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■' DATA PROTECTION

OPINION/2020/62

I. Order

The President of the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees of the Assembly of the Republic asked the National Data Protection Commission (CNPD) to comment on Draft Law No. 16/XIV/1.3 (GOV) - Transposes the Directive (EU) 2018/843, of the European Parliament and of the Council, of 30 May 2018, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering through criminal law.

The request made and the present opinion fall within the attributions and powers of the CNPD, as the national authority for the control of the processing of personal data, in accordance with the provisions of subparagraph c) of paragraph 1 of article 57 and n. 4 of article 36 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of article 3. , in Article 4(2) and Article 6(1)(a), all of Law No. 58/2019, of August 8 (which aims to ensure the execution , in the domestic legal order, of the GDPR).

The assessment of the CNPD is limited to the rules that provide for or regulate the processing of personal data.

II. appreciation

This Draft Law transposes Directive (EU) 2018/843, of the European Parliament and of the Council, of 30 May 2018, into the domestic legal order, which amends Directive (EU) 2015/849 on the prevention of the use of financial system for the purposes of money laundering or terrorist financing and which, in turn, amends Directives 2009/138/EC and 2013/36/EU. It also transposes Directive (EU) 2018/1673 of the European Parliament and of the Council, of 23 October 2018, on combating money laundering through criminal law, providing the legal systems of the Member States with mechanisms and criminal instruments that provide a

more efficient cross-border cooperation between competent authorities, improving the regime imposed by Council Framework Decision 2001/500/JHA, of 26 June, which establishes requirements regarding the criminalization of money laundering.

Under the terms of the preamble, the Draft Law aims to “review the main national legal instruments in terms of preventing and combating money laundering and terrorist financing, in an effort to guarantee a more efficient and complete legal regime to face and mitigate emerging risks, arising in particular from the use of alternative financial systems, such as electronic money and other virtual assets, and the threat posed by greater convergence between transnational organized crime and terrorism'.

Thus, this Draft Law introduces measures that aim to combat the risks inherent to the anonymity of coins and other virtual assets, which makes their abusive use for criminal purposes possible and imposes the adoption of enhanced due diligence measures on obliged entities to always relate to countries high risk third parties, expanding the subjective scope of these obligations.

Finally, the proposal broadens the framework of typical underlying illicit acts and the typical conduct typical of the crime of money laundering, as well as aggravates the criminal framework in cases where the offender is an obligated entity, under the terms of Article 2 of the Directive (EU) 2015/849 of the European Parliament and of the Council, of 20 May 2015, and commits the infringement in the exercise of their professional activities.

In addition to transposing the above-mentioned Directives, this law also makes the thirty-fifth amendment to Law no. 15/2001, of 5 June; the second amendment to Law No. 20/2008, of 21 April; the fourth amendment to the Legal Regime for Accessing and Exercising Insurance and Reinsurance Activities, approved in Annex I to Law No. 147/2015, of 9 September; the second amendment to Law No. 83/2017, of 18 August; the first amendment to Law No. 89/2017, of 21 August; the first amendment to Law No. 97/2017, of 23 August; the fiftieth amendment to the Penal Code, approved by Decree-Law No. 400/82, of 23 September; the forty-eighth amendment to the Commercial Registration Code, approved by Decree-Law No. 403/86, of 3 December; the fifty-second amendment to Decree-Law no. 298/92, of 31 December; to the twenty-fourth amendment to Decree-Law no.

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15/93, of January 22nd; the twenty-fifth amendment to the Notary Code, approved in an annex to Decree-Law no. 207/95, of 14 August; the thirtieth amendment to the Fee Regulations for Registries and Notaries, approved by Decree-Law No. 322-A/2001, of 14 December; and the second amendment to Decree-Law No. 14/2013, of 28 January.

However, from the point of view of the protection of personal data, not all the legislative changes introduced by the Draft Law have legal relevance. Let's see, therefore, those that deserve or raise observations, not forgetting to point out that throughout the Proposal, references to data protection legislation have been updated in the different diplomas subject to amendment.

A. Amendments introduced to Law No. 83/2017, of 18 August - Measures to combat money laundering and terrorist financing

As a preliminary note, the CNPD regrets that some legislative options that have already been pronounced in Opinion no. its compliance with the principles relating to the processing of personal data (in particular Articles 25(4) and 127(2) of Law No. 83/2017 of 18 August).

Among the changes now introduced by article 5 of the Proposal, with relevance in terms of data protection, the following stand out:

a) Article 25.0 - «Proof of identifying elements»

This section, in relation to natural persons, provides that obliged entities always require the presentation of valid identification documents, with proof of the identification elements being carried out through the means of electronic identification, qualified electronic signature and secure State authentication available through the website at internet authenticacao.gov.pt and through the authorization of the data subject for its transmission, under the terms of paragraph 2 of article 4-A of Law n.0 37/2014, of 26 June, in its wording current (cfr. subparagraphs a) and d) in paragraph 2 of article 25).

1 Available at https://www.cnpd.pt/home/decisoes/Par/40 3 I 2017.pdf

However, with regard to this last means of proving the data contained in the identification documents, it is not possible to reach what transmission is in question here, nor the need for authorization from the data subject for this to take place.

Effectively, Law No. 37/2014, of 26 June, last amended by Law No. 2/2020, of 31 March, establishes an alternative and voluntary system for the authentication of citizens in the portals and websites of the Administration Public, called Digital Mobile

Key, enshrining in paragraph 2 of Article 4-A that «Citizens holding a citizen card or CMD can, through secure authentication, obtain data contained in the databases of Public Administration bodies to be made available on authentication.gov.». In other words, it provides for the possibility for citizens to have access to their data contained in the databases of Public Administration bodies. However, paragraph d) of article 25 of the Proposal reflects a different interpretation, providing that data subjects authorize access to their personal data contained in the Public Administration databases by other entities and, also, authorize the transfer of themselves, which objectively does not fit in the letter of paragraph 2 of article 4-A of that law.

What may be intended is to allow data subjects, before financial institutions, to access the personal data contained in the citizen's card database and present them in real time to financial institutions, but in this case the remission must be made for paragraphs 1 and 4 of article 4-A of Law no. 37/2014, of 26 June, and cannot be for paragraph 2 of article 4-A, In effect , it states that «CMD holders, and therefore duly authenticated, can have access to the data contained in their identification documents [...], through a mobile application made available by the Agency for Administrative Modernization, i. P." and that "The presentation of data in real time to third parties through the application provided for in paragraph 1 has a legal value equivalent to that of the original documents, provided that those third parties have, in place, the electronic means necessary for their verification."

It is therefore recommended to review subparagraph d) of paragraph 2 of article 25 of the Proposal in order to effectively reflect the provisions of paragraph 2 of article 4-A of Law n° 37/ 2014, of June 26, in its current wording, or, if this is the ratio underlying that rule, the correction of the reference to paragraphs 1 and 4 of the same article; alternatively, its elimination.

In turn, paragraph 4 of article 25 provides that, when the citizen does not hold a citizen's card, proof of identification documents is carried out, among other ways, by means of a reproduction of the original of the identity card. , in physical or electronic form (cf. point a)).

The observations made in Opinion No. 31/2017 cited above are reiterated here and which is now partially reproduced: "It cannot help but be surprised that in a matter like this, in which the correct identification of customers and representatives is absolutely crucial, due to the impact that subsequent data processing has on people's lives, the use of solutions that present

special risks of manipulation of documents and identification is allowed, as is the case of proof by reproducing the original of the identity card, in physical or electronic. In fact, reproduction by photocopying or digitization does not guarantee that the original document has not been falsified... Therefore, it is understood that a solution must be found for cases in which people do not have identification documents in support electronic - all those who do not have a citizen's card or other digital identification document - or, for whatever reason, are not in a position to use it in this way, it seems more appropriate to admit the possibility of proof by one of two means : or through the in-person collection of data by the obliged entity based on reading the document presented in person and affixing the signature of the data subject to the document where such data will be entered; or by electronically sending a certificate issued by the /RN, i.P, which describes the data contained in the civil identification document, to which a hash is applied that marks whenever there is a change in the certificate. Furthermore, it should be noted that the hypothesis of a certificate is admitted in subparagraph b) of paragraph 1 of article 38, not understanding why it was not also considered in the context of article 25'.

It should be noted that subparagraph c) of paragraph 4 of this Article also provides, for cases in which the citizen does not hold a citizen's card, that proof of the identifying elements of natural persons is carried out through access to the respective electronic information with equivalent value, namely through: «/) The use of safe devices, recognized, approved or accepted by the competent authorities, which grant qualified certification, under the terms to be defined by regulation; ii) The collection and verification, with prior consent, of electronic data with the competent authorities responsible for its management; iii) Authorization for the transmission of data under the terms

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of no. 2 of article 4-A of Law no. 37/2014, of June 26, in its current wording; /V) Recourse to qualified providers of trust services, in accordance with Regulation (EU) No. 910/2014, of the European Parliament and of the Council, of 23 July 2014».

At the same time, with regard to subparagraph iii) of subparagraph c) of paragraph 4 of article 25, for the reasons indicated above, it is recommended that it be reformulated in order to effectively reflect the provisions of paragraph 2 of article 4. -A of Law No. 37/2014, of June 26, in its current wording, or, if this is the ratio underlying that rule, the correction of the reference to paragraphs 1 and 4 of the same article; alternatively, its eventual elimination.

b) Article 135.0 - «Duty of cooperation between supervisory authorities of the financial sector»

This Article provides for the cooperation regime of the supervisory authorities of financial entities with foreign entities that carry out similar functions, and a new paragraph 4 is now introduced on international flows of information subject to secrecy with authorities that carry out similar functions of financial supervision in States that are not members of the European Union, within the scope of cooperation agreements that they have concluded and for the exercise of supervisory functions, on a reciprocity basis and by demonstrating equivalent requirements in terms of professional secrecy.

Note that this item results from the transposition of Directive (EU) 2018/843 of the European Parliament and of the Council, of 30 May 2018, which amends Directive (EU) 2015/849, emphasizing here article 57- The one which provides that "Member States may authorize their national competent authorities that supervise credit institutions and financial institutions to conclude cooperation agreements providing for collaboration and exchange of confidential information with competent authorities of third countries that are counterparts of those competent national authorities. Such cooperation agreements shall be concluded on the basis of the principle of reciprocity and only if the information disclosed is subject to a guarantee of professional secrecy requirements at least equivalent to those referred to in paragraph 1'.

However, in order for the transfers of personal data to a third country, provided for herein, to be in accordance with the provisions of the GDPR, it is necessary that, whenever that third State has not been subject to an adequacy decision by the Commission

European Union, pursuant to article 45 of the GDPR, it is essential that the collaboration agreement presents adequate guarantees that the enforceable and effective rights of the data subjects are provided for, as well as effective corrective measures, under the terms imposed by article 46 of this Union diploma.

It is therefore important to specify in Article 135(4) that the agreements must comply with Article 46 of the GDPR.

B - Amendment to Law No. 89/2017, of August 21

The proposal under analysis amends articles 5 and 22 of Law no. 89/2017, of 21 and August, without, however, deserving corrections from the point of view of data protection: article 5 expands the range of persons who must inform the company with

a view to drawing up the registration, as well as the obligation to update the information within 15 days, while paragraph 5 of article 22, final part, now indicates as the relevant date for the relevance of the consequences arising from the failure to comply with the declarative obligations established by the decree of the members of the government responsible for the areas of finance and justice for the electronic consultation of the RCBE.

C - Amendment to the Legal Regime of the Central Registry of the Beneficial Owner - approved in annex to Law No. 89/2017

In addition to other occasional changes to related diplomas, this Draft Law, in its article 9, introduces changes to the legal regime of the Central Register of the Effective Beneficiary (RCBE), approved by Law No. 89/2017, of 21 of August.

1. It is noted, however, that in several changes introduced to the legal regime of the RCBE, the definition of essential elements of data processing is referred to the Protocol to be concluded between the IRN, I.P., and various entities.

See, for example, article 6 of the RCBE, regarding the legitimacy to declare information about its beneficial owners, to which a paragraph 3 is now added, which states that the legitimacy can, whenever possible, be automatically verified using the information contained in the databases that have relevant information for this purpose, under the terms to be defined by a protocol signed between /RN, !P, and the responsible entity

for the processing of data in the case of databases external to that institute. Attention is drawn from the outset to the vagueness of this standard, which does not identify the databases in question or delimit the relevant information.

In fact, there is no definition here of the minimum elements identifying the processing of personal data to consider that the legal norm provides for or admits the processing. In fact, for the legal norm to fulfill the purpose of legitimizing a processing of personal data, for the purposes of point c) or subparagraph e) of paragraph 1 of article 6 of the GDPR, and fulfill the requirement of predictability , you must at least identify the Public Administration databases in question and, hopefully, the categories of personal data.

The same applies to paragraph 4 of article 8 of the RCBE legal framework: while paragraph 4 currently provides that "information relating to the entity subject to the RCBE may, whenever possible and when the conditions techniques, to be validated using the Public Administration databases», the new proposed wording now establishes that the information contained in the RCBE can, whenever possible, be collected automatically, using the information already contained in the

databases of the Public Administration, under the terms to be defined by a protocol signed between /RN, iP, the entity responsible for data processing, in the case of a database external to that institute, with the information collected automatically subject to confirmation by the decision maker when necessary.

It should be noted that this change means, from the outset, that there is no longer an interconnection of data between Public Administration databases to validate the information in question, for now to provide for a data processing that embodies the indirect collection of data carried out. in the Public Administration's databases, based on subparagraph e) of paragraph 1 of article 6 of the RGPD as a legal basis.

In turn, paragraph 2 of Article 14 of the RCBE legal framework now provides that the information contained in the RCBE may, whenever possible, be automatically updated, based on the information already contained in the Public Administration databases. , under the terms to be defined by a protocol signed between the IRN, IP, and the entity responsible for data processing, in the case of a database external to that Institute.

Also with regard to this provision, it is recalled the need for its densification so that it can serve as a regulatory legal norm for the processing of data here in general.

outcropped. Indeed, the simple statement that the update of the information contained in the RCBE will be carried out, whenever possible, through automatic communication from the Public Administration databases, without identifying the databases that may constitute the power source of that Registry. does not define the minimum elements that identify the processing of personal data in order to consider that the legal norm provides for or imposes, as an obligation, the processing. It is insisted: for the legal rule to fulfill the purpose of legitimizing the processing of personal data, for the purposes of Article 6(1)(c) of the GDPR, and comply with the requirement of predictability, it must at least to identify the Public Administration databases in question, and desirably the categories of data that each of them can transmit to the RCBE via an automatic information transmission procedure, without prejudice to the regulation of other aspects of this data processing being made through the aforementioned Protocol.

Finally, it should be noted that Article 39(3) ("Charges") provides that access to information for purposes other than those

strictly provided for in Articles 19 to 21 may be made available under the terms and conditions conditions to be established in a protocol signed with the IRN, IP.

Given the fact that the Draft Law is delegating to the administrative protocols plan the definition of essential elements of data processing, the CNPD recalls that the protocols, insofar as they correspond to legal acts of public entities that define binding rules for the parties regarding the processing of personal data, have the nature of an administrative regulation. To that extent, pursuant to Article 36(4) and Article 57(1)(c) of the GDPR, they must be subject to prior assessment by the CNPD. So that there is no doubt as to this duty, the CNPD suggests its clarification in the text of the articles. two

2. In turn, it appears that the Draft Law, in the changes introduced to the legal regime of the RCBE, refers to the Ordinance of the Members of the Government responsible for the areas of finance and justice the definition and regulation of some of the processing of personal data .

Thus, article 17 of the RCBE legal framework refers to the Government Members Ordinance the notification of the rejection of the declaration as well as the subsequent notifications,

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as well as the communication of the conclusion of the procedure to the declarant, to the entity and to the persons indicated as beneficial owners (cf. article 18).

The same occurs in paragraph 3 of Article 19, now amended, which provides that the availability of the information referred to in paragraph 1, as well as the criteria for searching the RCBE information, are regulated in an Ordinance of Members of the Government responsible for the areas of finance and justice. The same provision is contained in paragraph 7 of Article 22, which establishes that the processing of the envisaged procedure is carried out electronically, under the terms to be defined by an Ordinance of the Members of the Government responsible for the areas of finance and justice, as well as paragraph 4 of Article 26, which refers to the Ordinance for the definition of the terms in which the communications, notifications and declarations of rectification provided for in the previous numbers are made.

The CNPD once again recalls the need for these legal instruments, Ordinances of the Members of Government responsible for the area of finance and justice, to be subject to the CNPD's assessment in accordance with the provisions of subparagraph c)

no. .° and Article 36(4) of the GDPR.

It should be noted that the Proposal now refers the definition of the form of the acts and the procedures aimed at entering the information in the RCBE, as well as the respective availability, for dispatch by the Chairman of the Board of Directors of IRN, IP. This reaffirms the statement made in Opinion No. 29/2017, of May 9, on Proposed Law 71/XIII/2aGOV,2 on the same item, which is reproduced here: "In this regard, the CNPD recalls that the legal regime for the processing of personal data, which covers the different operations on personal data, must be the subject of an iei of the Assembly of the Republic or an authorized decree-iei, with prior consultation of the CNPD. Whenever the legal diplomas that provide for the processing of personal data do not exhaust their regulation and refer the definition of aspects of the regime to other legal instruments, it is essential to subject such instruments to prior control by the CNPD, under penalty of being defrauded, in this way, the provisions of paragraph a) of paragraph 1 of article 6.0 of Law n.0 58/2019, of 8 August and the function that this entity has as determined by national law and European law. two

2 Available at https://vvwvv.cnpcl.pt/hoine/decisoes/Par/40 29 2017.pdf

In summary, the CNPD recommends densification in article 18.0 of the regime of communication and registration of personal data in the RCBE; if this is not the legislative option, the matter is subject to government regulation, subject to a prior opinion from the CNPD."

3. The expansion of the grounds for total or partial limitation on access to information on the active beneficiary should be noted as positive, with the wording now proposed for paragraph 1 of article 22 of the legal regime, in accordance with established in the Directive that is transposed.

D - Amendment to Decree-Law No. 298/92, of December 31

Regarding the changes introduced by the Draft Law to the General Regime for Credit Institutions and Financial Companies, approved by Decree-Law no. , of January 23, only the one referring to Article 81,°-A, deserves to be highlighted. Thus, paragraph 7 of Article 81-A provides that the information contained in the database of accounts is directly accessed immediately and not filtered by the Financial Information Unit (FIU) and the Central Department of Investigation and Action.

Penal Code (DCIAP), providing that the measures that prove necessary to ensure the effective protection of information and personal data processed, namely physical and logical security measures, are defined in a Protocol to be signed with Banco de Portugal.

We reiterate what was stated above regarding the need for prior consultation of the CNPD on the text of the protocol.

But it is more important to emphasize here that those responsible for accessing the accounts database have a duty to ensure access control, under the terms imposed by subparagraph e) n. /2019, of August 83. Thus, as direct and unrestricted access by the FIU and the DCIAP to the accounts database is now foreseen, it is important to ensure that this access is effectively carried out for the purpose of preventing and combating money laundering and financing crimes. in

3 Approving the rules on the processing of personal data for the purposes of preventing, detecting, investigating or prosecuting criminal offenses or enforcing criminal sanctions, transposing Directive (EU) 2016/680 of the European Parliament and of the Council, of 27 April 2016.

terrorism, as this is the scope of the respective legal provision. In these terms, it is recommended that paragraph 7 of article 81-A (and not only in the protocol to be concluded between public authorities) be included in the duty, on the side of the person responsible for access, to keep a record of each access, with the respective justification.

III. Conclusion

Under the terms and on the grounds set out above, the CNPD recommends:

1 - The revision of subparagraph d) of no. 2 of Article 25 of Law no. 83/2017, of 18 August, contained in Article 5 of the Proposal, in order to effectively reflect the provisions of no. 2 of article 4-A of Law No. 37/2014, of 26 June, in its current wording or, if this is the ratio underlying that rule, the correction of the reference to paragraphs 1 and 4 of the same article; alternatively, its elimination;

2 - The reformulation of paragraph 4 of Article 25 of Law no. 83/2017, of August 18, contained in article 5 of the Proposal, admitting alternative forms to the proof of identification documents in place of the reproduction of the original of the identity card, in physical or electronic form, and specifically with regard to subparagraph iii) of subparagraph c) of paragraph 4 of article

25, its revision in order to effectively reflect the provisions of paragraph 2 of the article 4-A of Law No. 37/2014, of 26 June, in its current wording or, if this was the ratio underlying that rule, the correction of the reference to paragraphs 1 and 4 of the same article ; alternatively, its elimination;

3 - The indication in paragraph 4 of Article 135, regarding the duty of cooperation between supervisory authorities of the financial sector of the need for collaboration agreements that legitimize international flows of personal data that occur in this scope respect the provisions of Article 46 of the GDPR;

4 - In the different rules of the RCBE legal framework that impose or generally admit treatments that involve access to personal data between unspecified Public Administration databases, referring their definition to a protocol between the IRN, I.P. and the entities responsible for them (also not specified), the essential identification of the databases and, hopefully, the categories of personal data, under penalty of these rules, as they do not contain the minimum elements

identifiers of the processing of personal data, do not serve as a basis for the lawfulness of the processing under the terms of c) or e) paragraph 1 of article 6 of the RGPD;

5 - The explanation in the text of the articles that provide for the conclusion of Protocols between the IRN, I.P., and other entities of the need for them to be subject to prior appraisal

6 - With regard to the changes introduced in the General Regime for Credit Institutions and Financial Companies, the provision in paragraph 7 of article 81,°-A of the duty, on the side of those responsible for access, to maintain each access, with the respective justification, in order to allow its control in the legally required terms.

Approved at the June 3, 2020 meeting

Filipa Calvão (President)

of the CNPD.