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PAR/2023/9

National Data Protection Commission

OPINION/2023/24

Order

1. The Institute of Registries and Notaries, I.P. (IRN) requested the National Data Protection Commission (CNPd) to issue an opinion on a protocol to be signed with Universidade Nova de Lisboa (NOVA IMS) and the Agency for Administrative Modernization, IP, (AMA), concerning ' the implementation of the "System for evaluating the perceived quality and user experience of public administration services" at the Instituto de Registos e Notariado, I.P.
2. The CNPD issues an opinion within the scope of its attributions and powers as an independent administrative authority with authoritative powers to control the processing of personal data, conferred by paragraph c) of paragraph 1 of article 57, in conjunction with paragraph b) paragraph 3 of article 58, and with paragraph 4 of article 36, all of Regulation (EU) 2016/679, of April 27, 2016 - General Regulation on Data Protection (hereinafter GDPR), in conjunction with the provisions of Article 3, Article 4(2) and Article 6(1)(a), all of Law No. 58 /2019, of August 8, which implements the GDPR in the internal legal order.
3. By Order No. 4149/2021, of April 23, of the Secretary of State for Portuguese Communities, the Deputy Secretary of State and Tax Affairs, the Secretaries of State for Justice and Innovation and Administrative Modernization and the Secretaries of State for Social Security and Infrastructure, the Intersectoral Coordinating Group “Laboratório de Assistência Público” (Public Service Laboratory) (LabAP), coordinated by the Agency for Administrative Modernization, I.P. (AMA, I.P.)
4. LabAP's Work Plan for the period 2021 and 2022 foresees a measure regarding the implementation of the System for evaluating the perceived quality and user experience of Public Administration services in the entities that make up this Coordinating Group, among which are find the Institute of Registries and Notaries, I.P.
5. The AMA, I.P. established a cooperation protocol, in October 2021, with NOVA IMS, which defines the terms of the provision of services necessary for the implementation of the System for evaluating perceived quality and user experience in public services provided by Public Administration entities (AP).

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6. Thus, under the terms of Clause One, this Protocol aims to define the responsibilities of the three parties in the implementation of the "System for evaluating the perceived quality and user experience of Public Administration services" at the Instituto de Registos e Notariado, I.P., as provided for in the LabAP Work Plan.

7. The project aims to pursue the following objectives: provide an analysis of users as a whole, also allowing an independent analysis and benchmarking by relevant segments; collect comments and suggestions for improvement from users and analyze them; advise the IRN on strengths, constraints and priority areas for action to make improvements in services, with a view to increasing user experience and involvement; allow the comparative analysis of results between the entities that implement the system, contributing to an alignment of tools, procedures and recommendations based on best practices, with a view to a better public service to be provided by the set of AP entities.

i. Responsibility and subcontracting

8. From the analysis of the Protocol, from the point of view of the right to protection of personal data, it follows that the basis for the lawfulness of data processing arising from its implementation lies in the consent of the data subjects, under the terms of paragraph a) of n. Article 6(1) of the GDPR. Thus, consent must comply with the requirements of Article 4(11) of the GDPR, and must be free, informed and specific and cover all processing activities carried out with the same purpose.

9. In turn, paragraph 1 of Clause Eleven, entitled "Personal Data", provides that the IRN is responsible for the processing of personal data resulting from the execution of this Protocol, with NOVA IMS being considered a subcontractor.

10. Controller is understood to be the natural or legal person, public authority, agency or other body that, individually or jointly with others, determines the purposes and means of processing; whenever the purposes and means of such processing are determined by the law of the Union or of a Member State, the controller or the specific criteria for his appointment may be

provided for by the law of the Union or of a Member State - cfr. Article 4(7) of the GDPR.

11. AMA, I.P., as the coordinating entity of LabAP, approved jointly with the other members that compose it, the implementation of the System for assessing the perceived quality and user experience of Public Administration services in the entities that make up this coordinating Group, among which is the Institute of Registries and Notaries, I.P.

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12. Subsequently, AMA, I.P., entered into a protocol with Nova IMS for the use of an analysis/assessment tool for user satisfaction with public administration services.

13. In fact, AMA, I.P., as responsible for implementing the plan/measure, chooses who is the subcontractor in the processing of personal data in question here, determining the main means of processing, and the purpose was determined by Order No. 4149/2021, of April 23, leaving only the IRN, I.P., to define some aspects of the treatment. Specifically, under the terms of the second clause of the Protocol, it is responsible for: identifying the service channels existing at the IRN; identify the total population of each channel and collect contact information from users and collect consents from data subjects who are asked for personal data within the scope of the study.

14. It is also true that the processing of personal data aims to ensure the fulfillment of functions assigned by law or by another legal rule both by AMA, I.P., and by IRN, I.P., in this sense both administrative entities benefit from the result of data processing personal that will be carried out.

15. It is recalled that, pursuant to Article 26 of the GDPR, when two or more controllers jointly determine the purposes and means of that processing, both are joint controllers. These determine, by agreement between themselves and in a transparent manner, the respective responsibilities for compliance with this regulation, namely with regard to the exercise of the rights of the data subject and the respective duties to provide the information referred to in articles 13 and 14. ° unless and to the extent that the respective responsibilities are determined by Union or Member State law to which they are subject. The agreement may designate a point of contact for data subjects.

16. Joint participation in determining purposes and means implies that more than one entity has a decisive influence on

whether and how processing takes place. It should be noted that the assessment of joint responsibility for processing must be carried out on the basis of a factual and non-formal analysis of the effective influence on the purposes and means of processing.

17. It should be noted that joint responsibility for processing can also, in the light of the case law of the Court of Justice of the European Union (CJEU), be demonstrated when the entities involved pursue purposes that are closely linked or are complementary. This may be the case, for example, when there is a mutual benefit arising from the same processing operation, provided that each of the entities involved participates in determining the purposes and means of the relevant processing operation, as set out in the Guidance on the concept of Controller and processor,

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of the European Data Protection Board.¹ However, the notion of mutual benefit is not decisive and can only constitute an indication - see, as an example, the case *Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV* (C-40/17) of the CJUE.

18. Pursuant to paragraph 9 of Clause Eleven, AMA, I.P., does not have access to any personal data nor does it process any personal data within the scope of this protocol. However, the fact that one of the parties does not have access to personal data is not enough to exclude joint responsibility for the processing, as was clearly evident in the *Jehovah's Witnesses* case².

19. Thus, in the case under analysis, it appears that we are facing a case of joint responsibility, under the terms referred to above, which presupposes the existence of an agreement that duly reflects the respective functions and relationships of the joint controllers in relation to the data subjects data.

20. In these terms, Clause Eleven should be amended, in order to indicate AMA, I.P., and IRN as jointly responsible for data processing and NOVA IMS as subcontractor. And, consequently, it must contain an express reference to the existence of an

agreement between those responsible for the treatment that enshrines the respective responsibilities for compliance with the RGPD or, alternatively, this delimitation is expressly regulated.

21. It is therefore suggested that the Protocol expressly regulate the respective responsibilities with regard to the exercise of data subjects and the duties to provide the information referred to in article 13 of the RGPD.

22. It is important here to remember the jurisprudence of the CJEU, in the Judgment Case C-210/163 and what is inscribed therein: "it is important to specify, as the Advocate General underlined in paragraphs 75 and 76 of his Opinion, that the The existence of joint responsibility does not necessarily translate into equivalent responsibility of the different operators concerned for processing personal data. On the contrary, these operators may be involved in different stages of that treatment and to different degrees, so that, in order to assess the level of responsibility of each one, all the relevant circumstances of the case in question must be taken into account."

1 See point 60 of Guidelines 07/2020 on the concept of controller and processor, adopted on 7 July 2021 by the European Data Protection Board, available at

ITietosuojavaltuutettu v Jehovan todistajat - uskonnollinen yhdyskunta (C- 25/17).

3 Available at

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ii. Other elements of treatment

23. Some notes on specific aspects of the Protocol:

24. Item 7) of this Clause assigns to NOVA IMS the obligation, after becoming aware of any violation of personal data, to notify the IRN, without undue delay, within a period of less than 48 hours (cf. Article 33.0 n.0 2 of GDPR). If this obligation is not questioned, it is suggested that it be included in Clause Eleven, along with other obligations attributed to the subcontractor.

25. With regard to information security, the Protocol provides, in Clause Twelve, that during the execution of the Protocol, NOVA IMS undertakes to comply with the policies and procedures provided for in the ISMS It is also referred that the

equipment used has the Operating System up-to-date, are protected with antivirus systems and are regularly scanned by the vendor for malware.

26. Now, under the terms of article 32 of the RGPD, the IRN, I.P., and the AMA, I.P., as data controllers, must assess the risks to the rights and freedoms of natural persons whose data are processed and apply measures designed to mitigate these risks. Such an obligation also rests with NOVA IMS who, regardless of the controller, will be responsible for assessing the risks to the rights and freedoms of data subjects and applying the necessary measures, and for this purpose, controllers must provide NOVA IMS with all the information necessary to identify and assess these risks. It is therefore recommended to reformulate this Clause in order to refer to the responsibility of the IRN, IP and AMA, I.P., in defining the security measures to be adopted, in compliance with article 32 of the RGPD.

III. Conclusion

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

- a) The reformulation of paragraph 1 of Clause Eleven in order to indicate AMA, Í.P., and IRN, I.P., as jointly responsible for data processing;
- b) That the Protocol expressly regulates the respective responsibilities with regard to the exercise of data subjects and the duties to provide the information referred to in article 13 of the RGPD;
- c) The reweighting of the remaining numbers of this Clause in order to reflect that AMA, IP, is jointly responsible for the treatment, expanding the obligations of NOVA IMS that must be addressed to it; It is

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- d) The reformulation of Clause Twelve enshrining the obligation of the IRN /AMA to adopt appropriate technical and organizational measures to ensure a level of security adequate to the risk to the rights and freedoms of data subjects, pursuant

to article 32 of the RGPD.

Lisbon, March 10, 2023

c «o

Maria Cândida Guedes de Oliveira (Rapporteur)