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National Data Protection Commission

OPINION/2022/63

I. Order

1. The Committee on Constitutional Affairs, Rights, Freedoms and Guarantees asked the National Data Protection Commission (CNPD) to comment on Draft Law No. 19/XV/1.1 2 3 (GOV), which seeks to amend the legal regime for the entry, stay, departure and removal of foreigners from the national territory (hereinafter 'the Proposal'),

2. The CNPD issues an opinion within the scope of its attributions and powers as the national control authority for the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and paragraph 4 of article 36. of Regulation (EU) 2016/679, of 27 April - General Data Protection Regulation (RGPD), in conjunction with the provisions of article 3, paragraph 2 of article 4, and subparagraph a) of paragraph 1 of article 6, all of Law no. 58/2019, of 8 August, and with the provisions of paragraph 2 of article 30 and paragraph c) of paragraph 1 of article 44, both of Law No. 59/2019, of 8 August1,

3. The Proposal makes the ninth amendment to Law No. 23/2007, of 4 July, in its current wording, which approves the legal regime for the entry, stay, departure and removal of foreigners from the national territory (Foreigners Law) , and the second amendment to Law No. 27/2008, of 30 June, amended by Law No. 26/2014, of 5 May, which establishes the conditions and procedures for granting asylum or subsidiary protection and the statutes asylum seeker, refugee and subsidiary protection (Asylum Law).

4. The Proposal also implements, in the domestic legal order, Regulations (EU) 2018/18602, 2018/18613 and 2018/18624, of the Parliament and of the Council, of 28 November 2018, relating to the establishment, operation and use of the Schengen Information System (SIS) - SIS Regulations.

5. Under the terms of paragraph 1 of article 1 of the Proposal, conditions are created for the implementation of the Agreement on Mobility between Member States of the Community of Portuguese-Speaking Countries (CPLP), signed in Luanda, on 17

July 2021.

1 Law approving the rules on the processing of personal data for the purpose of preventing, detecting, investigating or prosecuting criminal offenses or enforcing criminal sanctions, transposing Directive (EU) 2016/680 of the Parliament and of the Council, of 27 April 2016.

2 SIS Regulation for the purpose of returning illegally staying third-country nationals (return).

3 SIS Regulation in the field of border controls.

4 SIS Regulation in the field of police cooperation and judicial cooperation in criminal matters.

Av. D. Carlos 1,134,10

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

gerai@cnpd.pt

www.cnpd.pt

II. Analysis

6. The CNPD's assessment will essentially focus on the changes to be introduced in the Foreigners' Law, through which the SIS Regulations are also implemented in the national legal order, addressing the changes and additions to the law in an integrated manner.

7. A significant part of the changes only concern terminology updates and legislative references, including data protection legislation, and there are still systematic changes to the law. With the provision, in article 9 of the Proposal, of the republication of the Law on Foreigners, an update of some denominations is also cautioned.

8. As for the amendments introduced in article 43, to update the legislative reference to Law No. 67/98, of 26 October (formerly the personal data protection law), it is suggested that instead of the wording "in accordance with the law on the protection of natural persons (...)", either in paragraph 3 or in paragraph 5 of the article, is replaced by legislation or legal regime for the protection of personal data, a since such a regime comprises more than one legislative act.

i. Expansion of the categories of personal data processed

9. It should also be noted that the list of personal data for the identification of foreigners now includes copies of identification and travel documents, photographs and facial images and dactyloscopic data (see the Proposal as an amendment to be introduced in article 212 .°, no. 2, subparagraph d), subparagraph i), of the Foreigners' Law). This extension of personal data complies with the SIS Regulations, which also provide for an extension of the categories of data to be processed in the SIS5.

10. However, with regard to biometric data (facial image and dactyloscopic data), which are classified as special categories of data, pursuant to Article 9 of the GDPR and Article 6 of Law No. 59/ 2019, thus enjoying a reinforced protection regime, the law should contain specific safeguards for its treatment.

11. Firstly, the law must provide under which conditions these biometric data are collected, whether they are always mandatory or only in certain situations and which ones.

12. Secondly, the law must expressly determine which are the dactyloscopic data in question here, if only fingerprints or if also palm prints. It should be noted that the concept of 'dactyloscopic data' contained in Article 3(14) of Regulation (EU) 2018/1861 and in Article 3(13)

5 See article 4 of Regulation (EU) 2018/1860 and article 20 of Regulations (EU) 2018/1861 and 2018/1862.

of Regulation (EU) 2018/1862, covers fingerprints and palm prints. On the other hand, the law must define how many fingers the fingerprints are taken from, as this cannot be left to the arbitrary discretion of the authority that collects the data and there must be consistency with other national and Union legal instruments. The SIS Regulations allow between one to ten flat fingerprints and one to ten rolled fingerprints and a maximum of two palm prints under certain conditions. The situation in which fingerprinting is not possible should also be taken into account.

13. Thirdly, the law should contain an obligation to collect and further process biometric data with high quality standards, in order to guarantee biometric identification and verification with the highest level of security, that is, reducing as much as possible the occurrence of false acceptance rates and false rejection rates. This is the only way to guarantee that the

processing of these personal data fulfills the purpose for which it is intended and that, in this case, it may have consequences for the security of the territory. In addition, the SIS Regulations also require that the entry of biometric data into the SIS is carried out in compliance with quality standards and certain technical specifications.

14. Therefore, whether for entry into the SIS, or for entry only into the SEF's Integrated Information System (SII/SEF), biometric data must be collected respecting high quality standards, which ensure that the rights and freedoms of the holders of data is guaranteed. This specific requirement should be included in the law, as well as which data to process and under what conditions. Only in this way will the law have the necessary degree of predictability for its addressees.

ii. Indications regarding departure from the territory or impediments to travel

15. In accordance with the Explanatory Memorandum, the Proposal creates, in the domestic legal system, the figure of impediment to travel, which constitutes an indication relating, as a rule, to restrictions on exits judicially decreed for the protection of minors and vulnerable adults. However, derogations to the court decision are also provided for, providing for exceptional procedures for the urgent insertion of travel impediments.

16. Indeed, the Proposal adds article 31-A to the Foreigners Law, whose general rule, enshrined in paragraph 1 of the article, determines that those who have been prevented from traveling or leave the country, when such restriction has been judicially decreed. Judicial decisions and other legally required information must be sent to the SEF, as a matter of urgency, for the purpose of creating an indication of prohibition of departure in the SII/SEF. When the court so determines, the same information must also be sent to the SIRENE National Office in order for an alert to be created in the SIS under

Av.D. Carlos 1,134.1°

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

of Article 32 of Regulation (EU) 2018/1862, thus extending the ban on exit to the other Member States party to the Convention

Implementing the Schengen Agreement.

17. Paragraph 2 of Article 31-A lists the categories of data subjects that may be covered by this indication: missing adults, accompanied adults, compulsorily interns or victims of crime, prevented from traveling to your own protection; runaway or missing minors who are beneficiaries of the promotion and protection process; minors who are at risk, concrete and manifest, of imminent abduction by a parent, family member or guardian; minors who are at concrete and manifest risk of being removed from or leaving the national territory or the territory of the Schengen States, and becoming victims of trafficking in human beings, forced marriage, female genital mutilation or other forms of violence of gender, terrorist offences, or of being involved in such offences, or recruited or enlisted by armed groups or made to actively participate in hostilities.

18. These categories of persons who may be prevented from traveling are in line with the provisions of Article 32 of the SIS Regulation for the purposes of police and judicial cooperation in criminal matters. However, the proposed rule contains the adverb "in particular", which leaves open the possibility of creating indications in the SII/SEF with a view to banning departure from the territory or impediment to travel in relation to other categories of persons, not expressly provided for by law, which would not be admissible. As for the SIS, this will not be possible, because the SIS Regulations already limit the list of data subjects. Therefore, the expression "namely", must be eliminated in order to ensure that this restriction on a fundamental right is precisely delimited at the legislative level.

19. The first exception to the rule that the creation of alerts for the purpose of banning departure or impediment to travel results from a court decision is provided for in paragraph 4 of article 31-A of the Proposal. There it is determined that in exceptional situations, of manifest and justified urgency and impossibility of recourse, in good time, to the competent judicial authority, the aforementioned indications may be issued by the criminal police authorities or competent health authorities, subject to judicial validation in the maximum period of 48 hours in the case of minors and vulnerable adults who may become victims of crime, and a period of 15 days for judicial validation in the case of missing persons who must be placed under protection, for their own protection or to prevent a threat to public order or security.

20. First of all, it is not understandable why the period for judicial validation of the creation of a measure banning the departure or impediment to travel of a person, in an exceptionally urgent situation, is differentiated. Indeed, if the situation appears to be so urgent for the creation of the measure that it cannot pass through the

appeal to the court, the disparity for its validation between 48 hours and 15 days (which, being useful, will be equivalent to 3 weeks) is not understood.

21. On the other hand, it is not defined in the derogation whether the criminal police authority may decide to create an alert for the SII/SEF and for the SIS or only for the national system, given that the rule provided for in no. 1 of the article specifically provides that the court always determines the creation of the alert also in the SIS. Considering that an alert in the SIS has a very wide territorial application in all Schengen States Parties, the definition by law of this possibility is essential. This will also have consequences regarding the deadline for judicial validation, considering the impact that such a restrictive measure may have on people's rights and freedoms.

22. As for paragraph 5 of the same article, which provides that the indication on the ban on leaving the minor shall be in force until the judicial decision is amended or as soon as the age of majority is reached, the CNPD understands that it should also be provided that the court to notify the SEF and the SIRENE National Office, if applicable, when the decision is changed to lift the exit restriction, to ensure that the alert is only kept for the strictly necessary period and that the person is not prevented from leaving or traveling when there is no longer a court decision to that effect. In any case, the SEF and, when applicable, the National SIRENE Office must periodically review the need to maintain the indication.

23. Pursuant to Article 53(4) of the SIS Regulation, alerts relating to minors in the circumstances described above are only for one year and Member States are required to review the need to maintain the alert in that deadline. Therefore, the wording of the rule in paragraph 5 does not comply with the provisions of Regulation (EU) 2018/1862, and must therefore be amended in order to ensure that there is an effective assessment of the need to maintain the alert, either in the SII /SEF, or in the SIS, which will always imply the duty to annually assess the need to maintain or renew the alert, without prejudice to the deletion of the alert before that period if there is a change in the judicial decision or if the minor has reached the age of majority.

24. Article 31-A of the Proposal also allows for another derogation from the rule that the ban on exit must be decreed by a court decision: the possibility that someone with legitimacy in safeguarding the integrity and interests of the minor can invoke and prove , by means of a statement communicated to the SEF, opposition to the minor's departure. This may occur when it has not been possible to provide judicial protection in good time.

25. According to the Proposal, in paragraph 7 of the same article, it is foreseen that the indication of opposition to departure is registered for a maximum period of 90 days in the SII/SEF if the interested parties obtain and send it to the SEF, in the first

Av.D. Carlos 1,134.1st

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

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30 days, copy of the request for confirmation of the opposition within the scope of the judicial process. If this happens, this will be a condition for an alert to be created in the SIS.

26. However, from reading this Article 31-A, it appears that, in practice, exceptions will become the rule, with there being no consistency between the various provisions provided for herein. It is not justified because in some cases it is the criminal police authority that decides on the creation of the indication for an exit ban, subject to urgent judicial validation (48 hours), and in other cases, it is sufficient to demonstrate within the 30-day period that opposition has been raised with the of the court, the alert is created in the SII/SEF, without a defined deadline, and created in the SIS for an initial period of one year (maximum allowed by the SIS Regulation itself). This situation can lead to the existence of an indication of a ban on leaving for an extended period, without judicial validation, and without it being even foreseen that a formal decision is taken, which must be duly substantiated and legally challengeable. It is still unknown, since the article is silent, who, in the SEF, may make that decision6. This is essential, not least for reasons of legal certainty and liability.

27. Paragraph 8 of the article lays down a general rule on the period of retention of information specifically determined by the judicial authority; however, the extension of the derogations provided for in this article, precisely because of the lack of judicial control, precludes the application of this last rule in such a wide range of cases, without the law specifically providing for the conditions under which the conservation of these indications, and the consequent treatment of personal data, should take

place.

28. Finally, still in relation to this article, for reasons of systematics, it is suggested that paragraph 3 be moved to paragraph 9, since both provisions concern enforcement in national territory. alerts introduced by other Member States.

29. In short, the CNPD understands that article 31,°-A, to be added to the Foreigners' Law by the Proposal, must be substantially revised, in the sense of incorporating guarantees of effective judicial control of indications related to bans on exit or impediments to travel, and the exceptions must be duly regulated, in clear terms as to the conditions of their application, limited to what is strictly necessary and proportionate.

iii. Grounds for the decision of coercive removal or expulsion

30. The Proposal provides for an amendment to article 134 of the Aliens Law, adding as a basis for a decision to expel or expel the fact that the rules were circumvented or attempted to be circumvented.

6 Contrary to other articles of the Foreigners Law, which provide that administrative decisions that result in the creation of alerts in the SII/SEF or in the SIS are taken by the National Director of the SEF.

applicable in terms of entry and stay, namely through the use of identity or travel documents, visas or other false or falsified documents.

31. Since it is understandable and possibly necessary to introduce this new provision to penalize the falsification of documents for entry into the territory as a specific ground for coercive removal, it will always be said that the law should additionally provide for the consideration in the decision-making process of the specific situations in that the holder of the documents is also a victim of networks of illegal migration or trafficking in human beings, which provide the falsified documents.

32. So that the penalty does not prove to be disproportionate for those who are, above all, victims of the great organized criminalized, it would be necessary to take care in the norm that the use of this basis for a decision of coercive removal, and the subsequent indication in the SIS, takes into account It takes into account all the elements of the case and pays special attention to the circumstances, in order to reach a balanced judgment, which reflects on the period of validity of the indication.

33. The addition to article 134, as regards the grounds for coercive removal, must provide for a careful analysis of situations in which the foreigner presents false or falsified documents, as a result of circumstances in which he himself may be a victim of illegal migration networks or trafficking in human beings.

iv. Assignment of a tax, social security and national health service identification number

34. In articles 58 (residence visas), 65 (notification of approval for family reunification) and 215 (duty to communicate) of the Foreigners Law, amendments are introduced that provide for the exchange of information between various entities public, for the (provisional or definitive) allocation of a tax, social security and national health service identification number.

35. It is understood, from the outset, that the competent authorities, on the one hand, for issuing visas (MNE), as well as for issuing residence permits (SEF), and, on the other hand, for issuing above mentioned will have to communicate data with each other. Nothing is said as to the form and means to be used for this purpose. It would be appropriate for the legislation to provide for such information exchange to be regulated by a protocol between the various actors and in which the specific conditions and procedures for operationalizing this information exchange and the security measures attached to these communications are set out.

Av.D. Carlos 1,134.1°

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

III. Conclusion

36. For the reasons indicated above, the CNPD understands that Draft Law No. 19/XV/1a (GOV), which amends the legal regime for the entry, stay, departure and removal of foreigners from the national territory, should be reviewed in the in order to clarify the legal text, which is vague in some provisions or even contradictory, as well as in the sense of introducing certain safeguards for people's rights, freedoms and guarantees. Next, the most relevant points to be addressed are highlighted.

37. The inclusion of the processing of biometric data for the identification of foreigners is too vaguely foreseen. Article 212

should specifically specify which biometric data are to be processed, as well as make their processing dependent on high quality standards, at least in compliance with the requirements laid down in European Union law, which guarantee that their collection is carried out under conditions that allow its inclusion in the SIS, when applicable, as well as its treatment in the SII/SEF.

38. According to the analysis carried out in points 17 to 27 of this Opinion, article 31-A, to be added to the Foreigners' Law, in accordance with article 4 of the Proposal, must be substantially revised, in order to be guarantees of effective judicial control of indications relating to travel bans or impediments to travel are incorporated, and the exceptions must be duly regulated, in clear terms as to the conditions of their application, limited to what is strictly necessary and proportionate.

39. The addition to article 134, regarding the grounds for coercive removal, must provide for a careful analysis of situations in which the foreigner presents false or falsified documents, as a result of circumstances in which he himself may be a victim of illegal migration networks or trafficking in human beings.

40. The Proposal should provide that the exchange of personal data between competent public entities, in the context of the attribution of civil identification, social security and national health service numbers when issuing visas or residence permits, becomes duly regulated by a protocol between the entities involved, which defines the conditions and procedures for the communication of personal data, as well as the respective security measures.

41. Finally, the CNPD cannot fail to point out that this Proposal does not exhaust the implementation in the national legal order of the SIS Regulations, since the legislation in question only occasionally regulates their implementation.

Lisbon, July 20, 2022

Filipa Calvão (President, who reported)