legal order.

II. Analysis

3. The Bill introduces amendments to Articles 22 and 23 of Law No. 32/2006, concerning the conditions of post-mortem insemination and the determination of the paternity of the child born as a result of its use.

4. In the wording now designed for Article 22, it is foreseen that the existence of a parental project clearly defined and agreed in writing before the father's death allows post-mortem insemination and post-mortem embryo transfer.

5. Such provision needs to be regulated, under penalty of being unenforceable or very difficult to enforce. In fact, it is important to define the conditions that ensure that the aforementioned written declaration (which formalizes the parental project) fulfills the intended purpose, taking into account the death of one of the authors of the declaration. In fact, it is important to define the conditions that ensure that the said declaration fulfills the intended purpose, taking into account the death of its author in the

meantime. First of all, requirements regarding the authentication of the written declaration, as well as rules regarding the entity to which it must be presented. Moreover, for reasons of legal certainty, a centralized register of this type of declaration should be considered.

6. Note that the application of article 22 implies the processing of personal data, so it must at least determine who is responsible for the treatment and the other requirements that ensure that the purpose of the treatment is fulfilled, as these data are subject to the GDPR regime, as determined by paragraph 1 of article 17 of Law n.° 58/2019, of 8 August.

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7. It is also important to consider the application, in this context, of the provisions of paragraph 2 of article 17 of Law no. the deceased has designated or, in the absence of designation, by his heirs. In particular, to consider the possibility that an heir (for example, a child from a previous marriage or another relationship) comes to exercise the right to erase or erase personal data within the scope of this processing (e.g., pursuant to point a) of the Article 17(1) of the GDPR).

8. In addition to the difficulties that the very application of paragraph 2 and paragraph 3 of article 17 of Law no. expression of the data subject's will regarding the post-mortem processing of his/her personal data, which makes it impossible or very difficult for the controller and heirs to know if any will has been expressed, it is essential that, in this change in the regime of post-mortem insemination, it is determined whether, and if so under what terms, the regime provided for in those precepts of article 17 of Law No. 58/2019 applies.

III. Conclusion

9. Based on the arguments set out above, the CNPD recommends that article 22 be densified, specifying the requirements relating to the authentication of the written declaration that formalizes the parental project, as well as the rules regarding the

entity to which it owes the same. be submitted, and other essential elements of the processing of personal data.

10. In particular, it is recommended that this regime be articulated with the regime of the exercise by the heirs of the deceased person of the rights provided for in the RGPD, in particular the right to the elimination or erasure of personal data.

Approved at the meeting of January 26, 2021

Filipa Calvão (President)

National Data Protection Commission

OPINION/2021/13

I. Order

1. The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees asked the National Data Protection Commission (CNPD) to issue an opinion on Bill No. 71/XIV/1,a, on medically assisted procreation (seventh amendment to Law n.0 36/2006, of 26 July), presented by the Parliamentary Group of the Left Bloc.

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 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 n° 58 /2019, of 8 August, which enforces the GDPR in the domestic legal order.

3. It should be noted that this Bill, which introduces new relevant rules for the processing of personal data and regulates ex novo a processing of personal data, is not accompanied by the impact study on the protection of personal data required by n. 4 of article 18 of Law No. 43/2004, of 18 August, last amended by Law No. 58/2019, of 8 August.

II. Analysis

4. The Bill aims to introduce the necessary changes to conform the legal regime of surrogacy with the jurisprudence of the Constitutional Court.

5. For this purpose, it regulates in innovative terms the exercise of the right to revoke consent by the pregnant woman and grants her new rights and duties, which have repercussions on the processing of her personal data, but which do not give rise to reservations from the point of view of protection of personal data, as they prove to be adequate, necessary and not excessive measures, in relation to the purpose pursued by the treatment. This is, for example, the case with the reporting obligations set out in the new Article 13b.

6. More attention deserves the amendment of article 8 of Law No. 32/2006 with regard to the request for prior authorization for the conclusion of legal transactions of surrogacy. There, a new number 6 is introduced, which defines that the request is submitted to the National Council for Medically Assisted Procreation (CNPMA) through a form available on the respective website, whose model is created by this Council, signed

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jointly by the beneficiaries and the surrogate mother, and must be accompanied by documentation that is listed below.

7. The required documentation does not give rise to reservations to the CNPD, nor the provision that the submission of the request will take place electronically, as seems to be deduced from the wording of the precept when referring to a form available on the CNPMA website.

8. However, it is up to the CNPD to point out that the submission of the application and the transmission of documentation by electronic means require special precautions. At stake are highly sensitive personal data, especially protected under the terms of Article 9(1) of the GDPR, so it is up to the law to define the essential elements of such processing, among which the categories of data subject to the same, as well as the forecast or, at least, the need to adopt specially reinforced security measures.

9. And if this point is insisted upon here, it is precisely because of the evidence that the legal status of the CNPMA is manifestly insufficient to allow this Council to decide autonomously the means and conditions for carrying out the processing of personal data under its responsibility, in compliance with the obligations set out in the GDPR. In other words, despite the fact that the law recognizes important powers of authorization and guidance to this independent administrative body, it has not provided it with the necessary tools to fulfill its legal obligations as responsible for the delicate processing of personal data.

10. It is recalled, in this regard, that the CNPMA is responsible for processing personal data within the scope of donor registries, including surrogate pregnant women, beneficiaries and children born (cf. point p) of no. 2 of article 30 of Law No. 36/2006 and Regulatory Decree No. 6/2016, of December 29), but that in order to comply with obligations imposed by the GDPR, which involve an assessment of the risk of the operations it carries out and for the determination and application of suitable organizational technical measures to ensure an adequate level of security for the risks involved in this context, it does not have a service equipped with specialized and technical human resources for this purpose, nor in the rigor of the autonomy necessary for the subcontracting of such tasks.

11. In fact, paragraph 1 of article 32 of Law no. 26/2006 only determines that the CNPMA operates within the scope of the Assembly of the Republic, which ensures the costs of its functioning and the technical and administrative support needed.

12. Which means that the different personal data processing operations are carried out by third parties who act as subcontractors, without the person responsible for the treatments having, in fact, the means to verify who and under what circumstances accesses the information contained in the databases. data, neither have

of means to audit and supervise the performance of subcontractors, in clear breach of the provisions of article 28 of the GDPR, in particular of the provisions of subparagraph h) of paragraph 3.

13. The CNPD therefore takes this opportunity to underline the need to review the legal status of the CNPMA, in order to provide it with adequate human, technical and financial resources to fulfill its obligations as the person responsible for delicate processing. of personal data.

14. And, specifically, when, as in this Project, a processing of personal data is regulated that is likely to generate new risks for

the rights and interests of all the people involved, the CNPD recommends that such provision be accompanied by the effective regulation of the treatment and the provision of adequate means for its execution in terms that allow the CNPMA to comply with the RGPD.

III. Conclusion

15. Based on the above grounds, the CNPD recommends:

The. The prediction of the categories of data subject to processing provided for in paragraph 6 of article 8 and the imposition of the adoption of measures appropriate to the risk involved, as well as the appropriate means for the execution of the processing by the CNPMA;

B. The revision of the legal status of the legal status of the CNPMA, in order to provide it with the necessary capacity and autonomy to make decisions regarding the processing of personal data for which it is responsible and the appropriate means to fulfill its obligations as the person responsible for the treatments, under penalty of not being able to fulfill the obligations arising from the GDPR.

Approved at the meeting of January 26, 2021

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