

National Data Protection Commission

OPINION/2023/2

I. Order

1. The Legislative Assembly of the Autonomous Region of the Azores requested the National Data Protection Commission (CNPD) to issue an opinion on the Preliminary Proposal for Law No. 15/XII - first amendment to Law No. 95/2021, of 29 of December, which regulates the use and access by security forces and services and by the National Authority for Emergency and Civil Protection to video surveillance systems for capturing, recording and processing image and sound».
2. The CNPD issues an opinion within the scope of its attributions and competences as an independent administrative authority with authoritative powers to control the processing of personal data, conferred by paragraph c) of paragraph 1 of article 44 of Law no. 59/2019, of August 8, as well as paragraph c) of paragraph 1 of article 57 and paragraph b) of paragraph 3 of article 58 of Regulation (EU) 2016/679, of April 27, 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 August 8, which implements the GDPR in the domestic legal order.
3. The amendment to Law No. 95/2021, of December 29, provided for in the Preliminary Proposal for a Law, is exclusively aimed at extending the purposes of installing and using video surveillance systems to the objectives of «protection and conservation of the marine environment and preservation and restoration of marine living resources'. To this end, it amends not only the rules relating to the object of that law and the purposes of video surveillance systems (Articles 1 and 2 of Law No. 95/2021), but also the rules governing the authorizing competence of the systems and responsibility for data processing carried out through them (Articles 5, 6, 8, 9, 17 and 19 of Law No. 95/2021). And it adds a specific provision to article 18, in addition to a new article, 13-A, defining a special regime for video surveillance systems with the new purposes of protecting and conserving the marine environment and preserving living resources marine.
4. It begins by pointing out that an amendment to Law No. 95/2021 with the aim of expanding the purposes for the use of video surveillance systems, under the terms proposed here, means an extension of the restriction of rights, freedoms and guarantees of citizens, in particular, the rights to the privacy of private and family life and the protection of personal data,

enshrined in articles 26 and 35 of the Constitution of the Portuguese Republic, as well as in articles 7 and 8. ° of the Charter of Fundamental Rights of the European Union. Therefore, the regulation of this extension or intensification of the interference in these fundamental rights cannot fail to be

II. Analysis

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accompanied by the definition of a legal regime capable of giving predictability to those restrictions and adequate guarantees for the protection of said rights. Private and family life also deserves explicit protection in Article 8 of the European Convention on Human Rights, given the case law of the European Court of Human Rights requiring that legislative measures restricting those rights, especially in the context of police activity, have the degree of precision necessary to ensure the predictability of their effects and demonstrate that they are adequate, necessary and proportionate to the safeguarding of essential community values set out in paragraph 2 of that article 8.

5. However, in a democratic State governed by the rule of law, the mere general prediction of the use of video surveillance systems is not admissible, in particular using technologies that enhance their effects (the data analysis system provided for in article 16 of Law no. 95/2021), without the clear specification of the public spaces to be covered and without the specification of conditions, limits and criteria necessary to guarantee their suitability for the pursuit of purposes envisaged herein and essential to ensure that the affectation of fundamental rights occurs in the measure of what is strictly necessary and without excess.

6. The importance of protecting the marine environment is not ignored, nor is there any intention of diminishing or relativizing the importance of protecting the marine environment, nor is the ability of certain technological tools (such as remotely manned

aerial vehicles) to develop public activity more efficiently and effectively, in particular, in the context of extensive areas such as the territorial sea

7. But one cannot forget that, on the one hand, what is at stake is the safeguarding of interests and values that are considered of mere social order - therefore, the prevention and repression of infractions of mere social order, without criminal dignity - and, on the other hand, the Preliminary Proposal does not contain sufficiently dense specific norms (clear and precise as to the circumstances in which the restriction of rights to respect for private life and protection of personal data occurs) and guarantees of the fundamental legal sphere of citizens.

8. The provision for the possibility of installing and using electronic video surveillance systems to capture data in real time and the respective recording and processing (cf. paragraph 1 of article 13-A, introduced here by article 3 of the Preliminary Proposal of law), only linked to the purposes of protection and conservation of the marine environment and preservation of marine living resources¹ which are specified in paragraph 2 of article 13-A1, is insufficient

1 Article 13-A(2) provides that “[the] data recording, recording and processing systems referred to in the previous number are used in accordance with the general principles of processing of personal data, in order to ensure: a) The detection, in real time or through recording, of illegal fishing activity in protected marine areas or with marine influence, in areas prohibited or temporarily prohibited from fishing, in areas of restriction to fishing and in areas with distance from the coast or other reference points or with depths lower than the legally established for the type of fishing gear used, and

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to understand, from the outset, whether the beaches are still the object of this capture, but also whether the captured data correspond only to images or include sound.

9. In fact, the description contained in paragraph a) of paragraph 2 of article 13, °-A allows us to understand that the sea will be the main area covered by these video surveillance systems, especially using drones (portable cameras installed in remotely manned aerial vehicles), but it is not clear whether this implies the capture of the land area of the Portuguese coast, maximum

of the bathing areas, firstly because there is a delimitation of the areas covered using technical concepts, not all explained or delimited in legislative diplomas .

10. Added to this is the reference, in paragraph 3 of article 13-A, to the installation of video surveillance systems on private property, with the authorization of the owner, which leads to the presumption that it is intended, effectively , the installation of video surveillance systems that capture and record images and sound in the land area of the Portuguese coast.

11. It is recalled that beaches are a place typically enjoyed by people for the purposes of rest, leisure, sports or entertainment, where they are especially exposed, in environments that promote more relaxed behavior than those normally adopted in public spaces, and only shared by third parties who present themselves in similar circumstances. They are, therefore, spaces where the right to be anonymous is asserted with particular relevance or, at least, the right to privacy in terms of the right to be let alone, not being, from the outset, expected to affect such a right permanently or regular.

12. But even the installation of video surveillance systems in the coastal zone, covering beaches or other public spaces intended for use by citizens in general, represents such intense interference in the right to reserve private and family life that only circumstances Special and exceptional cases must justify their admissibility.

13. In addition, capturing and recording sound does not seem to be at all adequate for the purposes in view here, especially in bathing areas and during the bathing period, when the noise level is high, and even occasional screams, particularly from children, are heard. confuse with normal manifestations in that context. And even if, by hypothesis, it was intended to affirm such adequacy, the truth is that, for the purposes of prevention and repression of administrative offences, the recording of images is sufficient. Furthermore, sound capture will always prove to be

the application of the corresponding sanctioning norms; b) The information necessary for activating human and material means of control, inspection and surveillance, under the terms of the law; c) The use of video recordings for the purposes of evidence in criminal proceedings or administrative offences, respectively in the self-report, investigation, instruction and trial phases, or in the administrative and judicial appeal phases».

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excessive in areas that, due to the special context that the beaches represent, lend themselves to recording private conversations, often of an intimate nature.

14. For all these reasons, the CNPD recommends reconsidering the expansion of the purposes of installing and using video surveillance systems for the purposes of protecting and conserving the marine environment and preserving living marine resources, in particular with regard to the possibility of installing video surveillance systems video surveillance and the use of drones in areas corresponding to bathing areas, given the manifestly excessive nature of interference with the right to reserve private and family life.

15. It also appears that the possibility of using drones for the purpose of protecting and conserving the marine environment and preserving living marine resources must be differentiated, depending on the area to be flown over, admitting a specific regime for their use in the various maritime strips, excluding the coastal zone.

16. In any case, it considers that the capture and recording of sound, for the purposes of protecting and conserving the marine environment and preserving living marine resources, is not, *prima facie*, adequate or suitable, not fulfilling the first parameter of proportionality restricting rights, freedoms and guarantees, which is why it should be prohibited by law. Even if such suitability were likely to manifest itself, the CNPD still recommends its prohibition since, for the purposes of preventing and repressing administrative offenses here in view, recording the images is sufficient, with sound recording presenting a high risk overhearing private conversations irrelevant to that purpose.

17. Furthermore, the CNPD reiterates what it had already pointed out in opinion 2021/143, of November 5: if the object of the law is to regulate the processing of personal data resulting from the use of video surveillance systems in public spaces, not only for the purposes of criminal prevention and repression, but also for the prevention and repression of offenses of a strictly administrative nature, so this Proposal cannot be limited, in terms of data processing, to references to Law No. 59/2019, of 8 of August, and must also include references to the GDPR and to Law No. 58/2019, of August 8, which are those that objectively apply to the processing of personal data carried out by the control, inspection and surveillance services in the area of fishing.

18. Finally, it should be noted that the change in all the rules relating to powers authorizing the use of video surveillance systems was not accompanied by a corresponding extension in the obligation to disclose authorized video surveillance systems. In fact, Article 23 of Law No. 95/2021 is not subject to any amendment.

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19. However, even if there is an advantage in centralizing the dissemination of information regarding authorized video surveillance systems throughout the national territory, the intended extension of authorizing competence to members of national and regional governments responsible for the fisheries area must be accompanied by the obligation to advertise authorized video surveillance systems or, at least, the obligation to send this information to the Ministry of Internal Affairs, which appears to be provided for in article 23.

III. Conclusion

20. The Preliminary Proposal for the Amendment of Law No. 95/2021, of December 29, by providing for the extension of the purposes of installing and using video surveillance systems to the objectives of «protection and conservation of the marine environment and preservation and recovery living marine resources», does not specify the circumstances, conditions and limits of that installation and use, without even clarifying whether it covers only marine areas or also land areas of the Portuguese coast, not differentiating the regime, depending on the areas to be covered, nor depending on the type of equipment to be used (fixed cameras or drones), not fulfilling the function of predictability regarding the processing of personal data and likely consequences for the fundamental rights of citizens.

21. Taking into account that this extension of purposes implies the extension of the legal restriction on the fundamental rights of citizens, in particular the rights to respect for private and family life and the right to protection of personal data, provided for in Law no. 95/ 2021, it is essential to reconsider this legislative option, seeking to delimit the specific conditions and specific limits for the use of video surveillance systems with the aim of protecting the marine environment, especially in bathing areas or in areas intended for similar enjoyment purposes located on the Portuguese coast .

22. Thus, with the reasons set out above, the CNPD recommends:

The. the legal ban on capturing and recording sound for the purpose of protecting and conserving the marine environment and preserving and recovering living marine resources, due to its lack of suitability for this purpose;

B. the prohibition of capturing and recording images in bathing areas and areas intended for similar enjoyment purposes, given the excessive degree of interference in the right to reserve private and family life in this context;

w. the definition of a specific regime for the use of drones in the various maritime areas, excluding the coastal zone.

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