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National Data Protection Commission

OPINION/2021/136

I. Order

1. The Secretary of State for the Presidency of the Council of Ministers asked the National Data Protection Commission (CNPD) to issue an opinion on the Draft Decree-Law No. 920/XXII/2021, «which amends the implementation regime of the passenger tracking form'.
2. 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, subparagraph b) of Article 58(3) and Article 36(4), all of Regulation (EU) 2016/679, of 27 April 2016 - General Data Protection Regulation (hereinafter GDPR), in conjunction with the provisions of article 3, paragraph 2 of article 4 and paragraph a) of paragraph 1 of article 6 of Law No. 58/2019, of 8 August, which implements the GDPR in the domestic legal order.
3. This Draft Decree-Law establishes, for the first time, the regulatory legal framework for the system for tracing contacts between passengers in relation to confirmed cases of COVID-19, which aims to operationalize the Passenger Locator Form (PLF) «introduced in the legal system by the International Health Regulations (cf. Notice No. 12/2008, published on January 23, 2008”, according to the explanatory memorandum accompanying the Project.
4. The collection of information for this purpose already took place, through the Passenger Locator Card, under the Joint Guideline no. Saúde, EPE, the National Civil Aviation Authority and the Instituto de Turismo de Portugal, IP. It is now intended to ensure the interoperability of this system for collecting personal contact data with the PLF Exchange Platform, regulated, in the European Union, by Implementing Decision (EU) 2021/858, of the European Commission, of 27 May, 2021, which amends Implementing Decision (EU) 2017/253, of the European Commission, as well as enhancing its use, establishing the obligation to fill in the form and, therefore, to provide personal data.
5. Thus, paragraph 1 of article 2 of the Draft Decree-Law establishes the mandatory nature of filling in the PLF form, defining the universe of people subject to this new duty (passengers on flights to or from Portugal Continental and cruise ships that

dock at the terminals located in this territory), as well as the moment when such duty arises.

II. Analysis

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6. Also in article 2, the duty to display before the competent authorities an individualized QR code, generated following the electronic submission of the PLF, is also made reference to a proof of completion of that form sent by email . In fact, it is specified that the QR code can be presented in digital or paper format, to be read by a mobile application, and it is also admitted, in the alternative, that the verification is carried out «manually, through the data contained in the PLF, regardless of the medium on which it is displayed' (cf. paragraphs 3 and 4 of article 4 of the Project).

7. The competent entities for this verification or control are listed in article 4 of the Project. It imposes on airlines and ship owners (or their legal representatives) the duty to verify that all passengers have proof of completion of the PLF (in digital or paper format), on which the duty falls to prevent, respectively, embarkation and disembarkation in the event that any passenger does not demonstrate compliance with that obligation. It also establishes that the competent police authorities may carry out random checks upon arrival in national territory.

8. Article 6(1) of the Project defines the personal data collected, by reference to Annex I of Implementing Decision (EU) 2021/858, which are listed in the Annex to the Project and appear appropriate and necessary for the stated purpose of tracing contacts in relation to confirmed cases of COVID-19, in accordance with Article 5(1)(c) of the GDPR.

9. In this regard, the CNPD leaves only two notes of a formal nature. The first is to emphasize that the implementing decision cited in that provision only knows one version, and therefore the reference to “in its current wording” does not seem to make

sense - unless one intends to cite the Implementing Decision (EU) 2017 /253, which was amended in May 2021. The second note refers to the reference in item (7)(a), (b) and (e) of the Annex to the information referred to in item (f) » - it is believed that it is intended to refer to subparagraph (f) of paragraph 1 of article 2-B introduced in Implementing Decision (EU) 2017/253 by Implementing Decision (EU) 2021/858, therefore its alteration to the information referred to in item (7) is suggested.

10. All the processing of personal data described herein is in the public interest of public health, as stated in paragraph 3 of article 6 of the Project. However, the Project does not define the person responsible for the treatment or the quality in which other public entities intervene in this context. It is limited to mentioning that the portal where the PLF is available - Clean & Safe portal - is «managed by the Instituto do Turismo de Portugal, IP, which transfers the form directly to the database of the Directorate-General for Health. (DGS), not storing any data regarding its content" (cf. paragraph 2 of article 2), "being the DGS responsible

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by identifying the territorially competent health authorities to whom an access profile must be assigned for the reserved consultation of that information' (cf. paragraph 3 of article 6).

11. The CNPD cannot fail to point out the fact that the Draft Decree-Law is not clear and precise in defining the roles and responsibilities of these public bodies in the processing of personal data, especially when the Implementing Decision of the European Union, which the Project follows closely, is very clear in the identification of those responsible for data processing and the subcontracting relationship.

12. In fact, the intervention of the Instituto de Turismo de Portugal, IP, in this context can only be understood as a subcontractor of the national health authority and the service that supports it - the Director General of Health and the DGS -, which objectively, it is the only administrative body with the attribution and powers that legitimize the processing of personal data for tracing close contacts of people infected with SARS-CoV-2.

13. To that extent, it is not understandable why the Draft Decree-Law does not clearly define that the Director-General for Health (or as the national legislator has preferred to identify, the Directorate-General for Health) is responsible for the treatment of personal data that is intended to be regulated here. And that the intervention of the Instituto de Turismo de

Portugal, IP, for the management of the platform that provides the PLF, is carried out within the scope of the subcontracting relationship, since the protection of public health is clearly outside its attributions¹. See, at the same time, the clarity of recital (19) of Implementing Decision (EU) 2021/858 and Article 2c, paragraphs 1 and 2, which it introduced in Implementing Decision (EU) 2017/253.

14. The identification of the entity that is responsible for the processing of data is an imperative of legal certainty, especially in the context of a legislative act that prescribes the mandatory provision of personal data by citizens.

15. And it should not be considered that, by proceeding with “the direct transfer of the form to the database of the General Directorate of Health (DGS), it does not store any data regarding its content” (cf. no. 2 of article 2), the Instituto de Turismo de Portugal, IP, does not carry out personal data processing operations. Precisely, it is that Institute that collects the data and transmits it to the DGS, which is why it is important to define precisely the responsibilities or obligations that cannot fail to fall on it, first of all with regard to the security and confidentiality of the data (see more Once again, Implementing Decision (EU) 2021/858, in particular Article 2c(2) and (3) introduced by it in Implementing Decision (EU) 2017/253).

1 Furthermore, even its intervention as a subcontractor is only understandable by applying the legal framework that legitimizes the public interest of public health to be pursued through the collaboration of other public entities.

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16. Furthermore, as paragraph 2 of article 6 of the Project indicates that the Instituto de Turismo de Portugal, IP, directly transfers the form to the DGS database and does not store any data relating to its content, it is important that it specifies whether the platform where the form is submitted records and retains any information and whether this information is related to

the natural persons who submit the form, in which case personal data will be involved, the treatment of which must also, at this headquarters, be duly disciplined.

17. We insist on the need to regulate the subcontracting relationship, demanding precise rules for the delimitation of obligations in the relationship with the DGS, under the terms of article 28 of the GDPR (see in parallel, Annex III of the Implementing Decision (EU) 2021/858).

18. The diffuse nature of the definition of responsibilities regarding the processing of personal data contained in paragraph 6 of article 6 of the Project cannot be overlooked, without identifying the entities concerned. In fact, it could be said that, *prima facie*, the personal data being processed reside only in the DGS database - therefore, they can only be accessed there -, so it is not understood, from the outset, the prescription of obligations to the entities involved by the systems or services within the scope of which personal data are accessed. It is therefore recommended to clarify this rule, specifying, if applicable, whether there are entities, in addition to the DGS, that store personal data in this context, for what purpose, and the circumstances that may justify access by third parties to such data.

19. A further note regarding Article 6 of the Project, to focus on the provisions of paragraph 7. It is not possible to understand the teleology underlying such provision. When referring to "[s]ubject to the provisions of the following paragraphs, this decree-tei does not prejudice the application of legal and regulatory provisions on the protection of personal data, namely those provided for in the [RGPD]", it is intended to state an alleged specialty of paragraphs 1 to 6 of article 6 and its force to depart from the provisions of the GDPR? If that is the intention, it is worth remembering that the processing of personal data regulated herein is not excluded from the scope of application of the RGPD, nor is there anything in this regulation that is *prima facie* incompatible with this - because there is nothing that justifies its departure, in addition to the already mentioned lack of clarity in the rules regarding the distribution of responsibilities and obligations that obviously have to be reviewed in order to guarantee compliance with the GDPR. In fact, Implementing Decision (EU) 2021/858 is precise regarding the subjection of the processing of personal data carried out by the Member States (by their health authorities) in the context of the PLF to the RGPD - cf. recital (16) and Annex II, section I, subparagraph (1).

20. As mentioned above, in point 4, one of the two objectives of the Project is to regulate the interoperability of this system for collecting personal contact data with the PLF Exchange Platform. No

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notwithstanding this purpose, there is not a single rule in the diploma to regulate, or that effectively guarantee, the intended interoperability. Since the communication of personal data to third parties is at stake, it is recommended that the Project define rules regarding the procedures and security measures to be adopted to ensure interoperability with the PLF Exchange Platform.

21. Eventually, the legislator may consider that Article 7 fulfills that purpose. This article is limited to referring to the ordinance the definition of the "procedures to be adopted by the different actors for the purposes of collaboration with the health authorities when carrying out the epidemiological investigation of confirmed cases of COVID-19 and tracing of contacts with a history of travel by air or sea during the period of infectiousness'. But such a blank reference, without prescribing conditions related to the personal data protection rules, is clearly insufficient to fulfill this desideratum.

22. Furthermore, it remains to be explained the direct relevance of the different public interests that the identification of the members of the Government responsible for issuing the ordinance indicates as relevant in this context. In fact, it is not possible that the definition of procedures subsequent to the identification of cases of infection by SARS-CoV-2 for contact tracing still depends, for example, on the intervention of public entities in the area of tourism. It is therefore suggested that the provisions of Article 7 be reconsidered.

23. Finally, attention is drawn to the importance of establishing in the Project that it enshrines a transitional regime, temporally delimited, attached to the pandemic situation, as, in fact, is explained in the Execution Decision that the project invokes (where sets the period of validity: May 31, 2021 or until the formal declaration of extinction of the public health emergency situation related to SAR-CoV-2 by the Director-General of the World Health Organization, if that occurs before - cf. n. 2a(8) which Implementing Decision (EU) 2021/858 introduced in Implementing Decision (EU) 2017/253).

III. Conclusion

24. Under the terms and on the grounds set out above, the CNPD recommends reviewing the Draft Decree Law, in particular its article 6:

The. Explaining that the DGS is responsible for the processing of personal data and that the subcontractor Instituto de Turismo de Portugal, IP, is the subcontractor, as well as the respective obligations under the GDPR (see above, points 11 to 15 and 17);

B. Specifying whether the platform where the form is submitted registers and retains any information and whether this information is related to the natural persons who submit the form, in which case its processing must also be regulated at this headquarters (see above, point 16); and

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ç. Delimiting the categories of entities that are subject to the obligations listed in paragraph 6 of article 6, as it is not clear what the universe of entities is in view (see above, point 18).

25. The CNPD also specifically recommends amending paragraph 7 of article 5, for this reason, as it is written, seems to mean the prevalence of this diploma over the GDPR, without any reason, or even need, for the redefinition of the legal-constitutional criteria for resolving conflicts of norms in the Portuguese legal system (see above, point 19).

26. Finally, the CNPD also draws attention to the need for the Project to:

The. Regulate the interoperability of this information system regarding personal contact data with the PLF Exchange Platform, according to the purpose announced in the explanatory memorandum, in compliance with the GDPR, at most, regarding the procedures and security measures of personal data (cf. supra, points 20 to 22); and

B. Highlight the transitory nature of this restrictive regime of rights, freedoms and guarantees that it enshrines (see above, point 23).

Lisbon, October 14, 2021

Frlipa Calvão (President, who reported)