

/ JJr #

/ NATIONAL COMMISSION ON DATA PROTECTION

OPINION/2020/126

## I. Order

The Secretary of State for the Presidency of the Council of Ministers submitted to the National Data Protection Commission (hereinafter CNPD), for an opinion, the Draft Decree-Law that partially transposes Directive (EU) No. for the safety investigations of accidents and incidents.

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 , 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 Decree-Law

The CNPD already had the opportunity to comment on the content of the project in Opinion/2020/53, of 18 May<sup>1</sup>. In the aforementioned opinion, the CNPD concluded that the Directive that the Project aims to transpose did not introduce relevant changes compared 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. on access to video surveillance images. The CNPD also highlighted that, in order to maintain the intention of expanding 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 formalities registered 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.

<sup>1</sup> Available at [https://www.cnpd.pt/home/decisooes/Par/PAR\\_202CL53.pdf](https://www.cnpd.pt/home/decisooes/Par/PAR_202CL53.pdf)

Process PAR/2020/91 1v.

In the meantime, the Assembly of the Republic approved the legislative authorization<sup>2 3</sup>, recognizing the Government's power to legislate on matters of prevention and investigation of railway accidents, highlighting, by way of example, the power to legislate on the possibility of, in the exercise of those responsible for technical investigations of the Office for the Prevention and Investigation of Accidents with Aircraft and Railway Accidents (GPIAAF), be given access to video surveillance images that are relevant to the investigation. In accordance with the provisions of the aforementioned diploma, the purpose of the authorization is to ensure, through the provision of access to information from video surveillance, the speed and efficiency necessary to detect the causes of railway accidents or incidents, with a view, in order to ultimate public interest, increased safety and prevention of railway accidents/age. There, the extension of the authorization is also fixed, which corresponds to the concrete definition of the terms in which access to video surveillance images is provided to the researchers responsible for the technical investigations of the GPIAAF.

## 2. Analysis of the draft Decree-Law

At issue, in this opinion, is the provisions of subparagraph g) of paragraph 1 of article 7 of the Draft Decree-Law. There, GPIAAF researchers are recognized as having the power to access video surveillance images that are relevant to the investigation.

Note the extent of the power thus foreseen: it is not only a matter of recognizing access to the images of the video surveillance systems owned by REFER, EPE and CP, EPE, but also the images of any other video surveillance systems, including those installed and used by private entities.

The CNPD, in its successive opinions on this matter, has always stressed the need for greater densification of this provision. First of all, by virtue of the provisions in the final part of paragraph 3 of article 6 of the RGPD, according to which the national law that provides for the processing of personal data must correspond to an objective of public interest and be proportionate to the objective legitimately pursued, but also by virtue of Article 18(2) of the Constitution of the Portuguese Republic (CRP), since the processing

<sup>2</sup> Cf. Decree No. 72/XIV, published in the Diário da Assembleia da República of 19 September 2020.

<sup>3</sup> On which the CNPD issued Opinion/2020/118, available at [https://www.cnpd.pt/home/decisoies/Par/PAR\\_2020\\_118.pdf](https://www.cnpd.pt/home/decisoies/Par/PAR_2020_118.pdf)

JPJf

## NATIONAL DATA PROTECTION COMMISSION

of personal data in which access to video surveillance images implies the restriction of rights, freedoms and guarantees. 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 and the conclusion of proportionality of this measure, and does not respect the extension of the legislative authorization, which, it is recalled, in paragraph 2 of article 2, requires the government legislator to specifically define 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 concrete conditions or terms under which such access is provided and, therefore, , under which conditions images can be relevant. Task that the Draft Decree-Law does not fulfill.

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 GDPR). As mentioned in Opinion/2020/118, as the purpose of investigations in this context is not the determination of blame or responsibilities<sup>4</sup>, the images to be given to the investigators could and should, whenever possible, be edited in advance, in order to prevent, by the adequate technical means, the identification of the people in them.

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 Nash, 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.

<sup>4</sup> 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 should not be used for purposes other than improving safety, namely the determination of faults or responsibilities.”

In these terms, the CNPD reiterates 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 - in violation of paragraph 2 of article 18 of the CRP, as well as the final part of paragraph 3 of article 6 of the RGPD and disrespect for the extension of the legislative authorization on which the diploma is based, by not proceeding with the concrete definition of the terms in which such access may occur - in disagreement with the necessary subordination of this project to that authorization, under the terms of paragraph 2 of article 112 of the CRP.

### III. Conclusion

On the grounds set out above, the CNPD points out the need to densify subparagraph g) of paragraph 1 of article 7 of the Draft Decree-Law, 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, October 22, 2020

Filipa Calvão (President, who reported)