

NATIONAL COMMISSION

DATA PROTECTION

OPINION/2020/53

I. Order

The Office of the Secretary of State for Infrastructure (SEI), submitted to the National Data Protection Commission (hereinafter CNPD), for an opinion, the draft Decree-Law that transposes Directive (EU) 2016/798 of the European Parliament and the Council of 11 May 2016 on railway safety.

The indictment request expressly mentions “the possibility of access by investigators from the Office for the Prevention and Investigation of Aircraft Accidents and Railway Accidents (GPIAAF) to video surveillance images that may be relevant to the investigation, for reasons of threat prevention. to public safety”, being further substantiated by a summary of context.

The CNPD issues an opinion within the scope of its powers 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 , RGPD), in conjunction with the provisions of article 3, paragraph 2 of article 4, and subparagraph a) 6, paragraph 1 of article 6, all of Law No. 58/ 2019, of 8 August, which enforces the GDPR (hereinafter, Law of Enforcement) in the domestic legal order.

II. appreciation

As mentioned above, the draft Decree-Law under analysis aims to partially transpose<sup>1</sup> Directive (EU) 2016/798 of the European Parliament and of the Council, of 11 May, on railway safety. This Directive lays down provisions to ensure the promotion and enhancement of the safety of the Union's rail system and the improvement of market access for

<sup>1</sup> As indicated in Article 1(2).

Av. D. Carlos I, 134-1.º 1200-651 Lisbon Tel: \*351 213928400 Fax:-351213976832

geral@cnpd.pt www.cnpd.pt

FVFreiTYr»

PRIVACY LINE Ol» ul«I\* of 10 0\* 1) b

rail transport services and repeals, with effect from 16 June of this year, Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on the safety of the Community's railways .

a) Current legal framework

It is recalled that the 2004 Directive already provided for provisions obliging Member States, in accordance with national legislation in force, to allow persons carrying out the inquiry to obtain as soon as possible, among others specifically listed, “ access to any relevant information or records held by the infrastructure manager, the railway companies involved and the authority responsible for safety.”<sup>2</sup>.

Directive 2016/798 does not bring any major novelties in this chapter, adding only maintenance entities<sup>3</sup> to those that are in possession of any relevant information or record, in the terms listed above.

Decree-Law No. 394/2007, of 31 December, successively amended, lastly by Decree-Law No. 151/2014, of 13 October, partially transposed Directive No. 2004 into the domestic legal system. /49/CE, regulating the competences and methodologies to be applied by the Security and Railway Accident Investigation Office (GISAF), the national body responsible for investigating railway accidents and incidents.

In it, more precisely in subparagraph f) of paragraph 1 of article 7, the national legislator limited itself to reproducing the European provision: “In the exercise of its powers, the responsible researcher must be provided, as soon as possible, : Access to any relevant information or records held by the infrastructure manager, the railway companies involved and the IMTT”.

<sup>2</sup> Cf. Article 20(2)(g) of Directive No 2004/49/EC.

<sup>3</sup> Cf. Article 21(2)(g) of Directive (EU) No 2016/798.

NATIONAL COMMISSION

OF DATA PROTECTION

It is here that the Government intends to introduce changes, in order to clarify the possibility of access to video surveillance records by GPIAAF researchers.

b) Resolution 996/2016, of June 7

The CNPD, as reported in the summary of the context that accompanies the request for an opinion, had already issued a statement, then at the request of the Security Investigation and Railway Accidents Office (GISAF), on access by its investigators to “video surveillance records” relevant for the technical investigation of railway accidents, held by those responsible for video surveillance systems in railway infrastructures and trains, REFER, EPE and Comboios de Portugal, EPE, respectively”.

The scope of the Commission's deliberation was limited, therefore, to analyzing the question of the existence of a legal basis for GISAF to be able to access video images exclusively held by REFER, EPE and Comboios de Portugal, EPE.

The CNPD's pronouncement was based, at the time, on the current legal framework, in which Law No. 67/98, of October 26, amended by Law No. of Personal Data (LPDP), assumed centrality.

Since May 25, 2018, the GDPR has been applied in the European Union, constituting, from that date, the fundamental legal instrument for regulating the processing of personal data (also) in Portugal. More recently, Law No. 58/2019, of 8 August, complemented the European regulation, having revoked the LPDP.

As for the specific regime for access to images from video surveillance systems, Law no. , “the assignment or copying of recordings obtained in accordance with this law is prohibited, and may only be used under the terms of criminal procedural legislation”.

Av. D. Carlos I, 134 - 1 1200-651 Lisbon Tel: \*351 213928400 Fax: \*351213976832

gcral@cnpd.pt www.cnpd.pt

(FiniEra

## PRIVACY LINE

Hello\* út«i« from\* 10 to\* 13 h

doubti@cnpd çA

Process PAR/2020/34 2v.

## NATIONAL COMMISSION

## DATA PROTECTION

## THE

The LPDP provided for a special protection regime for a set of data that qualified

as sensitive, including those revealing information related to the life

private property, such as those resulting from the use of video surveillance systems. In this case, its article 7 only allowed the processing of this type of data “By legal provision or authorization from the CNPD, (...) responsible, or when the data subject has given his express consent for such processing, in both cases with guarantees of non-discrimination and with the security measures provided for in article 15”.

Since consent is an inappropriate basis for this type of treatment and in view of the taxation of the Private Security Law, the CNPD considered that it was not admissible to extend the possibility of accessing the images of the video surveillance systems of REFER, EPE and CP, EPE to the GISAF researchers.

The Government now intends, on the occasion of the transposition of Directive 2016/798, to change the legal framework in order not only to allow GPIAAF researchers to access images from the video surveillance systems owned by REFER, EPE and CP, EPE, but also to extend such access to any “video surveillance footage that is relevant to the investigation”<sup>4</sup>.

Amendment promoted by decree-law.

It is true that the GDPR carried out a different cataloging of data that are considered sensitive or, in its designation, special categories<sup>5</sup>, ruling out, as a rule<sup>6</sup>, the

<sup>4</sup> Cf. Article 7(1)(g) of the draft Decree-Law.

<sup>5</sup> Cf. Article 9(1) of the GDPR.

<sup>6</sup> It should be noted that recital 51 of the GDPR, referring to photographs, admits that their processing “should not be systematically considered a processing of special categories of personal data, as they are only covered by the definition of

personal data". biometrics when they are processed by specific technical means that allow the unambiguous identification or authentication of a natural person". Accordingly, the processing of images from video surveillance systems will only be covered by this more demanding concept.

c) Changes promoted by the proposed Decree-Law

Av. D. Carlos I, 134 - I.\* 1200-651 L.isboa

rvyiTfTFFni

Tel: \*351 213928400

geral@cnpd.pt

Fax: \*351213976832

www.cnpd.pt

PRIVACY NAIL Hi.i\* useful dl\* 1013 h

doubts^SCTpd en

Process PAR/2020/34 3

NATIONAL COMMISSION

DATA PROTECTION

given image of that set. Even so, any processing of personal data must have a basis that enables it.

In article 6 of the GDPR we find the list of these grounds, given that only subparagraph e) seems to be mobilized for the intended treatment, that is, its necessity in view of the exercise of functions of public interest or the exercise of the public authority vested in the controller.

This foundation is, however, developed in paragraphs 2 and 3 of the same article, the latter being decisive for the analysis of the draft Decree-Law.

Article 6(3) then tells us that The legal basis for the treatment referred to in paragraph 1(c) and e) is defined: a) By Union law; or (b) under the law of the Member State to which the controller is subject.

The purpose of the processing (...), with regard to the processing referred to in paragraph 1, point e), must be necessary for the exercise of functions in the public interest or for the exercise of the public authority vested in the person responsible for the processing . That legal basis may lay down specific provisions to adapt the application of the rules of this Regulation, in

particular: the general conditions for the illegality of the processing by the controller; the types of data being processed; the data subjects in question; the entities to which personal data may be communicated and for what purposes; the limits to which the purposes of the treatment must comply; conservation periods; and processing operations and procedures, including measures to ensure the legality and fairness of processing, such as measures relating to other specific processing situations in accordance with Chapter IX. Union or Member State law must respond to a public interest objective and be proportionate to the legitimate objective pursued.

“when they are processed by specific technical means that allow the unambiguous identification or authentication of a natural person”.

Av. D. Carlos I. 134 - I." 1200-651 Lisbon

Tel: \*351 213928400

geral@cnpd.pt

Fax: -351213976832

www.cnpd.pt

PRIVACY LINE

Hot\* useful from 10 am to 1 pm

doubtsgoipdpi

PAR/2020/34 3v Process

NATIONAL COMMISSION

DATA PROTECTION

From the combined reading of Article 6(1) and (3) of the GDPR, it is possible for Member States to base the processing of personal data on their need for the purpose of exercising public interest functions or exercising public authority to which the controller is vested, provided that this is provided for in Union law or in the law of the Member State. If that is the case, the law (EU or) of the Member State may provide for specific provisions to adapt the application of the rules of this Regulation, which results, of course, the full application of the rules of the GDPR, if the national legislator does not exercise this prerogative. If, in view of the generic framework of the GDPR, the possibility for Member States to base certain treatments on the basis provided for in Article 6(1)(e) of that regulation appears to be open, however, the requirements of the domestic law to

guarantee the full legality of this hypothesis.

The Constitution of the Portuguese Republic (CRP) is clear when it reserves legislative competence in matters of fundamental rights to the Assembly of the Republic<sup>7</sup>, only assuming that the Government legislates under its authorization. And there is no doubt that the right to the protection of personal data finds constitutional consecration within the set of rights, freedoms and guarantees subject to that reservation<sup>8</sup>.

Now, knowing that the Private Security Law, in its current wording<sup>9</sup>, does not include any exception to the use of images from video surveillance systems outside the scope of criminal procedural legislation, it is understood that the Government, by mere Decree-Law, it is not possible to overcome this limitation and open the possibility of access to video surveillance images relevant to GPIAAF researchers. This impossibility has nothing to do with the assessment of the public interest of the investigative activity that they carry out, but is based on the legal basis that is used here to enshrine this possibility.

<sup>7</sup> Cf. Article 165(1)(b) of the CRP.

<sup>8</sup> Cf. Article 35 of the CRP, in particular paragraphs 1 and 2.

<sup>9</sup> Amended by Law No. 46/2019, of 8 July.

Av. D. Carlos I, 134 - I.f 1200-651 Lisbon

Tel: \*351 213928400

geral@cnpd.pt

Fax: \*351213 976 832

www.cnpd.pt

PRIVACY LINE Business days\* from 10 am% 13 li

PT

Process PAR/2020/34 4

NATIONAL COMMISSION

OF DATA PROTECTION

d) National legislative limits

As noted with regard to the legal grounds that can be mobilized for the legitimization of the processing of personal data advocated by the draft Decree-Law under analysis, the GDPR requires additional legislation - from the Union or the Member

State - that materializes the provisions of subparagraph e) of article 6, but always with the indispensability that such legislation must respond to an objective of public interest and be proportionate to the legitimate objective pursued.

However, without prejudice to what has been said about the inadmissibility of, by mere Decree-Law, the Government being able to extend access to the images of video surveillance systems, a future Law of the Assembly of the Republic or authorized Decree-Law could not fail to respond to the double criterion of its indispensability and proportionality in view of the public interest objective pursued.

Therefore, a wording such as the one proposed in the draft Decree-Law seems inadmissible, since it is not limited to expanding the possibility for GPIAAF researchers to access images from video surveillance systems “in the possession of the infrastructure manager, of the railway companies involved, the maintenance entities, the service providers, the Instituto da Mobilidade e dos Transportes, I. P., abbreviated as IMT, I. P.”, also allowing indiscriminate access to video surveillance images “from any other relevant entity”. for the investigation”. Ultimately, it would be lawful for GPIAAF researchers to demand images from entities (and we are excluding individuals here) that were neither directly nor indirectly connected with the management of the railway.

It is accepted that the legislator does not intend such a result, but, as the wording of Article 7(1)(g) currently stands, that would be the consequence.

Finally, basic principles of the protection of personal data, would claim that what is provided for in subparagraph c) of paragraph 1 of article 5 - data minimization - is implemented in article

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

Tel: \*351 213928400

gcral@cnpd.pt

Fax: '351213976832

www.cnpd.pt

PRIVACY LINE

Business days\* from 10 am to 1 pm

doubt@cnpd p!

Process PAR/2020/34 4v.



## NATIONAL COMMISSION

### DATA PROTECTION

25.º - Data protection by design and by default all of the RGPD, appear minimally implemented in the legislation that was intended to open the range of entities with access to data from video surveillance systems. From the outset, and because the purpose of investigations is not to determine guilt or responsibilities<sup>10</sup>, the images to be given to the investigators could and should, whenever possible, be edited in advance, in order to prevent, by appropriate technical means, the identification of the people. in them constant. In fact, taking into account the purpose pursued by the GPIAAF, the provision in this draft diploma that access is limited only to previously edited images that guarantee the non-identification of the people covered by them would not raise reservations on the part of the CNPD, since, in that case, GPIAAF would not be processing personal data.

### III. Conclusion

The draft Decree-Law aims to transpose Directive (EU) 2016/798 of the European Parliament and of the Council, of 11 May 2016, on railway safety. It does not contain any relevant changes in relation to the existing framework under Directive 2004/49/EC, leaving it to the Member States to specify the specific means to be used. In the Portuguese context, the legislative reservation provided for in subparagraph b) of paragraph 1 of article 165 of the CRP, prevents, by mere Decree-Law, from altering the set of persons and entities authorized to have access to images of video surveillance, which are listed in paragraph 4 of article 31 of the Private Security Law.

Thus, if the intention regarding this enlargement remains, the intervention of the constitutionally competent body, in this case, the Assembly of the Republic, should be promoted, guaranteeing respect for the formalities inscribed in the CRP.

<sup>10</sup> Recital 39 and paragraph 4 of article 20 of Directive 2016/798, as well as paragraph 3 of article 11 of the draft Decree-Law “The report must protect the anonymity of the people involved in the accident or incident and must not be used for purposes other than improving safety, namely the determination of faults or responsibilities.”

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

Tel: \*351 213 928400

gcral@cnpd.pt

Fax: \*351213976832

www.cnpd.pt

PRIVACY NAIL Working days from 10 am to 1 pm

(luvidasgSciipd en

Process PAR/2020/34 5

NATIONAL COMMISSION

OF DATA PROTECTION

In addition to the dimension of constitutional reservation, the wording of subparagraph g) of paragraph 1 of article 7 of the draft Decree-Law reveals a disproportionate solution in view of the specific competences of researchers, as it gives them a power of access to images of any video surveillance systems they deem relevant.

Finally, any expansion of legitimate entities or purposes legitimizing access to images from video surveillance systems, within the framework of the provisions of Article 6(3) of the GDPR, must be based on an objective of public interest and enshrine proportionate solutions to this objective, which the content of the project does not reflect

Lisbon, May 18, 2020

Jo reported)

Av. D. Carlos I, 134 -Tcl: \*351213928400 geral@cnpd.pt

I.º 1200-651 Lisbon Fax:-351213976832

[www.cnpd.pt](http://www.cnpd.pt)

PRIVACY LINE

Working days from 10 am to 1 pm

duviiiiasgcnpd p!