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/. NATIONAL COMMISSION « - DATA PROTECTION

RESOLUTION/2020/424

## I. Order

The Regional Secretariat for the Sea, Science and Technology (hereinafter, SRMCT) submitted to the National Data Protection Commission (hereinafter, CNPD) the processing of personal data resulting from the use of video surveillance systems for monitoring coastal areas with restrictions on fishing activity in the Autonomous Region of the Azores, accompanied by the corresponding impact assessment on data protection.

The use of such a system «has as its main objectives: 1) To reduce situations of illegal use of these areas by unauthorized vessels; 2) deter attempts to use these areas with the dissemination of remote surveillance of the burrow; 3) increase surveillance in these areas and despoil nautical means of inspection whenever necessary; 4) contribute to the achievement of the public interest objectives that guided the creation of the areas to be monitored; 5) reduce operating costs and optimize inspection and control actions.

The CNPD is competent to assess the processing of personal data subject to the impact assessment on data protection, pursuant to paragraph 2 of article 36, as well as paragraph 2 and paragraph a) of paragraph 1. 3 of article 58 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of article 3. , in paragraph 2 of article 4 and in paragraph 2 of article 6, all of Law n.º 58/2019, of 8 August.

## II. Analysis

As stated in the data protection impact assessment (AIPD), the collection and transmission of personal data, for the purpose of real-time viewing and recording, will be done using fixed video surveillance cameras installed in coastal areas. , and also through systems coupled to remotely manned aircraft (drones).

The SRMCT, as data controller, specifies that the data concern “(natural) persons and nautical means that are in the areas under surveillance. Includes the registration of the vessel identification set'. From the stated,

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it follows that the information collected through the video surveillance system is complemented or cross-referenced with that existing in the information system relating to vessels.

According to the official, "it is intended to record exclusively images without the use of audio recording". Within the framework of the SRMCT, it will be up to the inspectors of the Regional Fisheries Inspection of the Azores to carry out the different image processing operations. But it admits that the other authorities with competence to intervene within the scope of SIFICAP (Integrated Information System on Fishing Activity, regulated in Decree-Law No. 79/2001, of 5 March), specifically, the National Maritime Authority and the Guarda Nacional Republicana, have access to the images transmitted in real time, through a protocol to be signed with the SRMCT.

The present analysis aims to verify whether the conditions for carrying out the treatment, which is the object of assessment in the impact study sent to the CNPD, are in accordance with the legal regime for the protection of personal data, especially with regard to measures that allow the elimination or reduction of risks arising from it for the rights and interests of data subjects.

1. It is therefore important, first of all, to consider the legal framework for the processing of personal data.

It is recalled, in this regard, that the capture of images of natural persons that identify them or allow them to be identified, by crossing them with other information, corresponds to the processing of personal data, under the terms of subparagraphs 1) and 2) of the Article 4 of the GDPR. In this context, the capture of images of identified or identifiable vessels (through a registration, name or through information associated with georeferencing) also translates into a processing of personal data by allowing the processing of information relating to natural persons associated with such vessels in administrative records correspondents (e.g., crew, owner).

For this reason, the processing of personal data resulting from the use of video surveillance systems must be based on one of the legal conditions provided for in paragraph 1 of article 6 of the RGPD.

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The controller invokes a set of legal diplomas on which the basis for the lawfulness of the processing resides, pursuant to Article 6(1)(c) or e) of the GDPR.

However, neither Decree-Law no. 29/2010/A, of 9 November, last amended by Regional Legislative Decree No. 11/2020/A, of

13 April, when, in its article 178-A, it recognizes fisheries inspectors the power of making photographic records and video images, legitimize the use of video surveillance systems to focus on public space.

Not only because the first diploma mentioned is specifically providing for and regulating a surveillance system by georeferencing, but also because the diplomas in question must be read in accordance with the provisions of Law No. 1/2005, of 10 January, amended and republished by Law No. 9/2012, of 23 February, which regulates the use of video camera surveillance systems by security forces and services in public places of common use, for image capture and recording and sound and its subsequent treatment. This is because, under the terms of the Constitution of the Portuguese Republic (article 18 and subparagraph b) of no. citizens' guarantees in this context.

To that extent, under penalty of contravening the law of the Republic, the power recognized in article 178-A of Regional Legislative Decree No. 29/2010/A, of November 9, must be interpreted as legitimizing the capture of images of the inside establishments or vessels, in certain circumstances, but not with the scope to legitimize the permanent capture of images of the maritime domain or other land areas adjacent to it.

Recognizing the importance of the objectives pursued with the function of monitoring fishing activity and other activity carried out at sea and the need for efficiency in the performance of the same and effectiveness in the management of resources, this function cannot, however, legitimize, for on its own, contrary to the conditions and limits defined in Law no. 1/2005, the use of video surveillance systems by administrative entities not covered by the subjective scope of application of this legal instrument.

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In fact, the controller invokes Law No. 1/2005, considering that this processing would fall within the “purpose of protecting assets, namely fishery resources”, but forgetting that the law actually has a scope of application limited to security forces and services.

In addition, the use of drones, «with cameras and other sensors for collecting information», does not have, as the CNPD has been emphasizing, a legal framework.

As this Committee stated in Opinion/2020/60, of 3 June<sup>1</sup>, the CNPD understands that Law No. literal, nor its ratio, reflects the balance between the underlying interests of video surveillance with that scope and impact and

The scope and intensity of the restriction of the fundamental rights of individuals<sup>2</sup>.

In fact, the use of video surveillance cameras attached to these aircraft, due to the special mobility of these devices, has a much greater impact on the privacy and freedom of citizens than that of a fixed video camera, and is therefore susceptible to very high measure the fundamental rights to respect for private life, protection of personal data and freedom. Indeed, this type of equipment facilitates and promotes the possibility of controlling people's movements and, therefore, knowing their location and tracking their action. As the CNPD maintained in Opinion No. 41/2014, of May 27, the use of drones or RPAS power in such a way,

1 Available at [https://www.cnpd.pt/home/decisooes/Par/PAR\\_2020\\_60.pdf](https://www.cnpd.pt/home/decisooes/Par/PAR_2020_60.pdf)

2 In fact, as the CNPD has already had the opportunity to explain, even if it were admitted that the literal content of Article 1(2) of the diploma allows the conclusion that the use of drones falls within the scope of this diploma, the consideration of the other hermeneutical elements rules out such a conclusion. In particular, it is important to pay attention to the spirit of the law, in order to verify whether the regime provided for therein includes rules that reflect the consideration of the different rights and interests at stake in the face of the use of technical means similar to video cameras endowed with high and special mobility, that is, , simplifying, to see if the situation in question still fits in the ratio of the diploma.

Now, from reading the diploma, and specifically, its articulation with the Ordinance that will guarantee its execution - Ordinance No. legal framework is not suitable for the use of remotely manned aircraft with video cameras attached. Indeed, the purposes for which the aforementioned law allows the authorization of video surveillance by security forces, listed in paragraph 1 of article 2 - here in particular, the protection of the safety of people and property and the prevention of crimes - only seem to be able to be reached if the cameras are capable of allowing the recognition and identification of individuals (cf, p. iii) of subparagraph b) of the Annex referred to in article 2 of Ordinance no. 372/2012).

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with such scope and with such intensity the restriction of fundamental rights to the privacy of private life, the protection of personal data and freedom, that the balance of these rights with the values justifying that use cannot be referred to the discretion of the Public Administration , without the legal definition of more delimited decision-making criteria. And this, whatever the nature of the entity or administrative body competent to carry out such consideration.

In short, not questioning the goodness of the intention behind the use of this equipment, the CNPD does not find a legal basis for the use of remotely manned aircraft for the purpose of video surveillance of the fishing activity.

Thus, the use of the video surveillance system, composed of fixed video cameras and video cameras or other devices coupled to drones, will only be admissible, in the current legal framework, if measures are adopted and conditions of use are defined that guarantee that it is not possible the identification, directly or indirectly, of natural persons, which, however, may not prove to be adequate for the declared purpose of monitoring the fishing activity.

2. Notwithstanding that there is no legal basis for the processing of personal data through the use of video surveillance systems with fixed cameras and cameras and other sensors coupled to drones, the CNPD also points out the following aspects of the processing that were not properly explained or analyzed in the AIPD.

2.1. In point 12 of the AIPD ("Identification of the legal framework for the use of a video surveillance system, with the identification of possible processing of special categories of personal data"), it is mentioned that the intention is to carry out inspection through the use of "video surveillance, either through fixed cameras, either through cameras and other sensors for collecting information installed in unmanned aerial vehicles, commonly known as "drones">. 3

3 Accessible at [https://www.cnpd.pt/home/decisooes/Par/40\\_41\\_2014.pdf](https://www.cnpd.pt/home/decisooes/Par/40_41_2014.pdf)

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In none of the sections that make up the AI PD is there a description about which other sensors for collecting information to be installed in drones can be. Note that different types of sensors may be involved, the use of which may generate different risks for data subjects. The use of thermal cameras, for example, can make it possible to identify the activity of crew members inside recreational boats, a processing of personal data that seems excessive in the context in question.

Thus, the possible use of other elements for collecting information other than video cameras would have to be specified, with identification of the exact equipment that is intended to be used, as otherwise it is not possible to assess the impact of its use on the rights of the holders, nor does it justify its use.

2.2. Still with regard to video cameras, there is no identification or description of remotely manned aircraft models, which would always jeopardize the assessment of the risks that could arise from their use, depending on their features and capabilities.

2.3. Finally, at no point in the AIPD are measures, of a physical or logical nature, presented that allow mitigating the impact of

capturing images through fixed cameras.

However, in the case of dome-type cameras, equipped with the ability to capture images at a 360° angle), it is assumed that they can capture images of terrestrial areas. If, on the one hand, it is true that some of these areas may be relevant for inspection by the Regional Fisheries Inspectorate, on the other hand, there will certainly be areas where the capture of images is not at all relevant for this type of inspection or, even if it could prove to be appropriate, this should be considered excessive, as it implies the affectation of fundamental rights to the preservation of privacy and freedom (cf. subparagraph c) of paragraph 1 of article 5 of the GDPR). It would therefore be important to define mitigating measures (e.g., physical or logical masks) that would prevent the capture of images of land areas where it is not necessary to monitor fishing activity or protect fishing resources.

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Incidentally, in this regard, it is worth noting that the relatively open provision of access to images in real time by other administrative authorities, even if referenced to the context of the SIFICAP, does not prevent the possibility of suggesting, in certain concrete situations, patterns of capture of images that translate into a diversion of this treatment for other purposes that still fall within the attributions of those authorities, with a risk to the rights, freedoms and guarantees of the holders.

### III. Conclusion

Although it is recognized that the use of video surveillance systems over the maritime public domain to continue the monitoring function of fishing activity is appropriate, the CNPD believes that there is no legal basis for carrying out the processing of personal data that such use implies, since that the presuppositions defined in Law No. 1/2005 are not fulfilled (first of all because in this case the entity responsible for the treatment is not covered by the subjective scope of application of this legal diploma), and the other legal diplomas, in particular the legislative decree invoked, must be interpreted in accordance with that general law of the Republic, as it is a matter within the reserved competence of the Assembly of the Republic.

In these terms, the use of the video surveillance system, composed of fixed video cameras and video cameras or other devices coupled to drones, will only be admissible, in the current legal framework, if measures are adopted and conditions of

use are defined that guarantee not to be identification, directly or indirectly, of natural persons is possible, which, however, may not prove to be adequate for the declared purpose of monitoring the fishing activity.

Approved at the meeting of September 15, 2020.

Filipa Calvão (President)

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