

"ynftk

MM Jf

NATIONAL DATA PROTECTION COMMISSION

OPINION/2020/118

I. Order

The Economy, Innovation, Public Works and Housing Commission submitted to the National Data Protection Commission (hereinafter CNPD), for an opinion, the Draft Law 55/XIV (GOV), which authorizes the Government to legislate in matters of prevention and investigation of railway accidents, partially transposing Directive (EU) no. 2016/798, a proposal that is accompanied by the authorized draft decree-law.

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 paragraph a) of paragraph 1 of article 6, all of Law No. 58/ 2019, of 8 August, which implements the GDPR in the domestic legal order.

II. appreciation

1. Background of the Draft Law

The purpose of this Authorization Law Proposal is to authorize the Government to legislate on the prevention and investigation of railway accidents, namely regarding the possibility that, in the exercise of the powers of those responsible for technical investigations of the Office for the Prevention and Investigation of Accidents with Aircraft, and Railway Accidents (GPiAAF), access to video surveillance images that are relevant to the investigation (cf. Article 1 of the Proposal).

This Draft Law follows on from a Government Draft Decree-Law which, seeking to partially transpose¹, Directive (EU) 2016/798 of the European Parliament and of the Council, of 11 May 2016, on railway safety , on which the CNPD had

¹ As indicated in paragraph 2 of article 1

opportunity to comment on Opinion/2020/53, of May 182. In the aforementioned opinion, the CNPD concluded that the Directive to be transposed did not introduce relevant changes in relation to the previous legislative framework of the Union, having recognized autonomy for the Member States to define the means to be used, therefore, it does not contain any specific provision regarding access to video surveillance images, and that, «in the Portuguese context, the legislative reservation provided for in subparagraph b) of no. authorized to have access to images from video surveillance systems, which are listed in paragraph 4 of article 31 of the Private Security Law»³. Consequently, the CNPD highlighted that, in order to maintain the intention to expand this universe of entities entitled to access the images, “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”. He further underlined the disproportionate nature of the rule that grants researchers the power to access images from any video surveillance systems they deem relevant, recalling, in this regard, the conditions set out in Article 6(3) of the GDPR.

2. Analysis of the Draft Law

In this sequence, the Draft Law now under consideration delimits the object of the legislative authorization - the matter of prevention and investigation of railway accidents -, highlighting, by way of example, the power to legislate on the possibility of, in the exercise of the powers of those responsible for technical investigations by the Office for the Prevention and Investigation of Aircraft Accidents and Railway Accidents (GPiAAF), access to video surveillance images that are relevant to the investigation.

The purpose of the authorization is, therefore, clear, and its meaning is also specified, in paragraph 1 of article 2 of the Draft Law: to ensure, through the provision of access to the

² https://www.cnpd.pt/home/decisoos/Par/PAR__2020_53.pdf

³ Rule which, it should be recalled, determines, in paragraph 4 of article 31, that “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”.

information from video surveillance, the speed and efficiency necessary to detect the causes of railway accidents or incidents, with a view, as an ultimate public interest, to increase safety and prevent railway accidents/age.

With regard to the extension of the legislative authorization, the CNPD points out that, through Article 2(2) of the Proposal, the Assembly of the Republic requires the Government to define the terms in which access to video surveillance images is provided. to the investigators responsible for the technical investigations of the GPIAAF.

As there is nothing to point out to the Authorization Proposal for a Law, with a view to complying with the requirements set out in paragraph 2 of article 165 of the Constitution of the Portuguese Republic, the CNPD proceeds to analyze the authorized draft decree-law, in particular for verify compliance with its rules by the provisions of paragraph 2 of article 2 of the Draft Law.

3. Analysis of the authorized Decree-Law

In Article 7(1)(g) of the Draft Decree-Law, GPIAAF researchers are recognized as having the power to access video surveillance images that are relevant to the investigation. Therefore, it is not only a matter of recognizing access to images from video surveillance systems owned by REFER, EPE and CP, EPE, but also to images from any other video surveillance systems, including those installed and used by private entities. This provision was already provided for in the previous Draft Decree-Law of the Government, and was then subject to critical analysis by the CNPD, in Opinion/2020/54, already cited, and continues to merit the reservations noted at that time.

In fact, the legal provision that sets out the basis for this processing of personal data (which translates into access to images from video surveillance systems in which identifiable natural persons appear or may appear) has, under the terms of subparagraph e) n. and Article 6(3) of the GDPR, to respond to a public interest objective and to be proportionate to the legitimate objective pursued.

AV. D. CARLOS I, 134-Io I 1200-651 LISBON | WWW.CNPD.PT | TEL:+351 213 928 400 | FAX: +351 213 976 832

Process PAR/2020/75 2v.

However, the imprecise content of a legal provision that allows access to any images that are relevant to the investigation, without delimiting the circumstances in which that relevance may manifest, undermines the judgment of proportionality on this measure, and does not respect the extent of the Authorization Bill, which, it is recalled, in paragraph 2 of article 2, imposes on the government legislator the concrete definition of the terms in which access to video surveillance images is provided. It is

true that the legislative authorization uses the same imprecise expression or concept “images that are relevant to research, but precisely, it refers to the government diploma the task of specifying the conditions or terms under which such access and, therefore, under what conditions the images may prove to be relevant. Task that the Draft Decree-Law does not perform. In fact, on the one hand, the aspect of the principle of proportionality with regard to the need for access to images and the requirement, from that resulting principle, to minimize personal data is not guaranteed (cf. subparagraph c) of paragraph 1 of article 5, and its implementation mirrored in article 25 - Data protection by design and by default all of the RGPD). As mentioned in the aforementioned opinion, as the purpose of investigations in this context is not the determination of blame or responsibilities⁴, the images to be given to researchers could and should, whenever possible, be edited in advance, in order to prevent, by technical means, appropriate, the identification of the persons contained therein.

On the other hand, no rule of the Draft Decree-Law imposes measures that ensure the reliability of the extraction of evidence (e.g., application of hash, time stamp), nor is it specifically provided for this element of evidence (the images) the duty of those responsible for video surveillance systems to keep them at least until the end of the investigation or investigation in progress.

4 Cf, 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.”

Process PAR/2020/75 3

I

NATIONAL DATA PROTECTION COMMISSION

In these terms, the CNPD insists on the need to densify the legal provision that grants the power of access to video surveillance images, under penalty of a judgment of disproportionality of such provision and disregard for the extent of the legislative authorization.

III. Conclusion

The CNPD has nothing to point out to the Draft Law of legislative authorization, but, taking into account the extent of this authorization, it points out the need, in the Draft Decree-Law that accompanies it, to densify subparagraph g) of no. of article 7, which grants the power of access to video surveillance images, under penalty of a judgment of disproportionality of such provision and disregard for the extension of the legislative authorization.

Lisbon, September 28, 2020

Filipa Calvao (President)

AV. D. CARLOS I. 134 - 1o I 1200-651 LISBON | WWW.CNPD.PT | TEL: +351 213 928 400 | FAX: +351 213 976 832