National Data Protection Commission

OPINION/2021/8

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. 214/XIV/1.®, amending Articles 22. and 23 of Law no. 32/2006, presented

by a group of citizens.

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 Draft Law regulates postmortem insemination, as well as the determination of the paternity of the child born following its

use, providing, in article 22, that the lawfulness of insemination depends on the prior issuance of a declaration of consent by

the person deceased.

4. However, article 22, with the proposed wording, lacks regulation, under penalty of unenforceability or very difficult

enforceability.

5. 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.

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 hypothesis of a

heir (for example, a child from a previous marriage or other relationship) comes to exercise the right to erase or erase personal

data within the scope of this processing (e.g., pursuant to Article 17(1)(a)) 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 wishes regarding the post-mortem processing of his/her personal data, which makes it impossible or very

difficult for the controller and heirs to know whether any wishes have been expressed, it is essential that, in this amendment to

the 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.

9. With the above arguments, the CNPD recommends that article 22 be densified, specifying the requirements regarding the

authentication of the written declaration that formalizes the parental project., as well as the rules regarding the entity to which

the presented, 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

Conclusion

Filipa Calvão (President)