

National Data Protection Commission

OPINION/2022/42

I. Order

1. The Secretary of State for the Presidency of the Council of Ministers asked the National Data Protection Commission (CNPD) to comment on the Draft Law Proposal that aims to transpose Directive (EU) 2019/884 of the European Parliament and of the Council , of 17 April 2019<sup>1</sup>, on the exchange of information from criminal records on third-country nationals, amending Law no. 37/2015, of 5 May, and Decree-Law no. 25 August, in its current wording (hereinafter “the Project”),
2. The CNPD issues an opinion within the scope of its attributions and powers as a national authority to control 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 paragraph 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 August.
3. As can be seen from the explanatory memorandum, the Project under consideration aims to adapt the national legal regime for criminal identification to the new European legal framework for the exchange of information between Member States on criminal records concerning third country nationals, stateless persons or unknown nationality.
4. These amendments also stem from Regulation (EU) 2019/8162, which creates a centralized system for determining which Member States have information on convictions of third-country nationals and stateless persons (ECRIS-TCN), allowing access to that personal data and its use, namely, in issuing criminal record certificates, and which imposes new obligations on the central authorities of the Member States, such as the duty to consult the system in advance to determine the existence of convictions above, irrespective of whether the third-country national resides or has resided in the territory of a Member State and whenever the latter requests the issuance of a criminal record.

<sup>1</sup> Directive (EU) 2019/884 of the European Parliament and of the Council of 17 April 2019 amending Council Framework Decision 2009/315/JHA with regard to the exchange of information on third-country nationals and to the Criminal Records

Information System (ECRIS), and replacing Council Decision 2009/316/JHA.

2 Regulation (EU) 2019/816 of the European Parliament and of the Council, of 17 April 2019, which creates a centralized system for determining which Member States have information on convictions of third-country nationals and stateless persons (ECRIS- TCN) with a view to completing the European Criminal Records Information System and amending Regulation (EU) 2018/1726.

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5. Consequently, specific amendments are proposed to Law No. 37/2015, of 5 May - Criminal Identification Law (LIC) and to the current version of Decree-Law No. 171/2015, of 25 August, which regulates and develops the legal regime for criminal identification, which aim to adjust domestic law to Union law.

6. An amendment is also introduced in article 2 of the LIC, giving a new wording to paragraph 2 of the article, concerning the collection of fingerprints of convicted natural persons, specifying which fingerprints were collected and the respective positions of the fingers and palms, and explicitly including non-imputable persons to whom a security measure has been applied, in accordance with what is currently required by Law No.

7. Also taking advantage of the legislative changes to these two diplomas, the references to the personal data protection regime are also updated, replacing the references to Law No. /2019 and Law No. 59/2019, including with regard to the sanctioning regime.

il. Analysis

The. Regarding the changes to the LIC

8. With regard to the new wording of paragraph 2 of article 2 of the LIC, in which the content of paragraph 4 of article 4 of Law

n° 67/2017 is reproduced, specifying the incidence of the fingerprints collected, which now include, in addition to all the fingers in the resting position and in the rolled position, the impressions of the two palms of the hand, in the resting position and in the writing position, the CNPD understands that such description is according to what is currently provided for in the lophoscopic judicial identification law.

9. It cannot be overlooked that the concept of fingerprints that is provided for in the current wording of Decision 2009/315/JHA, amended by the Directive that is now transposed, only encompasses the fingers of the hands in the resting and rolled positions. However, the extension of data collection to the palm prints of convicted persons, although under the designation of fingerprints, is already included in national law, so the update of the LIC appears to be adjusted and coherent.

10. The changes introduced in article 29 of the LIC, which regulates requests for information to be sent to foreign central authorities, are in the sense of always requiring prior consultation with other EU Member States that hold information on previous convictions. of the national of a third country, stateless or of unknown nationality, within the scope of the issuance of a Portuguese criminal record certificate, so that this information is attached to the certificate.

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11. These changes respect the new rules introduced by Regulation (EU) 2019/816 and Directive 2019/844, so the CNPD has nothing to observe in this matter.

12. Article 32 of the LIC also includes response times of 10 and 20 working days for the Portuguese authorities to respond to requests for information received by foreign national authorities.

13. As for article 34 of the LIC, which deals with «support for the transmission of information», as mentioned above, it is expressly established that the transmission of information between criminal identification services and the central authorities of the other Member States of the Union is carried out electronically, through the criminal records information system (ECRIS), provided for in Framework Decision 2009/315/JHA, in its current wording.

14. This is a decentralized European system, but which has now gained new technological developments in the new European legal framework. The system is now composed of an ECRIS reference application, developed at European level, but maintained by the Member States with the support of the European agency eu-LISA, and of a common communication infrastructure between the central authorities of the Member States that provides an encrypted network for the exchange of information, which is the responsibility of the European Commission.

15. It is considered that the use of a uniform system by all Member States can be beneficial and guarantee better security conditions for personal data, in particular when they are in transit. It is not clear from the legal norm whether the ECRIS application software is developed internally or whether the reference software will be used by Portugal, since both are admitted by Decision 2009/315/JAI.

16. The Project also adds a paragraph 2 to article 34 of the LIC, providing that, if the system is not available, the transmission of information is carried out, considering the security of the transmission, by any means capable of leaving a written record, able to allow the authority receiving the information to verify its authenticity.

17. The CNPD believes that, given the sensitivity of the information transmitted and received, there should be a solid alternative solution, duly considered in advance, which would enjoy the necessary and adequate security measures, guarantee the confidentiality and integrity of personal data and allow audit the interactions performed, rather than ad-hoc solutions, whose timing can jeopardize information security.

18. As regards the amendments to articles 38 and 43 of the LIC, updating the references to national data protection legislation, they are naturally welcome.

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B. Regarding the changes to the LIC regulation

19. Decree-Law No. 171/2015 also undergoes occasional adjustments to align the wording and content with the changes introduced in the LIC, as well as to update the legal references in terms of data protection (cf. No. 6 of article 19 and paragraph 1 of article 34 of the aforementioned decree-law).

20. In article 34 of this diploma, which regulates the security of the processing of criminal identification data, under the responsibility of the Director-General of the Administration of Justice, it is foreseen that the obligations contained in article 32 of the GDPR and of article 31 of Law No. 59/2019, with reference to the current legal framework for data protection.

21. In addition, additional requirements are added to the vast list currently contained in the law to ensure a higher level of information security, such as: preventing unauthorized person from accessing the equipment used for data processing (new paragraph b) of no. 1); ensure that the used system can be restored in the event of an outage; ensure that the system works to its fullest, that operating errors are reported and that the personal data stored cannot be falsified due to malfunctioning of the system.

22. The specification in the legal text of the objective to be achieved is positive, especially so that the controller becomes more aware of his obligations. In any case, the overall result to be achieved is already derived from the text of the GDPR and Law No. 59/2019.

### III. Conclusion

23. In short, the Project now under consideration adapts, to the extent necessary, national law to Union law, punctually introducing the indispensable rules in the Criminal Identification Law and in the decree-law that regulates and develops it, not raising any reservations or relevant observations on data protection.

24. It is considered opportune to update the references from the criminal identification legislation to the current regime for the protection of personal data.

Approved at the meeting of May 18, 2022

Filipa Calvão (President)