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OPINION/2020/80

I. Order

1. On November 22, 2019, by order of the Assistant Secretary of State and Internal Administration, an opinion was requested from the National Data Protection Commission (CNPd) on the request for authorization to expand the video surveillance system in the city of Amadora, submitted by the Public Security Police (PSP).

Following the request by the CNPD for additional information, dated January 16, 2020, on June 12, 2020, additional clarifications were sent, as well as the impact assessment on data protection relating to that system.

The CNPD assesses the request under the terms and for the purposes of Law No. 1/2005, of 10 January, amended and republished by Law No. 9/2012, of 23 February, which regulates the use of surveillance systems by video cameras by the security forces and services in public places of common use, for capturing and recording image and sound and their subsequent processing.

II. appreciation

1. Object of the opinion to be issued under the terms of article 3 of Law No. 1/2005, of 10 January

Pursuant to Article 3(2) of Law No. 1/2005, of January 10, as amended by Law No. 9/2012, of February 23 (hereinafter, Law No. 1 /2005), the CNPD's opinion is limited to pronouncement on the compliance of the request with the rules regarding the security of the treatment of the collected data, as well as on the special security measures to be implemented adequate to guarantee the entrance controls in the premises, of data carriers, insertion, use, access, transmission, introduction and transport, as well as verification of compliance with the duty of information and before whom the rights of access and rectification can be exercised.

In accordance with the provisions of the same legal precept and in paragraphs 4, 6 and 7 of article 7 of that law, the CNPD's opinion is also subject to respect for the prohibition of installing fixed cameras in areas that, despite located in public places, whether, by their nature, intended to be used in guarding or the use of video cameras when the capture of images and sounds covers the interior of an inhabited house or building or its

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dependency, or when this capture directly and immediately affects people's privacy, or results in the recording of conversations of a private nature.

The CNPD must also verify that all persons appearing in recordings obtained in accordance with this law are guaranteed the rights of access and elimination, with the exceptions provided for by law.

Pursuant to paragraph 7 of article 3 of the same legal instrument, the CNPD may also formulate recommendations with a view to ensuring the purposes provided for by law, subjecting the issuance of a totally positive opinion to the verification of completeness of compliance with its recommendations.

## 2. Processing of personal data not legitimized by Law No. 1/2005

Notwithstanding, under the terms of the legal powers defined in Law no. 1/2005, it is not up to the CNPD to pronounce on the proportionality of the use of video surveillance systems in public places of common use for the purpose of protecting people and property, this competence already exists when the cameras are installed in areas that are, by their nature, intended to be used as a guard or to capture images or sound covering the interior of an inhabited house or building or its dependence or affect, directly and immediately, the privacy of persons, or results in the recording of conversations of a private nature (cf. paragraphs 4, 6 and 7 of article 7 of Law No. 1/2005).

However, the expansion of the video surveillance system in the city of Amadora<sup>1</sup> implies the processing of personal data which, due to its scope and extent, seems to significantly affect the private life of people who circulate or are in that city.

<sup>1</sup> As stated in the authorization request for the expansion of the video surveillance system, the aim is to fully or partially cover a wide range of arteries in the city of Amadora, "taking into account that these are the areas with the highest crime rate in the Central area". of the Municipality of Amadora - specifically those [headquartered] in the parishes of Mina de Água, Encosta do Soi, Venteira, Faiagueira-Venda, Águas Livres and Aifragidé', using a total of 141 chambers for this purpose. In addition to the extent of the processing of personal data, it should also be considered here that such cameras have the ability to rotate and enlarge the image, which means the ability to capture, in all directions and with great acuity, images of people and vehicles. .

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It is not intended here to discuss the need for this extension, but rather to refocus the analysis of the request on the adequacy of the processing of personal data for the legally foreseen purpose invoked by the applicant.

It is stated in the request that the purpose of the treatment is to guarantee the protection of the safety of people and goods, public and private, as well as to ensure the prevention of crimes in which there is a reasonable risk of their occurrence, a purpose that has a legal framework (cf. .(1)(c) of Article 2(1) of Law No. 1/2005), it should be noted, from the outset, that the fight against "incivility" or the prevention and deterrence of 'anti-social behavior', as well as the need for the system to create a 'feeling of security'. It so happens that these grounds are clearly outside the scope of application of Law No 1/2005, in particular Article 2(1)(c). In fact, this specific legal provision only legitimizes the use of video surveillance systems to support the prevention or repression of conduct that effectively jeopardizes the safety of people and property - and for that reason, the prevention of illicit conduct qualified as crime - because only these assume sufficient relevance to justify the restriction of fundamental rights of citizens, such as the right to reserve or respect for private life and the right to freedom. Incivilities or other conducts that, even if illegal, are in tension with the mere social order, deserve, at most, a judgment of lesser censorship by the legal system and, therefore, do not justify the legitimacy of the restriction of rights, freedoms and guarantees through this type of information systems.

More worrying is the reference, repeated with regard to cameras no. 62 to 139, that they are intended to "monitor the movement of people, vehicles and bends (cf. Annex K - Individual camera files). The intention to use a video surveillance system, with the scope and extension of the one considered here, to monitor the movement of people and vehicles goes far beyond the legally defined purpose, having, in fact, no legal framework.

The safety of people and goods and crime prevention are not the direct basis for the permanent monitoring and tracking of people (and vehicles) in the public space, precisely because this is a different purpose than that. It may be assumed that, by pursuing this, it is still possible to contribute to the achievement of the purpose set out in subparagraph c) of paragraph 1 of article 2 of Law No. 1/2005, but the objectives are distinct and this difference is not just one of degree of intensity. The permanent monitoring of

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people, vehicles and goods on the public roads of the city of Amadora guarantees the monitoring and control of people (in terms of travel, human interactions in public spaces and other behaviors), surpassing, as mentioned, the purpose of criminal prevention and repression .

And this objective is further reinforced by the reference in the PSP's request to the use of Artificial Intelligence technologies and a biometric facial recognition system, which, as will be explained further below, are likely to enhance this control.

Now, since the CNPD is not insensitive, as no one is certainly insensitive in Portuguese society, to the need for people to feel safe to enjoy their freedom and the other fundamental dimensions essential to the development of their personality, a need invoked in the reasoning accompanying the request - even if the aforementioned reasoning is presented in a sensationalist style, which undermines the objectivity that an official document would claim -, it must not be forgotten that national law sets clear presuppositions for the use of video surveillance systems, first of all the admissible purposes, and that, therefore, apart from these presuppositions, no public body can use these auxiliary means for its activity.

It is recalled that, as stated in the grounds for the request, the fundamental right to reserve private life corresponds, in the context of the public space, to a right to anonymity. In fact, it was in the sense of right to be left alone that the right to privacy was first affirmed, and it is undeniable that Article 26 of the Constitution of the Portuguese Republic (CRP) and Article 7 of the Charter of Fundamental Rights of the Union (Charter) also protect you in this dimension. For its safeguard, as well as for safeguarding the fundamental right to freedom, in particular of movement in Portuguese territory and in public space (cf. article 27 of the CRP and, in the territory of the Member States of the European Union, article 6) of the Charter), Portuguese law defined the set of purposes of public interest that can justify the compression of these fundamental rights and that relate, either to the fundamental right to security and the public interest of security, or to the right to property. But the legal regime, as it could not fail to be, seeks to reconcile the different rights and interests that it considered relevant so as to prevent the affectation of the essential content of the fundamental rights of citizens (hence the limits defined in paragraphs 4, 6 and 7 of article 7 of Law no. 1/2005) - cf. Article 18 of the CRP and Article 52 of the Charter. This balance must be achieved precisely in the authorizing act

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of the Minister of Internal Administration (or of the delegated body), always safeguarding the essential content of the fundamental rights to privacy and freedom.

It is true that freedom also depends, for its full enjoyment, on security - as, incidentally, is underlined several times in the grounds of the request, where one can read that “a (very significant) part of the population tends to constrain their movements as a function of the perceived level of security, which - yes - represents a genuine and realistic loss of *Liberdade*”. But it is no less certain that if the guarantee of security - founded on freedom itself - implies a restriction of freedom in such terms that it is affected in its essential core, then the *raison d'être* of this restriction and the *raison d'être* of its realization ceases. of security.

However, monitoring the movement of people, vehicles and goods on the different public roads in the city of Amadora implies an unbearable control over the movement and behavior of people in terms of affecting, not only their privacy, but also their freedom, from the outset by strength of the (very easy) possibility of tracking citizens' movements and behavior. It is therefore important to emphasize that the declared objective of monitoring the movement of people, vehicles and goods is not included in Law no. and of freedom.

In fact, the restriction of these fundamental rights with this intensity presupposes the prior suspension of their exercise, as happened with the decree of the state of emergency during an initial period of the pandemic. It is recalled that the suspension of the exercise of freedom of movement made it lawful for the security forces and services to monitor the movements of citizens to guarantee the effectiveness of the imposed social confinement, some of which implied, based on their need, the restriction of the right fundamental to respect for private life. It is only within that framework, defined in Article 19 of the CRP, that a restriction affecting the essential content of fundamental rights is tolerable, and even there, on a temporary basis and to the strictest extent necessary.

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3. Video surveillance in public places of common use in the city of Amadora for the purpose of protecting people and property and preventing crimes

It is intended to install 38 cameras in the city of Amadora, in addition to the 103 already existing, of which 5 are repositioned, for a total of 141 cameras.

The new cameras, which are of the BOSCH MIC IP starlight 7100 model, are equipped with video analytics features. It is worth noting, for example, that the Intelligent Tracking function, which they are equipped with, allows the system to automatically zoom and continuously monitor the movement of the "object" (target) selected by the operator - the object can correspond to a person or a vehicle. Cameras in the 7000i range also have the Camera Trainer function, a Machine Learning mechanism that allows selecting an "object" for recognition by the system in future image captures.

### 3.1. Use of Artificial Intelligence technologies and facial recognition

It begins by analyzing, due to its relevance to the legal sphere of citizens, the following reference in the request for reasons:

"The cameras have lighting, resolution and magnification capabilities that provide quality viewing, both at night and during the day, ensuring: recognition of individuals, under the terms of Regulation EC n.º 2252/2004, of the Council, of 13 December; face detection, motion detection and object detection will be abandoned'.

As the CNPD has already had the opportunity to emphasize at another headquarters, the use of Artificial Intelligence (AI) associated with video surveillance systems in public spaces can prove to be useful and therefore appropriate, under certain conditions, in pursuit of the purpose of protecting the safety of people and goods and prevention of the practice of crimes in places where there is a reasonable risk of their occurrence - the purpose that, under legal terms, can be pursued with the use of this video surveillance system.

But, even for the pursuit of the purpose of protecting the safety of people and goods in relation to criminalized conduct - where AI may prove to be adequate -, the use of this technology, especially soft recognition, because it allows the tracking of displacement and people's behavior, it lacks a specific demonstration of the need for its use, which in the specific case does not happen. In fact, at the point

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none of the aforementioned reasoning explains the need for this specific technology and functionality: neither in Annex B, where the technical characteristics of the system are described, nor in the reasons presented in Annex D; nor in the clarifications provided in the meantime and in the impact assessment on data protection, in which the analysis of this

technology is omitted.

In addition, the lack of description of the algorithms involved in the comparison and detection of patterns, the lack of specification of who is responsible for defining these patterns and also the omission of specification of the criteria involved in these patterns (e.g. which visual patterns the system uses to differentiate a man from a woman; what are the configured tolerance rates for false positives/negatives), make it impossible to assess their suitability and necessity for the purpose of criminal prosecution.

It should be noted that the use of video surveillance systems with AI technological solutions, in particular soft recognition, is likely to generate a high risk for people's rights, freedoms and guarantees, namely the rights to respect for private life, freedom and equality, since the risk of traceability of behaviors and habits, as well as the selection of physical and biometric characteristics for video analytics, can generate the conditioning of freedom of action and discriminatory controls from certain profiles. To that extent, the impact assessment carried out in compliance with the provisions of article 29 of Law No. 59/2019, of 8 August<sup>2</sup>, must necessarily focus on the use of this technology in this context.

And it cannot, at all, intend to conclude without further ado about the suitability and necessity of using a specific technological instrument (which is especially recognized for its impacting dimension on people's rights and freedoms) just for the sake of security, simplifying reasoning with the conclusion of the preponderance of this value over individual rights and freedoms. In reality, the intelligent search for archived images and, specifically, the detection of abandoned objects is based on algorithms programmed to respond to specific stimuli and movements, but, as has been highlighted, at no point are the elements that integrate and complement the request clarified. which algorithm to use, which assumptions it will start from and which

<sup>2</sup> Law approving the rules on the processing of personal data for the purposes of preventing, detecting, investigating or prosecuting criminal offenses or enforcing criminal sanctions, transposing Directive (EU) 2016/680 of the European Parliament and of the Council, of 27 of April 2016.

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responses (outputs) to be achieved. Without this information, it is not possible to understand whether the results of its use, and on the basis of which the PSP will make decisions on the targeted citizens, are or are not discriminatory and, therefore,

inadmissible under the Constitution of the Portuguese Republic.

Thus, under the terms in which the use of this technology is presented, the opinion of the CNPD, regarding its use, can only be negative.

But the present request to extend the video surveillance system goes further. It provides for the use of facial recognition, when referring to “individual recognition, under the terms of Regulation CEn.02252/2004, of the Council of 13 December”. It is true that this diploma is referred to in subparagraph b) of no. 1 of the Annex to Ordinance no. 372/2012, of 16 November. Simply, the European diploma cited lays down rules for security features and biometric data in passports and travel documents issued by Member States, seeking to ensure the harmonization of security features, including biometric identifiers. Now, taking into account the object and scope of this European Union diploma, designed to guarantee the identification of people when entering and leaving the Schengen area and the Union, it does not serve to legitimize facial recognition within a city. Let's see. Given that the processing of biometric data intended to unequivocally identify a natural person can only be carried out in the circumstances specified in paragraph 1 of article 6 of Law no. The lack of legal basis for carrying out the processing of personal data via facial recognition in a video surveillance system in a public space such as the city of Amadora is all too evident. In fact, the aforementioned article only considers such processing legitimate if it is strictly necessary, if it is subject to adequate guarantees for the protection of the rights and freedoms of the data subject and if: it is authorized by lei, is intended to protect the vital interests of the data subject data subject or another natural person or if it is related to data manifestly made public by the data subject.

In addition to the need for its use not being demonstrated at any point in the reasoning, neither are there adequate guarantees of protection of rights and freedoms taking into account this specific technology, nor is it focused

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in the assessment of the impact on data protection presented, none of the legal grounds provided for in that article is verified.

In fact, there is no law providing for its use in association with a video surveillance system in public spaces; nor can the systematic and generalized use of the video surveillance system with facial recognition be based on the protection of the vital interests of the data subject himself or of third parties, because it cannot be said that there is a permanent danger to the lives



of people in that municipality. or systematic. Finally, the third plea - data manifestly made public by the respective holder - does not, of course, apply to biometric data, since the database from which facial recognition would be carried out results from the collection of biometric data carried out by law<sup>3</sup>, therefore, the further treatment of the same cannot be attributed to an alleged will of the holder.

Thus, it is not possible to achieve how one can intend to associate the use of facial recognition technology with the video surveillance system in the city of Amadora.

It should be noted, however, that generalized facial recognition in a city will always constitute a measure that requires a particularly reinforced foundation, considering the risk of controlling citizens that its use by security forces necessarily implies. There is not only an affect on individual freedom of movement and behavior. There is also a high risk of disruption to democratic society, as has been demonstrated elsewhere in the world. Therefore, the national legislator can only proceed to legitimize such a solution in very special circumstances, spatially and temporally delimited and under precise and clearly defined conditions and criteria for use. It is essential to ensure, with regard to this type of technology, the predictability for citizens of the conditions and consequences of data processing of this nature and impact. In particular, consideration should be given to the types of crimes that may justify their use and to what extent it proves to be adequate to prevent or repress these illicit acts and in which exact territorial areas of a city this suitability and need manifests itself.

As the CNPD underlined the obligation to carry out the impact assessment on data protection imposed by article 29 of Law No. 59/2019, of 8 August, it is

3 Whether the civil identification database or the databases created within the scope of criminal investigation.

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it is incomprehensible that the assessment presented in the meantime is silent on this aspect of the system.

Considering that there is a set of personal data that are subject to a specially reinforced protection regime - those provided for in paragraph 1 of article 6 of Law no. 59/2019, of 8 August - and that n. 2 of the same article prohibits the creation of profiles that lead to the discrimination of natural persons based on these data, the CNPD understands that the use of this type of biometric system must be, at the very least, preceded by a set of precise rules for users thereof, in order to limit the risk of

discrimination and infringement of Article 6 of that law. Without this, it can only conclude that it is inadmissible.

### 3.2. Other aspects of the processing of personal data

Now considering other technical characteristics of the video surveillance system, it is important to highlight the following aspects that give rise to reservations to the CNPD.

3.2.1. It is stated in point 7 of Annex D that accompanies the request, that “the video cameras guarantee the creation of privacy masks, in order to omit the image of private areas (doors, windows, balconies, terraces of residential buildings). , backyards, etc.)', with a view to complying with the limits set out in paragraphs 6 and 7 of article 7 of Law No. 1/2015.

However, in the supplementary information, it is clarified that “[there is the possibility of deactivating the masks by operators, but only in strictly necessary situations of a criminal nature of a greater kind even, with authorization from the Division Command, this procedure being duly registered in report.”

Besides there seems to be a contradiction between the statement and the subsequent statement that “masks can only be created, changed and deleted directly on the camera, so no operator has access to this functionality. Only available to the system administrator”, the CNPD considers that this possibility violates the provisions of paragraphs 4, 6 and 7 of article 7 of Law No. 1/2005. In fact, if the law imposes as a limit to the treatment the existence of solutions that prevent the privacy of citizens from being affected when they are in their homes or other dependencies, as well as in public places intended for use with protection, the video surveillance system cannot allow the removal of this limit, under penalty of a possible authorization to be issued in this procedure violates article 7 of Law No. 1/2015.

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In any case, it is always emphasized that, even if this were admissible, the security solution adopted would be manifestly insufficient to guarantee the integrity of the system configuration, since the (re)storage of the password after its use does not guarantee the confidentiality thereof. It would therefore be imperative that each use of a password be followed by the generation of a new password and consequent storage in a safe place.

Furthermore, for the purposes of system auditability, it would never be sufficient to record the procedure in a report. It would be essential to ensure that the system itself produced a log of this operation with the identification of the user, the date and time of

the event, and the deactivated masks.

Thus, the CNPD considers that the deactivation of masks intended to guarantee privacy is not admissible, under penalty of violating the provisions of paragraphs 4, 6 and 7 of Law no. 1/2005.

3.2.2. With regard to the system's auditability guarantees, even after providing additional information, it was only clarified that /ogs existed, without confirming that the records are carried out in an encrypted form, digitally signed and time-stamped. To that extent, the system does not seem to comply with the provisions of paragraph 3 of article 4 of Ordinance no. 59/2019, of August 8, and therefore compliance with this requirement must be ensured.

As for the conservation period of /ogs, this cannot be limited by the capacity of the database. Therefore, given that a storage period of two years has been determined, in the event that the maximum capacity indicated (4GB) is exceeded, the export of information to another file must be guaranteed.

3.2.3. Regarding the workstations (desktop) that connect to the videowall, the screen capture function must be deactivated, in order to comply with the legal duty to ensure, from the moment of designing the system, the necessary measures to guarantee respect for the data protection principles, in particular those provided for in subparagraphs c) and f) of paragraph 2 of article 4 of Law n.º 59/2019, of 8 August.

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In the same way and with the same legal foundations, the peripherals existing in the Image Monitoring Center must be deactivated, reinforcing that it is not admissible that the workstations have permissions to extract or reproduce images, a function that must only be possible on dedicated machines.

3.2.4. Regarding the maintenance of the video surveillance system, because it is directly related to information security and the system's ability to fulfill its purpose, it is important to underline that this obligation falls on the data controller, regardless of who the owner of the data is. video cameras and other equipment that make up the system.

Establishing Law No. 1/2005, in paragraph 2 of article 2, that the person responsible for processing the data is the security force with jurisdiction in the capture area or the requesting security service, any subcontracting in a company to ensure the maintenance or replacement of equipment must be formalized, contractually, with the PSP. It is not excluded that the PSP subcontracts the Municipality of Amadora, which may subcontract companies, under the terms regulated in article 23 of Law

### III. CONCLUSION

It is not within the competence that is legally attributed to it to comment on the concrete grounds for extending the video surveillance system in the city of Amadora, the CNPD, with the arguments set out above:

1. Highlights that:

The. The incivilities or other conducts that, although illegal, present themselves in tension with the mere social ordering do not justify the legitimization of the restriction of rights, freedoms and guarantees through this type of information systems;

B. In the same way, the intention to use a video surveillance system (in terms of cameras nos.

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legally defined invoked in this procedure, not having, in fact, any legal and constitutional framework;

And, therefore, it understands that the processing of personal data carried out with the use of the video surveillance system in the city of Amadora must stick to the purpose of protecting the safety of people and property in relation to criminalized conduct and criminal prevention, in accordance with the law and the Portuguese Constitution.

2. Even so, even for this purpose, the use of Artificial Intelligence (maximum, of soft recognition and Machine Learning solutions) in video surveillance systems lacks a specific framework in terms of assumptions and conditions or limits of its application, which , in this case, it does not exist, having not even been the subject of an assessment in the presented data protection impact assessment; in these terms, the CNPD understands that its use is not admissible.

3. The use of a biometric facial recognition system in the city of Amadora also lacks specific legal grounds and is therefore clearly prohibited.

4. The CNPD also recommends correcting the aspects of the processing of personal data carried out using the video surveillance system explained in point 3.2.

Lisbon, July 17, 2020

Filipa Calvão (President, who reported)

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