

CNPD

National Data Protection Commission

OPINION/2021/11

I. Order

1. The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees asked the National Data Protection Commission (CNPD) to issue an opinion on Bill No. 247/XIV/1,a, which guarantees access to the pregnancy of replacement, making the seventh amendment to Law no. 36/2006, of 26 July (medically assisted reproduction), presented by the PAN Parliamentary Group - People Animals Nature.
2. The CNPD issues an opinion within the scope of its attributions and competences as an independent administrative authority with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57, in conjunction with subparagraph b) of paragraph 3 of article 58, and with paragraph 4 of article 36, all of Regulation (EU) 2016/679, of 27 April 2016 - General Regulation on Data Protection (hereinafter GDPR), in conjunction with the provisions of article 3, paragraph 2 of article 4, and paragraph a) of paragraph 1 of article 6, all of Law n° 58 /2019, of 8 August, which enforces the GDPR in the domestic legal order.
3. It should be noted that this Bill, which introduces new relevant rules for the processing of personal data, is not accompanied by the impact study on the protection of personal data required by paragraph 4 of article 18 of the Law No. 43/2004, of 18 August, last amended by Law No. 58/2019, of 8 August.

II. Analysis

4. The Bill introduces amendments to Law No. 32/2006 following the jurisprudence of the Constitutional Court, aiming to guarantee access to surrogacy.
5. For this purpose, it regulates in innovative terms, in paragraph 8 of article 8 and in paragraph 5 of article 14, the exercise of the right of withdrawal of consent by the surrogate mother, with repercussions on the processing of personal data, but which do not give rise to reservations from the point of view of protection of personal data, as they prove to be adequate, necessary and not excessive measures, in relation to the purpose pursued by the treatment.

6. It also introduces, in paragraph 10 of article 8 of Law no. 32/2006, the provision that the surrogacy is carried out "after the formalization, in writing, of a joint request of the interested parties, addressed to the National Council for Medically Assisted Procreation»; this provision is, however, silent as to the information and documents that must accompany such request, in particular listing the categories of personal data being processed.

Av.D. Carlos 1,134.1° 1200-651 Lisbon

I (+351) 213 928 400 F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

PAR/2021/10

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7. It should be noted that highly sensitive personal data are at stake, especially protected under the terms of Article 9(1) of the GDPR, so it is up to the law to define the essential elements of such processing, among which stand out the categories of data that are the subject of the same, as well as the provision of adequate security measures or, at least, the need to adopt specially reinforced security measures.

8. And if this point is insisted upon here, it is precisely because of the evidence that the legal status of the CNPMA is manifestly insufficient to allow this Council to decide autonomously the means and conditions for carrying out the processing of personal data under its responsibility, in compliance with the obligations set out in the GDPR. In other words, despite the fact that the law recognizes important powers of authorization and guidance to this independent administrative body, it has not provided it with the necessary tools to fulfill its legal obligations as responsible for the delicate processing of personal data.

9. It is recalled, in this regard, that the CNPMA is responsible for processing personal data within the scope of donor records, including surrogate pregnant women, beneficiaries and children born (cf. point p) of no. 2 of article 30 of Law No. 36/2006 and Regulatory Decree No. 6/2016, of December 29), but that, in order to fulfill obligations imposed by the GDPR, which pass through the risk assessment of the operations it carries out and by the determination and application of suitable technical and organizational measures to ensure an adequate level of security for the risks involved in this context, it does not have a service equipped with specialized technical and human resources, nor, strictly speaking, the necessary autonomy to outsource such tasks .

10. In fact, paragraph 1 of article 32 of Law no. 26/2006 only determines that the CNPMA works within the scope of the Assembly of the Republic, which ensures the costs of its functioning and the technical and administrative support needed.

11. Which means that the different operations of processing of personal data are carried out by third parties that act as subcontractors, without the person responsible for the treatments having, in fact, the means to verify who accesses, and under what circumstances, the information contained in the databases, nor does it have the means to audit and inspect the performance of subcontractors, in clear breach of the provisions of article 28 of the RGPD, in particular of the provisions of subparagraph h) of paragraph 3.

12. The CNPD therefore takes this opportunity to underline the need to review the legal status of the CNPMA, in order to provide it with adequate human, technical and financial resources to fulfill its obligations as the person responsible for the delicate processing of personal data.

PAR/2021/10

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National Data Protection Commission

13. And, specifically, when, as in this Project, a processing of personal data is foreseen that is likely to generate new risks for the rights and interests of all the people involved, the CNPD recommends that such provision be accompanied by the effective regulation of the treatment and the provision of adequate means for its execution in terms that allow the CNPMA to comply with the RGPD.

III. Conclusion

14. Based on the above grounds, the CNPD recommends:

The. The processing of personal data resulting from the submission of the authorization request provided for in paragraph 10 of article 8 is densified, regulating the main elements of the treatment, as well as providing the appropriate means for its execution by the CNPMA;

B. The revision of the legal status of the legal status of the CNPMA, in order to provide it with the necessary capacity and autonomy to make decisions regarding the processing of personal data for which it is responsible and the appropriate means to fulfill its obligations as the person responsible for the treatments, under penalty of not being able to fulfill the obligations

arising from the GDPR.

Approved at the meeting of January 26, 2021

Filipa Calvão (President)

Av. D. Carlos 1,134,1o 1200-651 Lisbon

T (+351) 213 928 400 F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt