

I. Report

1. The National Data Protection Commission (CNPd) prepared a draft deliberation on December 16, 2020, in which the defendant Municipality^{^^^} was charged with the practice, in material authorship, with conscious negligence, of an administrative offence, p. and p. by subparagraph a) of paragraph 1 of article 5, in conjunction with subparagraph a) of paragraph 5 of article 83, both of Regulation (EU) 2016/679, of 27 April 2016 - Regulation General on Data Protection (RGPD), sanctioned with a fine, up to a maximum amount of € 20,000,000.00.

2. Notified of the content of said draft decision, pursuant to article 50 of Decree-Law No. 433/82, of 27 October [General Regime for Administrative Offenses and Fines (RGCO)], to present its defense the defendant came, in that sequence, to allege, in short, that:

The. the draft deliberation does not result in any relationship between the participant and the facts denounced in the case file, a relationship that is essential for the process to be opened, as required by article 77 of the RGPD, concluding that the participant is illegitimate and the consequent archiving of the cars;

B. at the time of publication, the CNPD had not issued any guidance on the matter;

ç. that the health and civil protection agents were responsible for weighing and deciding "in the immediate between rights and interests constitutionally guaranteed and safeguarded to all citizens, on the one hand the right to their personal and moral integrity, but also the right to life and to physical integrity, generating an immanent constitutional conflict between the rights of the infected person and the rights and guarantees of other people, whether family members, neighbors or community members who live in close proximity, in the same house, in the same apartment block with the use of common areas such as elevators, staircases or garages, or on the same street or commercial establishment (see, in particular, articles 24 and 25 of the Constitution of the Portuguese Republic);"

d. the number of voters, 3000 in the parish and approximately 500 in the

location^{^^^^^^} makes it impossible to precisely identify the couple residing in Vale de Madeiros who went to France and that the comments made to the publication on the social network show that the specific location was not identified;

and. on May 13, 2020, it deleted the information from the social network, following the issuance of the CNPD Guidelines on the

matter, of April 22, 2020;

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f. the CNPD is obliged to apply Article 39(3) of the GDPR Enforcement Law;

g. an admonition must be applied, by application of the RGCO, taking into account the reduced gravity of the infraction and the small guilt of the accused;

H. finally, the defendant invokes the application of paragraph 7 of article 83 of the RGPD, in conjunction with article 44 of Law no. of fine.

3. The defendant gathered three documents and named three witnesses.

II. appreciation

4. The CNPD is competent under the terms of paragraph 2 of article 58 of the RGPD, in conjunction with article 3, paragraph 2 of article 4, and subparagraph b) of paragraph 1 of article 6, all of Law No. 58/2019, of August 8 - GDPR Enforcement Law.

5. Bearing in mind the defense presented by the defendant, it is necessary to assess the arguments of fact and law presented therein.

6. With regard to the alleged illegitimacy of exercising the right to complain, it is important to clarify that this is not a complaint in the proper sense. In fact, the citizen only informed the CNPD of facts that, in his opinion, would not respect the RGPD and, having analyzed them, as there were strong indications of violation of the RGPD, the CNPD, in obedience to the principle of officialdom, took the initiative and proceeded procedural control of the application of the GDPR (cf. Article 57(1)(a) of the GDPR and Article 6(1)(b) of the GDPR Enforcement Law).

7. Regarding the performance of the health authorities with regard to the publication of information, it is important to mention

that the National Health Authority has carried out the daily dissemination and availability of information. This information contained national totals, as well as the regional distribution of the number of infected people and deaths. It also disclosed, on the institutional website of the Directorate General for Health (DGS), detailed information on the number of infected people and deaths per municipality.

8. However, for reasons of confidentiality and data protection, the DGS never made disaggregated information available, when the number of infected people in the Municipality was less than three, precisely so that it was not possible to identify the holders. Such a solution was imposed, and is still required, due to the fact that health information is subject to the deontological confidentiality of health professionals, as well as the confidentiality imposed by other legal norms and, also, by the data protection rules.

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National Data Protection Commission

9. In fact, this information is subject to a specially protected legal regime, as it corresponds to a category of personal data that is likely to generate or promote stigmatization and discrimination against the respective holders.

obedience to law and law, as a public entity subject to the principle of legality, enshrined in article 266 of the Constitution of the Portuguese Republic, a basic pillar of the Rule of Law.

Organization of Services, published in the Diário da República

12. In addition, you are required to have a data protection officer (cf. subparagraph a) of paragraph 1 of article 37 of the GDPR and subparagraph c) of paragraph 2 of article 12 of the Law of Enforcement of the RGPD), which must be designated based on their specialized knowledge of data protection law and practices and who is responsible for informing and advising the controller of their obligations under the RGPD (cf. n. 37(5) of the GDPR).

13. In fact, the data protection officer is a body of the public entity, which, despite not having (binding) decision-making powers, assumes itself as a center for attributing its own powers and, therefore, as an administrative body. It is a singular, irremovable, mandatory, consultative and control body, with the particularity that, under the GDPR, recommendations can be made on its own initiative and not only following a request from other bodies of the legal person in which it is integrates.

14. Finally, it is also important to mention that the Municipality, as the person responsible for processing

of personal data, you are subject to the Responsibility Principle, according to which you must comply with the GDPR and be able to prove that compliance. It is up to it, taking into account the nature, scope, context, purposes, as well as the risks to the rights and freedoms of individuals, to apply the appropriate technical and organizational measures to ensure and be able to prove that the processing is carried out in GDPR compliance (see Article 5(2) and Article 24(2), both GDPR).

15. For all these reasons, cannot the Municipality want to justify its conduct in the absence of guidelines from the CNPD This justification corresponds to the total inversion of the axiological logic of the data protection regime, which, it is reiterated, is based on the principle of responsibility and, therefore, on the obligation to verify and justify, before carrying out a processing of personal data, that this is GDPR compliant.

10. However, no guidelines are necessary for the Municipality to

be linked to

11. In fact, the Municipality has a Legal Office to support the executive (cf.

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16. It was as a result of the knowledge that local authorities were exposing identification and contact data of citizens, including children, on institutional pages and social networks, after confirmation of the diagnosis of Covid-19, that the CNPD issued the Guidance referred.

17. Regarding the alleged conflict between fundamental rights invoked by the defendant, it will always be said that it is not possible to see how the publication on a social network of information about infected citizens was able to safeguard the right to life and physical integrity of anyone . Thus, even if it is not conceded that there was a conflict between fundamental rights, the argument results in a patent contradiction. In fact, if one wants to say that the publication of that information did not allow or made it almost impossible to identify the holders in question, one cannot see how such publication could be able to guarantee..." the rights and guarantees of other people, whether family members, neighbors or community members who live

in close proximity to him".

18. With regard to the alleged "almost" impossibility of identifying the data subjects, with the set of information available, namely the indication of the parish of residence and the unnecessary and disproportionate information about a trip to France, with the specific dates in that this happened, with relative ease, in particular community members, would identify the persons concerned. In fact, there is no reason to make this information available that would not allow its identification.

19. With regard to the request for exemption from the application of a fine, the CNPD issues its decision in the final part of this determination, after considering all the facts and arguments presented and in the case of concluding that a specific fine has been imposed.

20. With regard to the possible application of a warning, which is equivalent to what the RGPD calls a reprimand and falls within the framework of the corrective powers provided for in paragraph 2 of article 58 of the RGPD, it is important to verify whether it is effective , proportionate and dissuasive. The choice between imposing a reprimand or imposing a fine depends on the nature, gravity, duration of the infringement and the fault. Indeed, reprimand is only acceptable when minor infractions are involved, as is clear from Recital 148 of the GDPR, which has a hermeneutic nature.

21. In the present case, the infringement in question cannot be considered minor, as it expressly forms part of the list of those sanctioned with the highest maximum amount under the GDPR, so the requirement of proportionality cannot be achieved by applying a rebuke.

22. In fact, when special data is at stake, it is not enough for their treatment to invoke a general public interest in guaranteeing the health and civil protection of the population, nor is there a legal rule that

CNPD

National Data Protection Commission

provides for such processing, and that the municipalities are responsible for carrying it out, with appropriate measures to guarantee the rights and interests of data subjects, as required by subparagraphs g) and i) of paragraph 2 of article 9 of the GDPR.

23. It should also be noted that the defendant acknowledges that she only removed the information from the social network on May 13, 2020, almost two months after having published it, and approximately three weeks after the issuance of the CNPD Guidelines, which were object of wide coverage by the media.

24. With regard to the evidentiary requirement for the examination of witnesses, in compliance with the principle of legality enshrined in paragraph 1 of article 266 of the Constitution of the Republic and in article 43 of the General Regime for Administrative Offenses and Fines, ex vi article 45 of the GDPR Enforcement Law, is rejected, since the defense's allegations do not call into question the facts, so they do not require further clarification or contradictory, which results in the aforementioned means of evidence being useless for the discovery of material truth, insofar as it does not deny the facts imputed to it.

25. Furthermore, the case file is endowed with sufficient documentary evidence that supported the draft deliberation, allowing the delivery of this Deliberation.

26. Thus, all things considered and considered, the defense's allegations do not call into question the facts, nor do they change the legal framework made in the draft deliberation, which is why the position taken therein is maintained.

27. With regard to the defendant's divergence, as to the fact that the CNPD disapplied paragraph 3 of article 39 of the GDPR Enforcement Law, it is important to note that the rule in question, by imposing on the CNPD a step prior to the decision the opening of a sanctioning procedure, which takes the form of a warning to correct the illegality within a reasonable period of time, establishes a special regime for illegal conduct committed with negligence that is not compatible with the regime provided for in the GDPR.

28. In fact, as is clear from the body of Article 83(2) of the GDPR, the EU legislature confers on the individual decision-maker, depending on the circumstances of each case, a discretionary power to impose fines in addition to or in instead of the measures referred to in subparagraphs a) to bj and j) of paragraph 2 of article 58 of the GDPR, recognizing the power of the national supervisory authorities to, on a case-by-case basis, opt for the imposition of only a fine, imposition of a fine and corrective measure, or isolated application of one or more corrective measures provided for in paragraph 2 of article 58. It is this discretionary power that is indisputably attributed to the national supervisory authorities, with the obvious possibility of review by the courts, that the rule in Article 39(3) of the GDPR Enforcement Law is restricting, imposing in the abstract to the CNPD the adoption of a

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specific measure, irrespective of the circumstances of each case (since it only takes into account the negligent nature of the infringement) and without allowing immediate cumulation of the application of a sanction

29. Such imposition voids the discretionary power recognized by the RGPD to the Portuguese supervisory authority, removing or considerably reducing the useful effect of the rule that attributes it¹.

III. facts

30. From the elements contained in the case file, of interest for the decision, we consider the following facts to be proven:

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¹ Moreover, the national legislator seems to want to recover a provision provided for in the first version of the proposal for a regulation authored by the European Commission (the then Article 76(3)), which at a later stage of the European legislative procedure was eliminated, which constitutes another argument in favor of the interpretation that the Union legislature refused to limit or exhaust in the abstract the powers to apply pecuniary sanctions to the offenses provided for therein, so that a national rule that provides for such a prior procedure for any and all infringements negligent act with the effect of postponing or making impossible the exercise of sanctioning power recognized by the RGPD voids the useful effect of the Union norm that provides for such powers, putting in crisis the principle of the effectiveness of Union law.

the place of|

|is a village located in the parish of dei

I, county

the parish is made up of three villages: |

according to the 2011 census, the parish of| the accused Municipality^{^^^B} is the holder of the NIF |

^{^^}Ivy composed of 3509 people; |and has its headquarters in Praça do Município,

the defendant has a page on the social network: "Facebook", identifying himself as "Municipality

following the beginning of the pandemic outbreak resulting from the new Coronavirus SARS-CoV-2 and the disease

COVID-19, since March 22, 2020, the defendant has made the information available on the aforementioned social network,

daily, alluding to the "monitoring of COVID -19";

on March 23, 2020, the defendant published, on the aforementioned page, a publication with the title: "Information No.

in the text of the publication, the defendant left it out: "(...) two more cases of COVID-19 disease were also diagnosed in a

couple residing in ^{^^^^^^}| who traveled to France

National Data Protection Commission

between the 4th and 14th of March, being permanently accompanied by the public health authorities, and also the same

couple, notified for isolation, to whom a speedy recovery is wished.

i. on March 25, 2020, the defendant published, on the aforementioned page, a publication with the title: "Information No. [^]I";

j. in the text of the publication, the defendant left it open: "(...) One of the new cases is related to

the couple previously diagnosed positively, being duly

accompanied by public health authorities and under mandatory quarantine at the residence of that same couple

k the defendant carried out a personal data processing operation which necessarily resulted in an impact on the privacy of

individuals and had an obligation to seek to know the legal framework in which it could in fact be carried out;

l. the defendant acted freely, voluntarily and consciously, when making the two partially transcribed publications, knowing that

he was revealing the health information of the two people affected by the COVID-19 disease, as well as the country where they

had been, as well as the time of permanence, substantiating a processing of personal data that is not based on any legal

basis, having, therefore, not acted with the care to which it was obliged and capable, representing as possible that it was

acting against the law.

IV. Decision motivation

31. The facts taken as proven result from the evidence obtained by the CNPD Inspection Unit.

V. Determination of the fine

32. In determining the specific measure of the fine, the criteria that injunctively result from subparagraphs a) to k) of paragraph 1 of article 83 of the GDPR must be applied, which entail a greater degree of legal certainty, predictability and transparency in the sanctioning action of the national supervisory authorities, where the CNPD is integrated at the national level, also ensuring consistency and uniformity in the application of data protection rules, in the sanctioning framework within the Union.

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33. These criteria also provide a general guideline, preserving the degree of amplitude necessary to adapt the fines to the particularities and requirements of general and special prevention that are felt in each specific case, in the light of the principle of proportionality.

34. Therefore, it is important to analyze the different criteria, relating them to the present case; to know:

The. the nature, gravity and duration of the infringement taking into account the nature, scope or purpose of the data processing in question, as well as the number of data subjects affected and the level of damage suffered by them - this is an infringement which is punishable within the framework of the most serious administrative offense in the light of the GDPR, because the rule violated corresponds to one of the fundamental principles in terms of data protection, the principle of legality. The duration of the infraction corresponded to almost two months, according to the evidence gathered and the defendant's own statement;

B. the intentional or negligent nature of the infraction - appeals to the subjective element of the legal type of administrative offense imputed to the defendant, considering that he acted with conscious negligence, since he did not act with the care he

was obliged to and of which he was capable, representing as possible that it was acting against the law, denoting the breach of the duty of care regarding the prior consideration of the legal grounds on which the processing of personal data could be based, and hence the action that in this way resulted. if censored in the area of misdemeanor;

ç. the initiative taken by the controller to mitigate the damage suffered by the data subjects was adopted late;

d. the specific categories of personal data affected by the infringement - the personal data in question - relating to the data subject's health - form part of a special category provided for in Article 9(1) of the GDPR, and the processing of which is generally prohibited here, unless that it is based on one of the grounds contained in the various subparagraphs of paragraph 2, which did not happen;

and. any other aggravating or mitigating factor applicable to the circumstances of the case, in light of Article 83(2)(k) of the GDPR, such as the financial benefits obtained or the losses avoided, directly or indirectly, through the infringement - here, as a mitigating factor, the absence of any economic benefit from committing the offense in question;

f. abstract frame of the fine, as expressed in the draft decision, the offense foreseen and punished under the combined provisions of subparagraph e) of paragraph 1 of article 5,

National Data Protection Commission

in conjunction with point a) of paragraph 5 of article 83, both of the RGD, sanctioned with a fine up to a maximum amount of € 20,000,000.00.

35. Assessing the facts found in the light of the above mentioned criteria and considering the circumstances in which the economic benefit extracted by the defendant as a result of the infringement cannot be measured, then the CNPD, under the terms of subparagraph f) of paragraph 2 of article 58 .° of the RGD, considers the application to the defendant of a fine, in the amount of €2,500.00 (two thousand five hundred euros), for the practice of the above referenced offense, as it constitutes the effective, proportionate and dissuasive sanction.

SAW. Decision on the application for exemption from the imposition of a fine

36. Regarding the request for exemption from the application of a fine, formulated by the defendant, it is important to emphasize that the CNPD has interpreted the provisions of paragraph 2 of article 44 of Law No. 58/2019, of 8 August, in the sense that it grants it a broad discretionary power to make decisions, which requires this authority to balance, on the one hand, the rights of data subjects and the public interests that the violated legal norms seek to safeguard with, on the other hand, the

situation of the offender and the public interest or interests that are specifically affected by the imposition of a fine - weighting that, obviously, is carried out in the light of general principles, in particular the principles of proportionality and equality (cf. Deliberation/2019/4952).

37. From the arguments presented by the Municipality, it is not possible to conclude that its specific situation or the public interests that it is responsible for pursuing are disproportionately or critically affected by the imposition of this specific fine, much less that they are thus affected in terms that justify their overlapping with the rights of data subjects and the public interests safeguarded by the violated norms.

38. In fact, it is important to remember that what is at stake is the processing of special personal data - data relating to health that therefore need reinforced legal protection, and which resulted in the stigmatization of data subjects, a consequence that the person in charge for the treatment he was obliged to have anticipated and considered; and that this treatment violates one of the fundamental principles in terms of data protection, the principle of lawfulness, corresponding to an offense subject to the most serious administrative offense under the GDPR.

2 Accessible at <https://www.cnpd.Dt/decisoos/historico-de-decisoos/?vear=:2019&tvpe=:2&ent=>

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39. On the other hand, the defendant's conduct reveals, at least, the secondary consideration of data protection principles that aim to protect fundamental dimensions of the human being, such as the reservation of private life and the right to non-discrimination. It is insisted that public entities have a specific duty to act in accordance with the law, and must take special care in observing the rules and concrete guarantees of the legality of the data processing they carry out, so the degree of defendant's fault.

40. Even if it were intended to cover up the performance of this processing of personal data under the municipal mission of collaboration in guaranteeing public health, this mission, like any other that is of public interest, does not justify disregard for

the principles and rules in force in the legal system and, specifically, those that directly safeguard the fundamental rights of citizens. Even because, objectively and clearly, the public disclosure of cases of contagion is not even the legal competence of local authorities, but rather falls under the responsibility of another public body.

41. Moreover, the financial situation of the public sector and, specifically, of this authority is not, by the CNPD, ignored, having already been considered in the setting of the fine, and it is also correct that there are legal mechanisms that allow to dilute, in time, its sale off. Such mechanisms are, moreover, available to any public or private entity.

42. In view of the foregoing, pursuant to the combined provisions of Article 3, Article 4(2) and Article 44(2), all of Law No. 58/2019, of 8 August, the CNPD decides not to waive the imposition of the fine imposed.

VII. Conclusion

43. In view of the above, the CNPD resolves:

The. To impose a fine of € 2,500.00 (two thousand euros and five hundred euros) on the accused Municipality^{^^^};

B. Pursuant to paragraphs 2 and 3 of article 58 of the RGCO, inform the defendant that the conviction becomes final and enforceable if it is not judicially challenged under the terms of article 59 of the same diploma.

44. The defendant must pay the fine within a maximum period of 10 days after its final nature, sending the respective payment slip to the CNPD. In case of impossibility of timely payment, the accused must communicate this fact, in writing, to the CNPD.

National Data Protection Commission

Approved at the meeting of April 27, 2021

Pedro Mourão ^

Maria Tecesa Naia ■\$*

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