NATIONAL COMMISSION

OF DATA PROTECTION

OPINION/2019/6

I. Order

The Office of the Minister of Foreign Affairs sent the National Data Protection Commission (CNPD), for an opinion, the Draft Decree-Law that creates and regulates the issuance and use of the diplomatic identity card.

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 the 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 in paragraph 1 of article 22, both of Law No. 67/98, of October 26, amended by Law No. 103/2015, of August 24 (Personal Data Protection Law -LPDP).

The assessment of the CNPD in this opinion is restricted to aspects of the regime relating to the processing of personal data, that is, operations that focus on information concerning natural, identified or identifiable persons - cf. lines a) and b) of article 4 of the RGPD -, focusing on the precepts that provide for or imply processing of personal data.

II. Analysis

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The draft decree-law, as its title indicates, aims to frame the creation and issuance of diplomatic identity cards (CID), a matter under the responsibility of the Ministry of Foreign Affairs1 (MNE). This type of identification is not limited to “diplomatic and consular agents accredited in Portugal, [to] administrative and domestic personnel or similar personnel who may serve in diplomatic missions or consular posts of the respective States, [to] employees of international organizations with headquarters or representation in Portugal and [to] members of their families”2 *, also extending to “other members or employees of entities with which the Portuguese State has concluded agreements and to which it has recognized diplomatic status” (cf. reasons).

One of the goals of this new legislation is the technical compatibility of these identity cards with the most recent European and international regulations, specifically mentioning the “reinforcement of the security of identity and travel documents and [the] guidelines established by the competent international organizations , namely by the European Union and the International Civil Aviation Organization (ICAO)”. More concretely, “The new model complies with the requirements and technical specifications whose parameters and fixing procedures are defined by Council Regulation (EC) No. 2252/2004, of December 13, 2004, amended by Regulation (EC)) No 444/2009, of the European Parliament and of the Council, of 28 May 2009, which lays down rules for security features and biometric data in passports and travel documents issued by Member States, and Doc. 9303 of ICAO, Seventh Edition, 2015, which contains the technical specifications for the implementation of machine-readable identity and travel documents.”.

1 It is incumbent upon "the State Protocol, within the scope of the General Secretariat of the MNE, to issue identification documents for foreigners residing in the national territory who benefit from diplomatic status, as prescribed in paragraph r) of article 4.9 of Ordinance n.9 33/2012 , of 31 January".

2 Pursuant to the combined provisions of articles 87.9 and 10.9, n.9 3, al. a) of Law n.9 23/2007, of July 4th, lastly amended by Law n.9 26/2018, of July 5th.

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Regarding procedural issues, and in terms of processing of personal data, it is up to the MNE to ensure the “collection and processing of personal data” necessary for the issuance of the CID, although it is obliged to consult the Aliens and Borders Service (cf. Article 6(1) of the project).

As personal data processed, the following appear, indistinctly, as it is a single model3: on the face - surname(s); own names); nationality; birth date; sex; facial image; name of the diplomatic mission, consular post, international organization or entity to which the holder belongs; professional category; signature. On the reverse side are added - the family function or link (professional category of the holder who performs functions in the national territory or, in the case of a family dependent, indication of the family link) and observations (privileges and immunities of the holder).

In the area intended for optical reading, data relating to the surname can be accessed; first name(s) of the holder; nationality; birth date; sex; Portuguese Republic, as issuing State; Document Type; document number; expiration date.

It is expressly stated that the CID model must respect the aforementioned European and international legislation.

The issuance of the CID is exclusively the responsibility of Imprensa Nacional - Casa da Moeda, S.A. (INCM).

There is an article specifically dedicated to the protection of personal data (Article 8) which establishes the purpose of the processing (No. 1), the possibility for the data subject to verify, at all times, their personal data and request its amendment (No. 2), the impossibility of communicating or revealing personal data processed within the scope of the CID outside the terms of the decree-law (No. 3), the responsibility for the treatment, in the case attributed to the MNE, to the SEF and the INCM (nº 4), the obligation of those responsible for the

3 There are four types of cards, with different color stripes, assigned according to the function or family ties associated with the holder.

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treatment put into practice the “security guarantees” necessary to “prevent the consultation, modification, destruction and communication of personal data not consented to in this decree-law” (no. of persons who, within the scope of the functions they perform, may come into contact with personal data from files in the IADC systems (paragraph 6).

• Relevant aspects

o The application of the GDPR

67/98, of October 26 (the Personal Data Protection Law - LPDP), in particular in the article on data protection (article 8th). Whether for the identification of those responsible for the treatment, or for the confidentiality obligations of professionals who may have access to the personal data of holders entitled to the CID, the reference to the LPDP is expressly enshrined. However, the LPDP was, in many of its provisions, and in particular those mentioned by the legislator in the project, repealed from the moment Regulation (EU) 2016/679, of 27 April 2016 (General Data Protection Regulation - RGPD) came into force, that is, from May 25, 2018.

The new regulation, which, by its nature, is directly applicable within the EU, enshrined a coherent and unique regime for the protection of personal data for all citizens who are in the Union (cf. °). Therefore, it is unquestionable that the GDPR applies to all data subjects in the EU, a fortiori, foreign citizens, holders of CID, are directly covered by the rules of this legal instrument. It

could be questioned whether the management and issuance of CIDs are not excluded from the provisions of the RGPD, in the light of subparagraph b) of paragraph 2 of article 2 of this regulation, where it is expressly stated that it is not applicable "...to the processing of personal data: (...) Carried out by the Member States in the exercise of activities covered by the scope of application of Title V, Chapter 2, TEU", that is, relating to foreign and security policy common. However, what is regulated here

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it is not so much, only or above all who is entitled to the CID, but rather the procedures, techniques and those responsible for its management, issuance and destruction. These matters, clearly auxiliary to the right to diplomatic or equivalent status, should not be included in this exception provided for in the GDPR, otherwise similar derogations will be extended to disproportionate levels. Even when only part of the regime included in the GDPR may be applicable, we understand that this content, even if fragmentary, must be rescued and produce all due legal effects, in the wake of (maximalist) jurisprudence on the protection of fundamental rights inscribed in the Charter and in the Treaties4, repeatedly affirmed by the Court of Justice of the European Union5.

As such, the articles indicated should be rectified, replacing the text of paragraph 4 of article 8 of the project with the following: "The MNE and the SEF are the entities responsible for the treatment, under the terms and for the purposes of Regulation (EU) 2016/679, of April 27, 2016, in operations involving the issuance and granting of the CID.". In this drafting proposal, it is noted the elimination of the reference to the INCM, which will be explained in the next point. The formula "responsible for the processing and protection of personal data" was also dispensed with, since the concept provided for in Article 4(7) of the RGPD is self-sufficient to encompass the entirety of the reality described in the current wording of the project. In paragraph 6 of the same article 8, which prescribes the confidentiality obligations of persons who, by virtue of their function, have access to

the personal data of applicants/holders of the CID, it is proposed to change to the following wording “Persons who have knowledge, in the exercise of their functions, of personal data contained in files of the IADC's systems, are bound by professional secrecy”. The lack of express reference to the RGPD is explained by the fact that it does not contain a rule that exactly coincides with the one provided for in the LPDP, and the regulation is now limited to stating the

4 Article 8.5 of the Charter of Fundamental Rights of the European Union and Article 16e of the Treaty on the Functioning of the EU.

5 See, for example, what the CJEU says in recitals 10, 54, 68 and 69 of the Judgment of 13 May

2014, in case C-131/12, available at

http://curia.europa.eu/iuris/document/document.isf?docid=152065&doclang=EN.

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confidentiality as a principle, in Article 5(1) al. f), and to implement it in Section 2 (“Security of personal data”) of Chapter IV (“Controller and processor”), more specifically in article 32, paragraph 1, al. b), concerning the safety of treatments. Choosing to fully frame this treatment in the GDPR, as we defend, we would always have to find a legal basis for the existing treatments, in this case, for the purpose of managing the process of issuing and destroying the CID. It is easy, then, to have recourse to Article 6(1) al. c), that is, the legal obligation imposed on the Portuguese State, due to the existence of

international conventions that oblige it to recognize the diplomatic status (or equivalent) of foreign citizens and to develop the means to attest to it. Here, as is well known, Article 8(2) of the CRP is the precept that determines, in the first place, the Portuguese State's obligation to fulfill the commitments it assumes in international conventions, the Convention on Diplomatic Relations being , celebrated in Vienna, on April 18, 19616, the infra-constitutional legal instrument that contextualizes the need for the existence of the CID. In this context, article 25 of the said convention provides sufficient support for the issuance of accreditation identifications of the special status recognized to diplomatic and equivalent personnel, by providing that "The accrediting State shall provide all facilities for the performance of the mission's functions".

Finally, whenever the legal basis mentioned is the legal obligation provided for in the aforementioned article 6, paragraph 1 al. c), of the GDPR, it is necessary to provide for the conditions of paragraph 3, in fine, of that same precept, that is to say: "The purpose of the treatment is determined on this legal basis (...). That legal basis may provide for specific provisions to adapt the application of the rules of this Regulation, in particular: the general conditions of lawfulness of the processing by the controller; the types of data being processed; the data subjects in question; the entities to which personal data may be communicated and for what purposes; the limits to which the purposes of the treatment must comply; conservation periods; and

6 For which Portugal's accession was approved by Decree-Law 48295 of 27 March.

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processing operations and procedures, including measures to ensure the legality and fairness of processing, such as

measures relating to other specific processing situations. that, in the terms indicated in this opinion, there are occasional corrections to consider.

o Those responsible for processing

As already explained, the draft decree-law provides that the MNE and the SEFea INCM will be responsible for the processing cumulatively (cf. article 8, no. 3). Notwithstanding the fact that the GDPR provides that "where the purposes and means [of] processing[s] are determined by Union or Member State law, the controller or the specific criteria applicable to his appointment may be provided for by the law of the Union or of a Member State", the appropriateness of determining, in the text of the decree-law, the joint responsibility of the three entities involved in the materialization of the identity card is questioned. There is no doubt that the MNE is responsible for the processing, given its role in collecting the required personal data, in deciding on the granting and issuance of the CID and in the subsequent management of the information. As for the SEF, which here has a merely advisory function, not even achieving that this consultation results in a binding pronouncement, it can also be seen that this quality is attributed to the fact that the analysis of the personal data assigned to it falls within the scope of the attributions of this service and that the purpose and means of the treatment that are incumbent on the SEF are totally foreign and alien to the MNE, rather resulting from the law. What is already strange, due to the apparent impropriety, is the qualification of the INCM as responsible for the treatment. Unlike the MNE, the INCM does not control any aspect of the processing of personal data linked to the collection, verification and alteration of such data, limiting itself to issuing and destroying the cards that the MNE requires, under the terms it determines.

It would seem to us, due to the residual and merely instrumental function that it plays in the framework of the draft decree-law, that the INCM would be more appropriate to classify it as

subcontractor, since it is limited to processing personal data indicated by the MNE. The supporting and accessory nature of this action, in addition to its possible provision by other providers of this type of service, contribute to a clear approximation of the INCM to the concept of subcontractor. Furthermore, as is known, the controller has, among other tasks, the obligation to respond to the exercise of rights by the data subjects. However, it is not foreseeable how the INCM can respond, fully or precariously, to any request made to it, since it does not hold the database where the personal data of those who require and use this means of identification are included. It is admittedly possible to keep, for a specified time and necessarily shorter than that provided for in this project, a set of data on applicants to precisely fulfill their mission, which is to produce the cards. It is also recognized that the INCM has access to the cards, as well as the personal data that are exposed therein, when they are received with a view to their destruction. What will no longer happen is that the INCM keeps its own database or has indiscriminate access to one created by the MNE, when its only function is to produce the CID and/or destroy it.

It is important to start by mentioning that, realizing the intention of the national legislator to reconcile the security and reliability requirements of the identification documents of those who are entitled to apply for and enjoy the special status of diplomatic personnel or those equivalent to European and international requirements, the CNPD it can only reinforce the indispensability of fully complying with the technical requirements of the aforementioned legislation.

What is not reflected, in terms of information security, are the other requirements for managing the treated information. It should be noted that the issuance and management of the CID is an aspect of the set of processing of personal data involved in the entire cycle of the purpose of the draft decree-law. To explain, in order to issue an identification card of this type, a previous process of collecting the necessary data is assumed. And this prior process must be surrounded by the necessary security measures provided for and required by data protection legislation. This reasoning applies, with the same

o Safety of the treatment(s)

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relevance, conservation of and future access to personal data collected and entered on the card. The database thus created will necessarily have to be surrounded by similar concerns, as will have to ensure the conditions for limiting access to information that will prevent unauthorized persons from knowing, altering, disseminating, subtracting or eliminating the your content.

The content of paragraph 5 of article 8 is not unknown, which precisely obliges that “the necessary security guarantees are put into practice to prevent the consultation, modification, destruction and communication of personal data not consented to in this decree law”. What is doubtful is the sufficiency of such a precept, especially in the context of the necessary creation of an autonomous database (which we believe) and which, therefore, demands concrete rules that guarantee, among others, the integrity of the information entered therein. The mere repetition of the obligation already prescribed in the current personal data protection regime will eventually be useful, but incomplete in view of the current legal requirements. In fact, article 32 of the GDPR, which deals with the security of processing, imposes certain and determined measures in this area, which, although it may not be reflected in the draft decree-law, will at least have to be the subject of its own regulation. .

o Respect for the principles of data minimization and limitation

As for the quantity and quality of the personal data processed for the issuance of the CID, the principle of necessity (provided for in article 5, no. of October, amended by Law No. 103/2015, of August 22, henceforth LPDP, or GDPR) that the information processed for a specific purpose is limited to the essential. And given the list of personal data provided for in the draft decree-law, it is understood that this principle is effectively complied with, and excessive or disproportionate data is not required.

Equally appropriate is the provision in article 11, no. 4, which determines that personal data processed within the scope be deleted when the CID is destroyed. Here, too, one of the basic principles - that of limiting conservation (provided for in article 5, no. 1, paragraph, and both of the LPDP and the RGPD) - appears to be fulfilled.

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o The rights of data subjects

As for the rights of data subjects, they appear briefly and insufficiently provided for in article 8, no. , including in the optical reading area, and to request its alteration.". In fact, the rights of data subjects are not limited to the possibility of access and rectification, as listed here, although with concepts separate from those normally used in terms of data protection.

In addition to the traditional rights - of access, rectification, opposition, erasure and information - the RGPD provides new rights: portability (Article 20) and limitation of processing (Article 18). In the present case, it is true that the portability and opposition rights do not seem to be applicable in the case of the issuance and management of the CID. This will no longer be the case, however, with regard to the right to information, due to any data subject, except for a specific condition that allows it to be excluded, which does not occur here. This right will not necessarily have to be provided for in this decree-law, but it must be stressed that it cannot be omitted; As for the limitation of treatment, its total unavailability is seen as difficult, although it is admitted that only in residual cases can such right be exercised; And as for the right to erasure, which is not precluded by the existence of a legal obligation to erase the data, such as that provided for in Article 11(4) of the project, it must also be exercised. Imagine, from the outset, the case in which, despite having ceased the legal justification for granting the CID, the MNE maintains, through carelessness or intentionally, the information regarding the data subject.

For the above, it is imperative to expressly enshrine the right to erase data and limit processing, as well as the provision of the right to information, regardless of its enshrinement in the final text of the decree-law.

o The possibility of reproducing the CID

No obstacle to the retention and reproduction of the CID is included in any part of the project, as is the case with the identification document of citizens

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nationals7. Although the CID does not presuppose the permanence of the citizen's card, it constitutes, for all legal purposes, "enough title to prove the identity of the holder before any authorities and public or private entities, being valid throughout the national territory..." (cfr. article 2, no. 1). In this way, and taking into account the reciprocity of rights that foreign citizens are constitutionally recognized8, to which are added obvious considerations of information security and proportionality in the access and availability of copies of documents of identification, no formal or material reason is foreseen to rule out, to foreign citizens holding the CID, a regime identical to that in force for the citizen's card. oblige or by decision of a judicial authority or, even, and only in the case of reproduction, when the data subject consents to it. the existing rules for the citizen's card or refer to this regime, as far as retention and reproduction are concerned.

III. Conclusion

The CNPD understands that the present draft decree-law lacks some specific changes that allow filling some gaps or less clear aspects of the articles.

Among these, the legislative references to the LPDP should be updated, replacing them, when relevant, with the corresponding references to the RGPD.

It will also be important to rethink the list of those responsible for the treatment that are provided for here, especially the case of the INCM, in view of the specific function that it has (of mere production or destruction of the CID). Aware of the content of the concepts of controller present in the current personal data protection regime, as well as the

7 As provided for in article 5.g of Law n.^ 7/2007, of 5 February, lastly amended by Law n.^ 32/2017, of 1 June.

8 Considering the provisions of article 15.e, n.? 1 of the CRP.

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tasks that result from the attribution of this quality to those involved in the treatment cycles (with a special focus on respect for the rights of the holders), it seems out of place to qualify the INCM,

In terms of processing security, it is not enough to list and comply with the obligations laid down in relation to identification cards themselves (Council Regulation (EC) No 2252/2004, of 13 December 2004, amended by Regulation (EC) No. 444/2009, of the European Parliament and of the Council, of 28 May 2009, which establishes rules for security features and biometric data in passports and travel documents issued by Member States, and by Doc. 9303 of the ICAO, Seventh Edition, 2015). The issuance of CIDs presupposes a cycle of treatments that include moments prior to and others subsequent to that issuance, especially those linked to the collection, maintenance and elimination of the information included in the CID. And, for these, security must also be guaranteed, under the terms prescribed in the RGPD, an aspect that is not confirmed in the text of the

project.

Finally, it is considered useful, from the point of view of information security, to provide an express mention of the impossibility of retaining and reproducing the CID, in the same terms as provided for in the Citizen's Card Law, or through a reference to this regime, since that it constitutes “a title sufficient to prove the identity of the holder before any authorities and public or private entities, being valid throughout the national territory...” and there is no reason to treat it with distinct dignity in relation to the identification document of the holders. national citizens.

Lisbon, February 12, 2019

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