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National Data Protection Commission

OPINION/2022/32

I, Order

1. By order of the Assistant Secretary of State and Internal Administration, received on January 31, 2022, the National Data Protection Commission (CNPD) was asked for an opinion on “the draft decree-law provided for in no. article 10 of [Law No. 95/2021, of December 29]», which establishes the characteristics and minimum technical requirements and rules for the use of portable cameras for individual use, as well as the form of transmission, storage and access to the data collected.

2. The CNPD issues an opinion within the scope of its attributions and competences, as an independent administrative authority with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57, subparagraph b) of Article 58(3) and Article 35(4), all of Regulation (EU) 2016/679, of 27 April 2016 - General Data Protection Regulation (hereinafter GDPR) , 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 of August, which implements the GDPR in the domestic legal order.

3. This draft decree-law (hereinafter, Project), regulates the technical characteristics and use of portable cameras for individual use (CPUI), commonly known as bodycams, as well as the processing of personal data carried out in this context, by the security forces in police action (cf. article 1 of the Project). It is recalled that the use of these devices was already the subject of a legal provision in article 10 of Law no. definition of the characteristics and rules for the placement, activation, signaling and use of said cameras, as well as the form of transmission, storage and access to the data collected; in the same article, the definition of the terms of authorization for the use of portable cameras for individual use is also referred to the decree-law.

4. The Project begins by defining the rules for the use of portable cameras for individual use (chapter II), and then focuses on the conservation of personal data (chapter III), ending with the definition of the technical characteristics of the cameras (chapter IV). This assessment will follow the same sequence, to assess compliance with the principles and limits defined in Law No. 95/2021, as well as in Law No. 59/2019, of 8 August.

5. Nevertheless, we will begin with two preliminary observations.

II. Analysis

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6. The first observation concerns the need to update the wording of paragraph 1 of article 4 of the Project, when it refers to 'this regulation'. Although it is understood that the provisions of this Project are the regulation of bodycams and their use, the truth is that the law of the Assembly of the Republic chose to recognize that the proper headquarters for the regulation of the processing of personal data arising from the use of such devices it is the legislative act of the Government and not the governmental ordinance - cf. no. 8 of article 10 of Law no. 95/2021 and article 11 of the draft law discussed at the Assembly.

7. The second observation, of a substantial nature, concerns the circumstance that the present draft decree-law, in several points, seems to forget the ratio legis of the provision of the use of bodycams, seeking to extend the purpose provided for in paragraph 1 of the article 10 of Law No. 95/2021. What is intended with the legal provision of its use is an individual record (of each agent) of the police intervention, thus aiming at the full protection of the fundamental rights of citizens in the context of the intervention of the agents of the security forces, therefore, also the protection of the fundamental rights of the agents.

8. In this context and for this purpose, the recordings are capable of functioning as a means of proving the terms in which a certain agent/citizen interaction takes place. But, considering this specific ability and this objective recognized by Law No. 95/2021, it is intended to use the recorded images and sounds as a means of proof of any illicit that occurs regardless of that interaction, or to serve purposes other than those listed. in article 3 of Law No. 95/2021, the legislative basis on which the Project is based already clearly goes beyond. It is recalled that the legislative competence in this matter is, under the terms of article 165 of the Constitution of the Portuguese Republic (CRP), of the Assembly of the Republic, which is why this

decree-law must stick to the aspects for which Law no. 95/2021 refers it, not extending the restrictions or conditions to rights, freedoms and guarantees beyond the measure defined by that legislative body.

9. It so happens that in some provisions of the Project, in particular in articles 5 and 10, the scope and purpose of the use of bodycams is extended far beyond the object and objective assumed in Law No. 95/2021, as will be shown later.

i. Use of Bodycams

10. A first note deserves the provision, in paragraph 2 of article 3 of the Project, of the possibility of the bodycams being fixed to another support or object (other than the agent's uniform or equipment). While this solution can only be adopted in exceptional and duly substantiated circumstances, it is still important to remember that the purpose of using these cameras is not to monitor (and record) the behavior of citizens in general, but to record the behavior of the agent. and the citizen (or the

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citizens) with which it interacts. In this sense, the hypothesis, for example, of agents attaching the bodycam to a selfie stick during the monitoring of a demonstration or meeting in a public space, at least as long as the exercise of the fundamental right to demonstrate and meet is peaceful, does not seem to be admitted, in the light of the principle of proportionality, in terms of necessity, taking into account the purpose of using the bodycams.

11. Next, it is important to consider the list of circumstances that justify the activation of the recording mode of the cameras, presented in paragraph 3 of article 5 of the Project.

12. It is recalled that Law No. 95/2021 limits the capture and recording of images and sounds through these cameras to situations of intervention by the security forces element, a concept that is later explained, by way of example, with reference to «occurrence of a criminal offense, situation of danger, emergency or alteration of public order». It is true that this statement is merely exemplary, but its terms seem to point towards a delimitation of the concept of intervention to cases with criminal relevance or, at least, with a special ethical-social relevance.

13. To that extent, the CNPD cannot fail to point out that the indication, in subparagraph a) of no. which is necessary, in terms of processing personal data, for the pursuit of the purposes listed in article 3 and the objective set out in paragraph 1 of article

10 of Law No. 95/2021.

14. First, because the concept of an administrative offense must always be defined in terms of the purposes set out in Article 3 of Law No. 95/2021, which do not extend to the prevention or repression of any and all illegal acts. misdemeanor.

15. Secondly, because in paragraph 1 of article 3 of that law, the pursuit of purposes such as traffic control and safety of people, animals and goods in road traffic, prevention and repression of road infractions, traffic control of people at the external borders, protection of forests and detection of rural fires, and support in external search and rescue operations, does not depend on or require the capture and recording of images and sound via cameras for individual use, since, according to with paragraph 1 of article 10 of Law no. 95/2021, this data processing aims to ensure “the record of individual intervention of an agent in police action”.

The. Circumstances underlying the activation of recording mode

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16. In the context of these legal purposes, any situations that reveal the need to capture and record images and sound through bodycams are already specified in the same paragraph 3 of article 5 of the Project, especially in paragraphs b) to d) - current aggression directed against the agent or against third parties, disobedience or resistance to legal and legitimate orders of the agent, verbal interaction in which insulting, insulting or defamatory statements are made against the agent or the police institution.

17. Furthermore, it would always have to be concluded that the capture and recording of image and sound in any and all intervention by a security force agent in the context of the practice of an offence. The restriction of fundamental rights,

especially the right to respect for private life, which the recording of images and sound implies, must be justified by the need to safeguard an important community interest or a fundamental right, not just any interest of mere social ordering. . That is why video surveillance in public spaces, when it involves the processing of personal data, is at the service of criminal prevention and repression or the safeguarding of people's lives (and now animals) and, only in certain well-defined circumstances, it may serve the purposes of preventing and repressing illicit acts of mere social order - but here, even so, because human dimensions or values that are especially relevant in society are considered to be at stake.

18. In short, the CNPD understands that subparagraph a) of paragraph 3 of article 5 of the Project violates the principle of proportionality to which the legal restriction of rights, freedoms and guarantees, under the terms of n. 2 of article 18 of the Constitution of the Portuguese Republic (CRP), by allowing the capture and recording of image and sound through bodycams whenever any offense occurs, when the other paragraphs of the same number ensure the capture and recording of image and sound in situations in which, in the context of the detection by the agent of an offence, there is an effective need to carry out that processing of personal data, for the individual recording of the agent's action, with a view to guaranteeing the fundamental rights (of the citizens, including the agent) and the constitutional values protected by the regime of Law No. 95/2021.

19. Thus, under penalty of considering as unnecessary and excessive the processing of personal data carried out under the terms of subparagraph a) of paragraph 3 of article 5 of the Project, in violation of the principle of proportionality, the CNPD recommends the deletion of the reference in this provision to 'or administrative offence'.

20. On the same grounds, the CNPD recommends the elimination of subparagraph i) of paragraph 3 of article 5 of the Project, and especially because the "operation to maintain public order" appears to be too broad a concept - dir it would even correspond to the generic function of the security forces -, not suitable, therefore, to densify the legal concept of intervention.

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21 Still on the same grounds, the CNPD recommends the elimination of the reference to "or administrative offense" contained in paragraph 4 of article 5 of the Project, in the light of the purposes specified in article 3 of Law no. 95/2021. And, even with

regard to these, bearing in mind that the purpose of bodycams, under the terms of paragraph 1 of article 10 of Law no. in the interaction between the agent and the citizens, it appears that the limits defined in Law no. of private life and individual freedoms.

22. A final note regarding article 5 of the Project, to indicate that, in paragraph 8, the non-inclusion of non-compliance with the provisions of paragraph 7 of the same article in the range of situations of non-compliance, on the part of the agent, which determine the investigation of police action and possible disciplinary liability is likely to impair the usefulness or suitability of these chambers for the purpose or purposes assigned to them by law.

23. At issue is the provision which provides that the recording must be uninterrupted until the conclusion of the incident that gave rise to the recording, unless specific circumstances dictate otherwise.

24. The fact that it is foreseen that the violation of rules prohibiting recording in certain circumstances (cf. paragraph 6 of article 5 of the Project) and of imposing norms of recording of police interventions in others (cf. no. 5 of article 5 of the Project) implies investigation of the police action and possible disciplinary responsibility of the agent and the same consequence is not foreseen in the case of interrupting the recording without adequate and detailed justification, it means the recognition to the agents of an autonomous space of decision to stop the recording, without guaranteeing effective control of the decision, to the detriment of the suitability of this means of evidence and to the detriment of the protection of the fundamental rights of citizens.

25. In other words, the solution found here does not prevent the risk of the agent not wanting part of his action to be captured and recorded, being of doubtful use for the purpose of proving his intervention.

26. Thus, the CNPD recommends the insertion, in paragraph 8 of article 5 of the Project, of the reference to the provisions of paragraph 7 of the same article.

B. Omission of legal regulation on the authorization of the bodycam system and the authorization of the use of bodycams

27. Article 10 of Law No. 95/2021 provides for two authorizations: the first, relating to the system of portable cameras for individual use, is the responsibility of the member of the Government who exercises control over the force of

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safety; the second, relating to the use of portable cameras for individual use, is the responsibility of the top manager of the security force, with the definition of the terms of this last authorization being referred to the decree-law (cf. paragraphs 1 and 2 of article 10 of Law No. 95/2021).

28. However, no reference is made to this authorization at any point in the Project, which, given the express reference, in paragraph 2 of article 10 of Law No. 95/2021, of the terms of authorization for the decree -Law, very strange.

29. Even the hypothesis of considering that the assumptions and conditions for authorizing the use of the cameras are those provided for in articles 4 and 5 of the Project seems to hamper the fact that paragraph 1 of article 5 of the Project delimits the situations provided for therein as presuppositions for activating the recording mode, distinguishing it from carrying the camera in active mode, which already corresponds to its use.

30. The difficulties in understanding this complex system of authorizations become more pronounced when considering Article 6 of the Project. It provides that “[t]he use of CPUI for image and sound capture is carried out in accordance with the orders or instructions of whoever commands the respective force [...]”. It is true that the force commander differs from the security force leader (cf., for example, articles 9, 10 and

21 of the PSP Organic Law, approved by Law No. 53/2007, of 31 August, amended by Law No. 73/2021, of 12 November), it is good to see that Article 6 of the Project is not regulating the authorization to use bodycams, for the purposes of paragraph 2 of article 10 of Law n.º 95/2021.

31. It is also worth noting the omission of regulation of the assumptions for the authorization of the member of the Government exercising management over the security force, provided for in paragraph 1 of article 10 of Law no. clarify under what assumptions or conditions the Government member authorizes portable camera systems for individual use. Law No. 95/2021 says nothing, and the same omission is verified in this Project.

32. The question that remains to be answered here is whether this ministerial authorization (or to be issued by the body to which the minister delegates authorizing competence) is a mere formality, without involving any appreciation and evaluation of

the system of portable cameras for individual use, or whether it is subject to the same substantive and procedural rules defined in Law No. 95/2021 for other video surveillance systems - an interpretation that the CNPD considers more in line with the ratio legis of this diploma, first of all due to the importance of prior verification that the system of the single-use chambers meets the technical requirements and is able to guarantee compliance with the legal limits to their use.

33. In short, the CNPD recommends the clarification and densification of the authorization regime that this Project intends to define, under the terms and for the purposes of article 10 of Law No. 95/2021, maximum of its number 2.

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ç. Principle of transparency and the moment of verbal announcement about the recording

34. With regard to the transparency requirements regarding the processing of personal data, Article 7(2) of the Project provides that '[t]he verbal announcement is made with the CPUI already in recording mode and consists of the sentence: "I inform you that I have started recording sound and image"».

35. However, this provision does not seem to be in accordance with the provisions of Law No. 95/2021, since the final part of Article 10(4) of this law requires that 'the start of recording is preceded by clearly perceptible warning'. Although it is possible to understand the reason for the forecast in the Project that the announcement is made after activating the recording mode, so that it is registered that the agent has fulfilled this duty, the truth is that the law that legitimizes the Project requires the prior announcement to that activation.

36. Thus, and to ensure compliance with Law No. 95/2021, the CNPD recommends that this Bill binds the agent to the duty of issuing the announcement twice: the first before triggering the aggravation - indicating that it will start the recording -, and the second already after the activation.

37. However, it should be noted that, in accordance with paragraph b) of article 13 of the Project, the system continuously records image and sound (see below, points 51 to 53), when it is not agent-triggered recording mode. Which means, in practical terms, that if the warning is made a few seconds before (up to 30 seconds before) the recording is triggered by the agent, the verbal announcement will always be recorded. Therefore, if this provision of paragraph b) of paragraph 2 of article

13 of the Project is maintained, it will suffice, to ensure its compliance with Law n.º 95/2021, to amend paragraph 2 of the Article 7 of the Project in the sense that the warning is given up to 30 seconds before activating the recording mode.

ii. Preservation of personal data

38. With regard to the chapter on “data retention”, it should be clarified that it regulates more than the operation of storing personal data in the system, as can be seen from the outset from the headings of Articles 10 and 11, ° of the Project. In this regard, it is noted that, although Article 9 refers to the storage of recordings in the system, this concept is only explained in Article 14 of the Project¹. At issue is «the system for managing and storing recorded images», which, strictly speaking, also covers recorded sound.

39. However, in addition to the operations of conservation, access and destruction of personal data, it is important to attend to the transmission of recorded data. And the Project is essentially silent about this. It is limited to providing in paragraph 3 of the 1 It should be noted, in this regard, that the mention in paragraph 1 of article 14 that it is “hereinafter referred to as a system” is systematically out of place, as it has been designated as such since article 9. ° of the Project.

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Article 9 that '[t]he transmission of recordings to the system must be carried out at the end of the service, under the supervision of a hierarchical superior or responsible police officer'. This rule is complemented by Article 14(3) of the Project, which provides that “[t]he process of transferring images recorded by CPUs, the system must guarantee their immediate encryption”. In addition to the doubt as to whether the encryption is only guaranteed in the system, and therefore at the end of the transfer process, it is also unclear why it refers only to the encryption of images and nothing is said about the sound.

40. In any case, the Project does not require encryption or encryption of recordings on bodycams, therefore not ensuring the

confidentiality and integrity of data from the moment of capturing and recording them.

41. It is also unclear where the agent responsible for the recording (the bodycam user) should proceed to identify the file (cf. Article 9(4)).

42. And, although the erasure or alteration of recordings by the police officer who executed them is prohibited, it is important to impose, in the articles of this Project, the duty to adopt technical measures that guarantee the impossibility of erasure or alteration, by the user of the bodycam, of the images and sound recorded on the camera and on the system.

43. Therefore, in order to guarantee the confidentiality and integrity of the personal data recorded (for example, in case of loss of equipment), adequate technical measures must be provided. For example, provision should be made for the storage unit on the bodycam to be non-removable; as well as the internal support for recording the images must be encrypted with a public digital key configured in the camera, which can only be decrypted with a system's private key, or, if this is not feasible, there must be an electronic record (log) in the camera downloading recordings.

44. With regard to the regime of access to recordings of images and sounds, therefore, to personal data, provided for in article 10 of the Project, paragraph 2 admits access for two circumstances that do not seem to have a framework in the Law No. 95/2021. At issue is access for the purpose of training security forces agents and for the purpose of verifying and monitoring the proper functioning of the equipment. Such purposes go beyond the purpose of individual registration for evidentiary purposes (referred to in paragraph 1 of article 10 of Law no. 95/2021, which delimit the use of video surveillance cameras and also of portable cameras for individual use.

45. The CNPD considers, therefore, that paragraphs d) and f) of paragraph 2 of article 10 of the Project must be eliminated, under penalty of violating Law n.º 95/2021, in particular, the list of purposes and objectives of capturing and recording images and sound by security forces in public space or access to the public.

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46. On similar grounds, and reproducing what has been said above, in points 12 to 18, the CNPD considers that the reference to 'or administrative offence' in Article 10(2)(a) should be deleted. .º of the Project.

iii. technical characteristics

47. Now considering the technical characteristics of bodycams, it is important to remember that the minimum technical requirements for their use must take care, at least, for the following aspects: physical security of the cameras and risk of loss of the device; protection of personal data recorded in the cameras; transfer of personal data to the storage system; cataloging and organization of the data record; management of the allocation of chambers; export of recorded data and submission to the Public Prosecutor's Office and guarantee of the data subjects' right of access.

48. Articles 9 and 10 of the Project contain some specifications that frame these concerns, but essentially they are listed in articles 13 and 14. However, as explained above, the Project does not provide sufficient technical measures necessary to guarantee the security, integrity, confidentiality and availability of recorded personal data.

49. Thus, in addition to the recommendations mentioned above, in points 42 and 43, the CNPD here points out some insufficiencies or omissions, as well as some technical requirements whose reconsideration is recommended.

50. First of all, it is recommended that the requirement set out in Article 13(1)(e) be reconsidered, as it is not clear that a lens with a horizontal angle of view of 40° is fully suitable for the purpose of its use - strictly speaking, it is enough for the agent to be very close to the object of his action or to be in an oblique body position in relation to this object in order not to capture images related to the behavior of the citizen or the action of the agent himself.

51. From a technical point of view, there are also doubts as to the susceptibility of guaranteeing, with a camera of this type, the quality of the recording necessary for the identification of people up to a distance of 7 meters from the camera - as required in subparagraph e) of no. 2 of article 13 of the Project -, in low light conditions, especially at dusk and during the night period.

52. The provisions of subparagraph b) of paragraph 2 of article 13 of the Project, in turn, give rise to substantial reservations. As mentioned above, according to this provision, the recording system of bodycams must "[have a standby mode that allows at least the 30 seconds prior to pressing the recording button to be recorded". This means, first of all, the continuous capture of images and sound as long as the camera is in active mode, even before activating the recording mode. What seems to mean that the camera records

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continuously, otherwise it would not be able to guarantee the recovery of images and sound until 30 seconds before the moment of pressing the record button.

53. But, in addition, the norm, by specifying «at least, record the previous 30 seconds», is leaving an opening for this recording to take place without regular deletion (e.g., every 30 seconds), before being able to remain recorded there images and sound to the limit of the camera's memory capacity. Such an opening clearly violates the conditions laid down in paragraphs 4 and 6 of article 10 of Law No 95/2021 and is therefore inadmissible.

54. The CNPD therefore recommends the elimination, in subparagraph b) of paragraph 2 of article 13 of the Draft, of the adverbial phrase “at least”, under penalty of gross violation of those legal precepts.

55. Also in the context of the technical requirements of the bodycam recording system, Article 13(2)(h) refers to the requirement to 'register, without possibility of alteration or removal, the date, time and location of the recordings made'.

However, the synchronization of the date and time is not required, nor are measures indicated to guarantee it. In fact, the Project is silent as to the source of the time of the equipment and the way and moment in which the adjustment with the Portuguese legal time is carried out. As the synchronization of these data is essential to the evidentiary function that the law assigns to the use of these cameras, it is recommended to densify this provision.

56. Finally, still with regard to article 13 of the Project, the omission of requirements relating to camera batteries is noted, which are an essential element in guaranteeing the ability of bodycams to meet the legally established objectives for their use.

57. In fact, nothing is mentioned regarding the responsibility for guaranteeing the charge of the equipment, nor regarding the means by which the agent is informed about the status of the battery and under what circumstances it must be replaced, and, above all, if the information is ensured. about the battery status of recorded images. The relevance of this last information for understanding cases of abrupt recording interruption is evident.

58. At the same time, it is also important to define rules regarding responsibility for ensuring that the camera assigned to the

agent has all the memory space available when it takes action, as well as the electronic recording (log) of the space available over time (also for that you can understand the situations of abrupt interruption of recording).

59. Finally, with regard to the storage in the system, Article 14 of the Draft must expressly provide for the deletion of the data recorded in the recording system of the cameras, once the transfer of the data to the storage system is completed.

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60. It is also recommended that Article 14 provides for clear rules on storage conditions. Although Article 10(3) of the Project states that "access to recordings is only allowed to agents duly accredited for the purpose, through the system, at a fixed workstation located in a police facility", it is not other essential requirements are established to ensure the confidentiality, integrity and availability of personal data and the auditability of their treatment. Therefore, it is recommended to provide for the guarantee of a reserved physical space, with restricted access, for the workstations dedicated to the storage and maintenance of bodycams, downloading of recordings, visualization and access to data recorded in the system. Access and permanence in such reserved spaces must be subject to an automatic control mechanism, which allows registration for audit purposes.

61. Article 10(4) also deals with the (electronic) recording of all access operations to the recordings recorded in the system, but in addition to indicating the date and time and the person responsible for the intervention, it must also require if the contextualization of access (for example, through a field for entering the number of the open process and in which the access is justified). This requirement may be contained therein or, alternatively, in paragraph 5 of article 14 of the Project.

62. Furthermore, it remains unclear whether the management and storage system assumes or allows for the centralization of this platform for a diverse set of organic units of the security force. If this is the case, it is important to consider adequate security safeguards in communications, as it becomes a distributed system in the National Internal Security Network.

III. Conclusion

63. The present draft decree-law seems to forget, in some of its provisions, the *raison d'être* of the legal provision for the use of bodycams, extending the purpose provided for in paragraph 1 of article 10 of Law n.º 95/ 2021. Bearing in mind that this law aims, with the individual registration (of each agent) of police intervention, the protection of the fundamental rights of citizens in

the context of the intervention of security forces agents, therefore, also the protection of the fundamental rights of agents , the CNPD recommends the elimination of the following provisions or mentions, as they imply unnecessary and excessive processing of personal data, in violation of the principle of proportionality:

- i. The reference to 'or administrative offence', in subparagraph a) of paragraph 3, in paragraph 4 of article 5 and in subparagraph a) of paragraph 2 of article 10;

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- ii. Article 5(3)(i) of the Project, also because the "operation to maintain public order" appears to be an overly broad concept, not suitable, therefore, to densify the legal concept of "intervention »;

- iii. Subparagraphs d) and f) of paragraph 2 of article 10 of the Project, as they unduly expand the purposes and objectives of capturing and recording images and sound by security forces in public spaces or accessible to the public.

64. On similar grounds, by applying the principle of proportionality, the CNPD also recommends the insertion, in paragraph 8 of article 5, of the reference to the provisions of paragraph 7 of the same article, under penalty of harming the usefulness or suitability of these chambers for the purpose or purposes assigned to them by law.

65. To ensure compliance with Law No. 95/2021, the CNPD also recommends:

- i. The clarification and densification of the authorization regime, which this Project must define, under the terms and for the purposes of article 10 of Law no. 95/2021, maximum of its no. 2;
- ii. The amendment of paragraph 2 of article 7, binding the agent to the duty to issue the notice twice: the first before triggering the aggravation and the second already after triggering, or, to maintain the provision in subparagraph b) of paragraph 2 of article 13, in the sense that the warning is given up to 30 seconds before activating the recording mode.

66. The CNPD also recommends that the other observations mentioned above be considered, maximum in points 42,43 and 49 to 61, otherwise the bodycam system will not be able to fulfill the legal purpose of its use by security forces agents .

Approved at the meeting of April 19, 2022

Filipa Calvão (President)