

I. Order

1. The Assistant Secretary of State and Justice requested, on August 2, 2022, the issuance of an opinion by the National Data Protection Commission (CNP) on the "Draft Ordinance that regulates the integration of fingerprints collected from convicted defendants and registered in the dactyloscopic file of the criminal identification services of the Directorate-General for the Administration of Justice (DGAJ) in the Central File of Lophoscopic Data (FCDL), under the responsibility of the Judiciary Police, through the Scientific Police Laboratory (LPCj).

2. The CNP issues an opinion within the scope of its attributions and powers as a national authority to control the processing of personal data, conferred by Article 30(2) and Article 44(1) cj, both of Law No. 59/2019, of August 81.

II. Analysis

3. This Draft Ordinance is issued under the provisions of article 24 of Law No. 37/2015, of 5 May, amended by Law No. 14/2022, of 2 August, which provides for that «[the fingerprints collected from the convicted defendants and registered in the dactyloscopic file can be integrated into the criminal information system of the Judiciary Police in terms to be regulated in a specific diploma».

4. In addition to pointing out the lapse in the reference to a "paragraph 2 of article 24" when the rule in question does not have a numbering, it should be noted, as a preliminary assessment, that the provisions of this Draft Ordinance, is presented with a generic character, not very detailed, not fully complying with the stated objective of (effective) regulation of the "integration of fingerprints collected from convicted defendants and recorded in the fingerprint file of the criminal identification services of the Directorate-General for the Administration of Justice (DGAJ) in the Central Lophoscopic Data File (FCDL), under the responsibility of the Judiciary Police, through the Scientific Police Laboratory (LPC)»

5. In fact, a diploma like this, whose regulatory content is a legal provision that admits as possible a new processing of special personal data, such as the biometric data in question here, cannot fail to fulfill this regulatory function and, therefore, , not

limiting itself to regulating some aspects of the treatment being vague about the others, when not even omitting.

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.

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PAR/2022/60

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6. The CNPD's observations, set out below, aim to fill some gaps that a regulatory diploma for the processing of personal data with this sensitivity should not present, under penalty of not guaranteeing compliance with the legal regime for the protection of personal data. Only then will a set of provisions be mentioned that seem to go beyond what is foreseen in the legislation that regulates the processing of personal data relating to lophoscopic data.

i. Need for clarification and densification of regulations

7. In article 2, after the provision for the integration of fingerprints collected from convicted defendants in the AFIS (Fingerprint Identification System) platform of the Judiciary Police, in a reserved area of the repository, access to this area is provided for « by the entities provided for by law". Even though Article 2(1) of the Draft Ordinance makes reference to Law No. 67/2017, of August 9, it is important to clarify (not least because in No. 37/2015, which specifically provides for access to criminal records) in paragraph 2 of article 2 of the Project that the universe of entities entitled to access that reserved area of the repository is defined in paragraph 7 of article 7. ° of Law No. 67/2017, of August 9, also delimiting the purposes of access, perhaps by reference to the same law.

8. It is also essential to define the different procedures that must be observed in the fingerprint collection phase, given that Article 2(3) is limited to providing for the automatic remission of the identifier, with nothing on its generation. From the outset, it remains unclear whether the generation of the identifier in the courts is also automatic and on which support it will be carried

out.

9. Moreover, it is not clear how the identity of the holder of the biometric data is made known to the Judiciary Police, for the purpose of applying paragraphs 7 and 8 of article 2 of the Project, and also of paragraph 2 of article 12 of Law no. 67/2017. In other words, neither the law that is regulated here, nor the draft ordinance, explain how the Judiciary Police has the biographical data of all the convicts (taking into account that the criminal investigation may have been carried out by other police bodies criminal).

10. Finally, paragraph 5 of article 2 of the Project is also omitted, as it does not indicate who and by what procedure the verification of possible correspondence of fingerprints collected in the courts with those already inserted in the AFIS platform (and whether the result of this verification is subject to registration), nor does it provide for the relevant criteria for the need to collect a new sample (e.g., quality or completeness of the data).

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ii. Responsibility for compliance with data protection principles and rules

11. The CNPD also draws attention to two provisions of article 2 of the Draft Decree concerning the intervention of criminal identification services of the Directorate-General for the Administration of Justice (DGAJ) in the context of the processing of personal data under the responsibility of the Police Judiciary, in which access to these services is created, for two specific purposes, which are not provided for in the law.

12. Since the CNPD does not question the reasonableness of the solution presented in paragraph 4 of article 2, it is doubtful that, as regards the processing of personal data which, under the terms of the law, is the responsibility of the Judiciary Police, it is foreseen by mere regulatory norm that the legal duties to update, rectify and erase stored data fall to a different entity, in particular providing direct access for this purpose. It is recalled that these duties fall under the terms of subparagraphs d) and e) of paragraph 2 and paragraph 3 of article 4, in conjunction with article 20, all of Law n.º 59/ 2019, of August 8, on the person responsible for the treatment that the Ordinance Project regulates here, that is, on the Judiciary Police and not on the DGAJ.

13. The CNPD therefore recommends reconsidering the provisions of paragraph 4 of article 2 of the Project, safeguarding, in

any case, that these legal obligations cannot be excluded from the legal sphere of the Police by a mere regulatory rule.

Judiciary, as responsible for the treatment that the Ordinance Project regulates here.

14. With regard to paragraph 6 of article 2 of the Project, the CNPD limits itself to pointing out that it is not clear why, in order to fulfill the obligations (only implicitly) referred to in article 25 of the Law No. 37/2015, the same DGAJ services are based on the reference samples existing on the AFIS platform and not (also) on the criminal identification database for which they are responsible. The CNPD therefore recommends reconsidering this forecast, in the light of the legal framework.

15. Finally, given that a high degree of security is essential in the communication of sensitive information such as the one at issue here, the CNPD recommends that, while a secure connection is not guaranteed for the purpose of communication and integration of fingerprints - provided for in article 4 of the Project - the aforementioned transmission of biometric data is not carried out.

III. Conclusion

16. On the grounds set out above, the CNPD recommends that Article 2 of the Draft Ordinance be densified to ensure effective regulation of this processing of special personal data

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PAR/2022/60 2v.

(biometric data) in accordance with the personal data protection regime and for full compliance with the stated objective of this regulation. In particular, it recommends:

The. The clarification, in no. 2, of the universe of entities entitled to access and the purposes of access, through an explicit reference to Law no. 67/2017, of 9 August;

B. In paragraphs 3 and 5, the definition of the different procedures to be adopted in the fingerprint collection phase, regarding the issuance of the identifier, as well as the way in which the Judiciary Police has the biographical data of all convicts ; and the definition of the procedure for verifying any correspondence between fingerprints collected in the courts and those already

entered in the AFIS platform.

17. The CNPD also recommends reconsidering the provisions of paragraph 4 of article 2 of the Project, safeguarding that a mere regulatory norm cannot exclude legal obligations from the legal sphere of the Judiciary Police, as responsible for the treatment that the Draft Ordinance here regulates.

18. Finally, given that a high degree of security is essential in the communication of sensitive information such as the one at issue here, the CNPD recommends that, while a secure connection is not guaranteed for the purpose of communication and integration of fingerprints - provided for in article 4 of the Project - the aforementioned transmission of biometric data is not carried out.

Lisbon, August 16, 2022

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