CNPD

National Data Protection Commission

OPINION/2023/54

I. Request

1. The President of the Commission on Constitutional Affairs, Rights, Freedoms and Guarantees of the Assembly of the Republic asked the National Commission for Data Protection (CNPD) to pronounce on Proposal for Law No. 83/XV/1 (GOV) which transposes into national law Directive (EU) 2021/1883, of the European Parliament and of the Council, of 20 October 2021, on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment and which repeals Council Directive 2009/50/EC.

2. The CNPD issues an opinion within the scope of its attributions and competences, 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, paragraph b) of paragraph 3 of article 58 and 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, paragraph 2 of article 4 and paragraph a) of paragraph 1 of article 6, all of Law no. 58/2019, of 8 of August, which implements the GDPR in the internal legal order.

II. Analysis

3. This bill (hereinafter Proposal) transposes Directive (EU) 2021/1883 of the European Parliament and of the Council, of 20 October 2021, on the conditions of entry and residence of third-country nationals to purposes of highly qualified employment and repealing Council Directive 2009/50/EC.

4. The Proposal also amends Law No. 23/2007, of 4 July, in its current wording, which approves the legal regime for the entry, stay, exit and removal of foreigners from national territory; the second amendment to Law No. 53/2007, of August 31, amended by Law No. 73/2021, of November 12, which approves the structure of the Public Security Police; to the third amendment to Law No. 63/2007, of November 6, amended by Decree-Law No. 113/2018, of December 18, and Law No. 73/2021, of November 12, which approves the organization of the Republican National Guard; the amendment of Law No.

27/2008, of June 30, in its current wording, which establishes the conditions and procedures for granting asylum or subsidiary protection and the statutes of asylum seekers, refugees and subsidiary protection, transposing for the internal legal order Directives No. 2004/83/EC, of the Council, of April 29, and 2005/85/EC, of the Council, of December 1, and the amendment of Law No. 73/2021 , of 12 November, approving the restructuring of the Portuguese border control system,

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proceeding with the reformulation of the regime of the forces and services that carry out the activity of internal security and establishing other rules for the reallocation of competences and resources of the Aliens and Borders Service.

5. As a preliminary note, it should be noted that Decree-Law No. 41/2023 was published on June 2, after the deadline indicated for this pronouncement had expired. Regarding this diploma, which comes into force on October 29, 2023, the CNPD was not called upon to pronounce as it should have been under the terms of subparagraph c) of paragraph 1 of article 57, subparagraph b) of Article 58(3) and Article 36(4), all of the GDPR, in conjunction with the provisions of Article 3, Article 4(2) and subparagraph a) of no. 1 of article 6, all of Law no. 58/2019, of August 8. This diploma proves to be fundamental for the understanding and analysis of the current Proposal, insofar as, among other provisions, it creates the Agency for Integration, Migration and Asylum. IP (AIMA, I.P.), and the Borders and Foreigners Coordination Unit (UCFE) defining its attributions and competences. The short time allowed for pronunciation hinders a more complete analysis of the legislation in question.

6. Lastly, it is important to point out that with the repeal of Decree-Law No. 252/2000, of October 16, which establishes the organic structure and defines the attributions of the SEF, by article 14, paragraph b), of the Law n.° 73/2021, there is a set of attributions that are no longer foreseen in the law, in particular those related to the responsibility for processing data of the national parts of the large-scale European information systems, such as the N.SIS, the VIS, Eurodac, as well as the new systems that are already being implemented such as the EES (Entry and Exit System) and ETIAS. In fact, these systems are

currently being developed by the SEF, with no indication of who will be entrusted with these attributions in the future. Assessing separate legislation without contextualizing the overall framework of the functioning of these institutions does not allow for a rigorous analysis and a useful and effective contribution. For example, in the transfer of competences to the PSP and the GNR under Law n.° 73/2021, of 12 November, it is clear who is responsible for controlling borders and foreign citizens within the territory, but nothing is known about which entity will issue visas within the territory, which is an obligation of the VIS Regulation.

7. Turning now to the analysis of the Proposal, it is important, first of all, to point out that this Proposal for Law is not supported by an impact study on the protection of personal data - which is, remember, mandatory in terms of no. 4 of article 18 of Law no. 43/2004, of August 18, amended by Law no. 58/2019, of August 8. The absence of the aforementioned impact study compromises a more complete assessment of the likely risks arising from the processing of personal data.

8. With regard to the amendments introduced by the Proposal to Law No. 23/2007, of July 4, it should be noted that throughout the diploma, references to powers previously attributed to the Aliens and Borders Service are updated (SEF) with such competences now falling to the Agency for Integration,

Migrations and Asylum. IP (AIMA, I.P.), and/or the Borders and Foreigners Coordination Unit (UCFE) created by Decree-Law No. 41/2023, of 2 June.

9. Point 7 of Article 6 of Law No. 23/2007 (Border Control) provides that 'The provisions of No. do not function as border posts, but where the arrival or departure of international traffic is eventually authorized by the territorially competent security force». The wording of this item is not clear as to the existence of control of entries and exits from Portuguese territory in these situations. In addition, the use of the expression eventually authorized raises the question whether this authorization is mandatory or not. It is therefore important to clarify this item.

10. In turn, article 26 of Law no. 23/2007 (Safe conduct), in paragraph 3, attributes to the board of directors of AIMA, I.P., the

competence to issue a safe conduct, which previously belonged to the Director of the SEF. It should be noted that under the terms of paragraph a) of paragraph 1 of article 45 of Decree-Law no. 41/2023, of 2 June, references made to the «SEF» in law, regulation or contract, considered to be made to the «Director Council of AIMA, I.P.» when they relate to matters transferred to AIMA, I. P„ under the terms of Law No. 73/2021, of November 12, in its current wording, and the aforementioned legal diploma.

11. Also with regard to this article, two new points are introduced: paragraph 5 - Within the scope of the opinion provided for in the previous number, whenever it deems necessary and justified, AIMA, I. P„ requests and obtains from UCFE information for the purpose of verifying the absence of reasons of internal security or the prevention of aid to illegal immigration and related crime, which do not admit the issuance of the safe-conduct; eon.°6-0 safe-conduct cannot be granted whenever the UCFE information referred to in the previous number concludes that there are reasons of internal security or the prevention of aid to illegal immigration and related criminality that advise against it.

12. It should be noted that since these two entities have different functions and competences, well defined by law, it is necessary to ensure that each of them (AIMA, I.P., and UCFE) is fully responsible for the opinion it issues separately.

13. With regard to article 81 (residence permit application), the new paragraph 3 establishes the situations in which the request for authorization or renewal of residence must be rejected. Now, from the point of view of the diploma's logic and structure, this norm is out of scope, since the conditions for granting the residence permit and for its renewal are established in articles 77 and 78 respectively, so that its inclusion in these articles is suggested.

14. It should be noted that the provisions of subparagraph a) of paragraph 3 of this article, providing that the request is rejected whenever "There is an indication of prohibition of entry and stay in the SIS" violates article 27 of the Regulation (UE) 2018/1861, of the European Parliament and of the Council of 28 November 2018, on the establishment, operation and use of the Schengen Information System (SIS) in the field of border controls, as it provides for prior procedures for consultation between the Member States (between the Member State that entered the alert in the SIS pursuant to Article 24 of that

regulation and the Member State that issues or renews the residence permit), of a harmful nature, to establish the factual reasons and of law that motivated the indication in the SIS to inform an adequate and proportionate decision, not outright ruling out the possibility of granting or renewing a residence permit as results from this item.

15. In addition, Article No. 77(1)(i) already provides for, in the general conditions for granting a residence permit, the absence of an indication in the SIS, which is accepted as a general condition subject to later the analysis and decision of the specific case, as provided for in the SIS Regulation. It is therefore suggested that this paragraph be reformulated in order to make its content compatible with the regime established in article 27 of Regulation (EU) 2018/1861, of the European Parliament and of the Council of 28 November 2018.

16. In turn, subparagraph c) of paragraph 3 of article 81 provides that «The information provided by UCFE provided for in subparagraph b) of paragraph 2 of the following article...» Article 81 does not apply. The following refers to since article 82 of law 23/2007, of July 4th, does not contain such a provision and the following article in the amendments introduced, article 121, does not contain such a provision either. It is therefore recommended that this item be rectified in order to ensure its legal clarity and precision.

17. On the other hand, paragraph 4 of article 121-E provides that the «EU blue card» issued to the beneficiary of international protection, must have inscribed in the heading «remarks» the designation «international protection granted by [name of the State member] on [date]'. Now, bearing in mind the discriminatory potential that the visibility of such information on the card contains and not achieving the purpose for which it is intended, it is recommended that this item be reconsidered and its eventual elimination.

18. From the point of view of the right to the protection of personal data, the amendments introduced to article 212, concerning the «Identification of foreigners» are particularly relevant. As a preliminary note to the analysis of this item, it should be noted that the Proposal, with regard specifically to the processing of personal data, limited itself to reproducing the current wording of Law No. 23/2007, of July 4, which attributed to the SEF, as a security service and criminal police body, certain attributions and responsibilities are now assigned to AIMA, I.P., and to UCFE.

19. Thus, the wording already existing in Law No. 23/2007 remained practically unchanged, considered already outdated, in conjunction with Regulatory Decree No. 4/95, of January 31, which regulates the base

of personal data maintained by the SEF, which no longer corresponds to the current reality and the responsibilities resulting from obligations at the European Union level. Regrettably, this item did not update the terminology regarding the legal data protection regime, nor did it regulate the processing of personal data arising therefrom, under the terms provided for in the RGPD and in Law No. 59/2019.

20. Lastly, it is strange that the same article (212th) regulates two different information systems alongside each other, integrating information concerning the administrative and police aspects of the attributions pursued by the SEF, when in the future such attributions and competences will be pursued by two separate entities, subject to a different legal regime (GDPR and Law No. 59/2019). Let's see:

21. No. 1 of this item begins by referring that «With a view to establishing or confirming the identity of foreign citizens, the GNR, the PSP, the IRN, I.P., and the AIMA, I.P„ may use the means of civil identification foreseen in the law and in the community regulations applicable to the issue of identification cards and visas, namely the obtaining of facial images and fingerprints, resorting, when possible, to biometrics, as well as to expert examinations. It should be noted from the outset that this provision does not clarify whether the GNR and the PSP process the data in their own information systems or whether they use another information system.

22. On the other hand, taking into account that these entities pursue different purposes, with AIMA, I.P„ and IRN, I.P., succeeding in the tasks of an administrative nature of the SEF under the terms of Law No. 73/2021 of 12 November, in its current wording, and Decree-Law No. 41/2023, of 2 June, the means used to establish or confirm the identity of foreign citizens will necessarily be different. Thus, it is suggested that the standard be segmented according to the purposes pursued by the various entities, in compliance with the principle of data minimization provided for in subparagraph c) of paragraph 1 of article 5 of the RGPD.

23. As for paragraph 2, relating to an integrated information system called SII/AIMA, it appears that it results from a transposition of a 2007 wording of Law no. 23/2007, which did not take into account updating the legal framework for the protection of personal data, in this case the GDPR. In turn, the terminology used must be consistent with the data protection

regime, for the sake of rigor, clarity and legal certainty.

24. In these terms, the Proposal must indicate the person responsible for processing the data; list the various data processing to be carried out and the respective purposes; the categories of personal data processed in each operation carried out on personal data; the way in which the treatments are interrelated (since the acronym SII was adopted, which was used to designate the SEF integrated system), and indicate any third party recipients of the data, pursuant to paragraph 3 of article 6 of the RGPD .

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25. In turn, subparagraph a) of paragraph 2 provides that «The collection of data for automated processing within the scope of the SII/AIMA, must be limited to what is strictly necessary for managing the control of entry, stay and departure of foreign citizens, within the scope of their attributions and competences.

26. In the annex referred to in article 2 of Decree-Law no. 41/2023, the powers and powers of AIMA, I.P., are enshrined in article 3. In the present case, paragraphs e) and f) of paragraph 2 attribute to AIMA, I.P., the competence to ensure the fulfillment of the attributions of an administrative nature provided for in the law on the entry, stay, exit and removal of foreigners from the national territory, namely the initiation, processing and administrative decision of removal, readmission and return; and, provide support at border crossing posts in issuing visas granted at border posts and in receiving asylum seekers, in conjunction with the security forces responsible for surveillance, inspection and control of people at borders. It should be noted that under the terms of article 2 of Law No. 73/2021, the management and control of the entry and exit of foreign citizens is the responsibility of the PSP and GNR in their areas of territorial competence.

27. In addition, according to the legal regime for the protection of personal data, these must be collected for specific, explicit and legitimate purposes, which is why the norm must expressly indicate them in compliance with the principle of limitation of

purposes enshrined in paragraph b) Article 5(1) of the GDPR.

28. In turn, under the terms of paragraph c) of paragraph 2 of this article «The SII/AIMA, is made up of personal data and data relating to legal assets, integrating information within the scope of the attributions of an administrative nature that the law commits to AIMA, I. P., about foreigners, nationals of European Union member states, stateless persons and national citizens, as well as their stay and activities in national territory. The observation made in point 24 is reiterated here, since the rule only refers to the categories of data subjects.

29. As for the personal data subject to processing, point i of paragraph d) lists them. However, in view of the attributions of AIMA, I.P., such a list is reductive, not including the data contained in the requested opinions and which will determine the granting or not of a residence permit and other titles, including whether the person represents a danger to public safety , taking into account that the justification of the decisions must be preserved.

30. In turn, paragraph 3 of article 212 establishes that the registration of personal data in matters of foreigners and borders, which contain information of a police nature and of international police cooperation, consists of an integrated information system, whose management and responsibility rests with UCFE, designated SII UCFE, and which obeys the following rules and characteristics. personal. In the case under analysis, the legal reference

is Law No. 59/2019, of August 8, which approves the rules relating to the processing of personal data for the purposes of preventing, investigating or repressing criminal offenses or the execution of criminal sanctions, transposing Directive (EU) 2016 /680 of the European Parliament and of the Council, of April 27, 2016. It should be noted that the text under analysis must be updated and comply with the legal data protection regime in this matter. It appears that not only is the terminology used not in line with the terminology of Law No. 59/2019 (eg the UCFE SII complies with the following rules and characteristics) but also that it does not respect the provisions of this legal diploma. Note, for example, that paragraph b) of this paragraph 3 already derives from paragraph 1 of article 10 of Law no. 59/2019, so isolating this rule here may give the false idea of that the rest of the article is not to apply.

31. Thus, the Proposal must indicate the person responsible for processing the data; list the various data processing to be

carried out and the respective purposes; the categories of personal data subject to processing in each operation carried out on personal data; the way in which the treatments are interrelated (since the acronym SII was adopted) pursuant to paragraph 2 of article 5 of Law no. 59/2019, of 8 August.

32. As for point i of paragraph c) of paragraph 3 of article 212, it refers to the information contained in the UCFE SII related to the control of the respective transit at land, sea and air borders, as well as their stay and activities in national territory, namely for the purpose of consulting, inserting, storing and processing data within the scope of indications for the purposes of return or refusal of entry and stay of nationals of third countries or others, under the terms of this law and the rules applicable to the use of the SIS.

33. However, the use of the adverb "namely" leaves open the possibility of using this information for purposes other than those enshrined herein, in violation of paragraph 2 of article 5 of Law no. 59/2019, and not allowing the CNPD to pronounce on the need and proportionality of the treatment. Therefore, the expression "in particular" should be deleted, in order to ensure that the treatment of this particularly sensitive information is precisely delimited in the legislative plan.

34. It should be noted that paragraph c) of paragraph 4 of article 212 indicates, among the data being processed, participation or indications of participation in illicit activities. However, referring to illicit activities is very vague, because we may be dealing with a criminal, civil or administrative offense, so it is important that the rule explains the nature of the offense in question. It should be noted that if we are dealing with an offense of a criminal nature, the word "participation" would only include the accomplices or instigators, leaving out the perpetrators (in this case, it would be co-payment). Law 53/2008, of August 29, by Article 34 of Law No. 41/2023, of June 2. Since the UCFE is not a criminal police body nor is it responsible for carrying out investigations in this matter, it is not possible to origin of such suspected practices of illicit activities or how the collection of this data outside this scope is justified.

35. In the case of evidence of participation in illegal criminal activities, it is necessary to fully clarify the purpose of their treatment and to ensure that this purpose is supported by the Constitution of the Portuguese Republic (CRP). In fact, the

evidence of criminal activities is relevant for the purposes of carrying out criminal proceedings, which certainly cannot be at issue here since these functions are, pursuant to paragraph 1 of article 219 of the CRP, attributed to the Public Prosecutor's Office , which has no intervention in this area.

36. It should be noted that paragraph 3 of article 272 of the CRP provides that crime prevention can only be carried out in compliance with the general rules on the police and with respect for the rights, freedoms and guarantees of citizens, for which this provision has no constitutional framework.

37. In turn, the same paragraph also contemplates the processing of data relating to a person who has been involved in one of the activities referred to in Law No. 52/2003, of 22 August. Such a provision raises the greatest doubts about its concrete scope, first of all in view of the principle of the presumption of innocence, and also because its wording does not allow clarifying whether a criminal proceeding is in progress or whether the existence of a conviction is at stake. The law has to be specific, clear, transparent and predictable in this regard, and this vague wording cannot be accepted taking into account the enormous sensitivity of the information with obvious consequences for the fundamental rights of the citizens concerned.

38. As for point 5 of this article, it should be noted that Law No. 59/2019, of August 8, referred to there, only applies to No. 3 of this article in relation to UCFE. As for point 2 concerning AIMA, I.P., the GDPR applies. However, since the legal application of different legal regimes is at stake, with different and autonomous controllers, the recommendation is reinforced to regulate the SII/AIMA and the SII/UCFE in separate articles for reasons of legal clarity.

39. As for paragraphs a) to f) of point 5 and point 6 of this article, it is noted that Law No. 59/2019 already lists all the situations provided for herein, so the CNPD recommends a mere reference to said Law , these points must be deleted. If this is not the case, the Proposal is enshrining a more limited legal regime than that provided for in Law No. 59/2019. It is recalled that Law No. 59/2019 is a transposition of Directive (EU) 2016/680 of the European Parliament and of the Council, of April 27, 2016, so that its rules regarding Information security have primacy in national law. Thus, national law may enshrine a higher level of protection for personal data, but not reduce such protection, namely with regard to security measures.

40. Regarding the period of retention of personal data, point 7 establishes that «Personal data are kept for the period strictly necessary for the purpose that justified the registration in the SII/AIMA, and/or in the SII/UCFE, and in accordance with such purpose, with the record subject to verification of the need for conservation,

10 years after the last issue of the documents concerning its holder, after which they can be kept in a historical file for 20 years after the date of that document».

41. First of all, it should be noted that the applicable legal regulations are different when it comes to the SII/AIMA (article 5(1) of the RGPD) or the SII/UCFE (article 12 of the GDPR). Law No. 59/2019). As a result of these provisions, since different purposes are at stake, the retention periods cannot be the same, defined automatically.

42. For the CNPD to be able to analyze the adequacy of the retention periods, it would need to have a better description of the various data processing (because it is not just one treatment) and their purposes to assess when they can be considered fulfilled, in respect for the principle of confidentiality. conservation limitation enshrined in paragraph e) of paragraph 1 of the RGPD and paragraph 1 of article 12 of Law no. 59/2019, of 8 August.

43. In turn, verifying the need for maintenance only after 10 years after the last issue of documents concerning the holder - for data of a police nature - is extremely excessive, as the rule is not in line with article 12. ° of Law 59/2019 on this matter.

44. With regard to point 10 of article 212, the rule provides that the transmission to the competent judicial entity or to other holders of access rights of any parts of the electronic workflow used by the AI MA is always carried out in electronic format, I P„ by the security forces and services or by the UCFE, to exercise the powers provided for by law.

45. First of all, it is important to clarify whether the reference to other holders of access rights includes natural persons exercising their right of access to data or other public entities whose access is also foreseen. It is also important to clarify what is meant by “electronic workflow”. In fact, the issue in question concerns the communication to third parties of information, which must be provided in electronic format (which is different from being electronically - it could be a file on a CD, on a PEN) and therefore it is recommended to reformulate this item .

46. With regard to the amendments to Law No. 27/2008, of 30 June, paragraph d) of article 9 provides that foreigners or stateless persons cannot benefit from refugee status when they «represent a danger to the security of the Member State in which it is found.” However, the current wording appears to be more correct as it defines danger or a well-founded threat to security. Indeed, this type of rule must provide for a justification or concrete factual indications. This open wording lends itself to a great deal of discretion and appreciation.

47. The same comment deserves the amendment to paragraph c) of paragraph 5 of article 41 of Law no. 27/2008, of June 30 (Causes for termination, revocation, suppression or refusal to renew the right of international protection.

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Here it says "Represents a danger to the security of the Member State in which it is located". The current wording also only contains danger, but adds to the «internal security» that implies a certain type of activity. Only the use of the word danger to security (it does not even contain public security) is too vague and imprecise, especially for a decision to deny international protection, especially safeguarded in the international instruments to which Portugal is bound.

48. In turn, it is important to mention, in relation to paragraph 3 of Article 19-A, under the heading «Admissible applications», the probable occurrence of a lapse, as this rule clearly does not refer to this article. Therefore, its elimination is suggested.

49. Lastly, a note regarding subparagraph b) of article 9 - (revoking norm) which provides that "subparagraphs b) and d) of article 57 of Law no. 27/2008, of 30 June, in its current wording». However, this article 57 has several paragraphs and more than one paragraph b) and d), therefore it is necessary to rectify this item.

III. Conclusion

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

a) The reformulation of point 7 of article 6 of Law no. 23/2007 with a view to clarifying it under the terms of point 9;

b) The reformulation of points 5 and 6 of article 26 of Law no. 23/2007 in order to ensure that each of the entities (AIMA, I.P., and UCFE) is fully responsible for the opinion it issues;

c) The reformulation of paragraph a) of paragraph 3 of article 81, in order to make its content compatible with the regime established in article 27 of Regulation (EU) 2018/1861, of the European Parliament and of the Council of November 28, 2018;

d) Rectification of Article 81(3)(c);

e) The reconsideration and possible elimination of paragraph 4 of article 121, °E;

f) The total reformulation of article 212, dividing it into two articles, one concerning the SII/AIMA and the other concerning the SII/UCFE, with the indication that the processing of personal data complies with the RGPD and Law no. 59/2019;

g) In each of them, in addition to using terminology consistent with the legal data protection regime, list the various data processing to be carried out and the respective purposes; the data categories

personal data subject to treatment in each operation carried out on personal data; the way in which the treatments interrelate and indicate any third party recipients of the data;

h) The reformulation of point i of subparagraph c) of point 3 of article 212, eliminating the expression “in particular” and listing the possibilities for using the information;

i) The clarification of article 212(4)(c) under the terms set out in point 35;

j) The reformulation of paragraph c) of paragraph 4 of article 212 with the grounds expressed in paragraph 37;

k) Elimination of the provisions of points a) to f) of point 5 and point 6 of article 212;

l) The delimitation of data conservation periods according to the purposes of the treatments;

m) The amendment of point 10 of article 212 with a view to clarifying whether the reference to other holders of access rights includes natural persons exercising their right of access to data or other public entities whose access is also foreseen;

n) Elimination of point 3 of article 19-A of Law no. 27/2008, of 30 June; It is

o) Rectification, paragraph b) of article 9 of the Proposal.

Approved at the meeting of June 6, 2023

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