

National Data Protection Commission

OPINION/2021/157

## I. Order

1. The National Civil Aviation Authority (ANAC) asked the National Data Protection Commission (CNPd) to issue an opinion on the Draft Regulation that «[establishes the rules and procedures for the installation, operation and use of a system electronic surveillance and control system installed in ANAC exam rooms and also the rules regarding the processing of personal data collected through the CCTV system, taking into account the provisions of the RGPD and the legislation currently in force».

2. The request for an opinion is accompanied by the report of the impact assessment on data protection (AIPD), as well as the opinion of the Data Protection Officer.

3. The CNPD issues an opinion within the scope of its powers 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 36(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 of Law No. 58/2019, of 8 August, that enforces the GDPR in the domestic legal order.

## II. Analysis

4. The Draft Regulation aims to regulate the installation, operation and use of an electronic video surveillance and control system installed in ANAC's examination rooms and also the processing of personal data collected through the CCTV system. i.

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### i. Replication of GDPR rules in the draft Regulations

5. We begin by pointing out that the draft diploma contains, especially in chapter II, a set of rules generic, related to the processing of personal data carried out by ANAC, which goes beyond the object of the Project, delimited in article 1. Furthermore, it is underlined that most, if not all, of these rules reproduce provisions of the RGPD and Law n.° 58/2019, of 8 August.

6. Now, if the intention is to remind the addressees of the regulation of the principles and some rules of protection of personal

data, with regard to a specific processing of personal data, it cannot be overlooked that the repetition or reproduction of rules of European Union law entails the risk, already stressed on several occasions by the Court of Justice of the European Union, of jeopardizing an application

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uniformity of that Law and to affect the jurisdiction of this Court (cf. Variola judgment, Proc. 34/731 and Commission/Italy judgment, Proc. 39/722).

7. And, in fact, it is not possible to see the immediate usefulness of reproducing these rules in Articles 3, 4, 6, 21, 24, 25 and 28, and also in paragraph Article 5(2).

8. It would be more useful to explain the implementation of data protection principles regarding the processing of personal data subject to regulation.

ii. Basis of lawfulness of data processing: the assumption of the need for processing

9. As for the legality of the treatment, ANAC subsumes in subparagraphs c) and e) of paragraph 1 of article 6 of the GDPR, which is not rigorous, because the application of subparagraph c) precludes the of subparagraph e), so Article 7 of the Project must always be revised.

10. In the explanatory statement or prologue to the Draft Regulations, it is stated that:

"two. [...] the examination of aeronautical personnel must be carried out with all the rigor required for the exercise of professions that involve the safety of third parties and civil aviation in general.

3. This rigor depends on the certainty that the examinees do not defraud, in any way, the theoretical knowledge they must have for the exercise of the profession (fundamental to guarantee air safety).

4. Regarding the need to process data in this way (use of a video surveillance system), it can be said that it exists, not only for the reasons mentioned above, but also taking into account the size and configuration of the room of exams, the arrangement

of places, computers and partitions, factors that make the surveillance process difficult (which is essential as we have seen) if it is only face-to-face and with a less reliable degree of rigor than real-time surveillance through chambers duly installed and signaled (in compliance with the principles of loyalty and transparency).»

11. Arguments that, in part, are reflected in the text of Article 9 of the Draft Regulation. 1 2

1<http://curia.europa.eu/iuris/showPdf.isf?text=&docid=88457&DaaeIndex=0&doclana=ENRmorte=req&riir=&occ=first&part=1&cid=378305>

2<http://curia.europa.eu/iuris/showPdf.isf?text=&docid=88354&nanelIndex=0&doclann=PT&mode=lst&dir=&occ=firsi&part=1&cid=601673>

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12. The CNPD does not question that ANAC is obliged to follow specific examination procedures that prevent fraud situations, in accordance with European Union Law, which have or may have a not insignificant impact on the public interest in safety, taking into account the sector of activity that is in question here.

13. In fact, according to the provisions of the ARA.FCL.300 standard, contained in Regulation (EU) No.

1178/2011 of 3 November 2011, under the heading 'Examination procedures', the 'competent authority shall adopt all necessary measures and procedures for applicants to be able to carry out theoretical knowledge examinations in accordance with the requirements of Part FCL', specifying, among other rules or conditions, that 'Candidates must be seated in such a way that they cannot read each other's examination papers. They must not address a word to anyone other than the monitors of the test;».

14. But this obligation thus provided does not require, i.e., does not depend on the use of a CCTV system. In fact, point c) of paragraph 1 of article 6 of the GDPR only legitimizes the processing of personal data when it is expressly imposed by law or when it is necessary (the essential) to comply with the legal obligation. , which is not verified here.

15. Therefore, the foundation contained in subparagraph e) of paragraph 1 of article 6 of the RGPD, which legitimates the

processing of personal data that proves necessary for the pursuit of ANAC's public interest functions, would remain here.

16. But the mere reference to taking into account the size and configuration of the exam room, the arrangement of places, computers and partitions, factors that make the surveillance process difficult (which is essential as we have seen) if it is only face-to-face and with a less reliable degree of rigor than real-time surveillance through duly installed and signaled cameras (complying with the principles of fairness and transparency), it does not seem sufficient to demonstrate the need for this processing of personal data.

17. And on this point, the AIPD - rectius, the AIPD report - presented adds nothing.

18. In fact, in order for the need for personal data to be processed, it is not enough to simply state that the rooms do not offer the necessary conditions to prevent fraud, or that this specific means of processing reinforces fraud prevention, either for the deterrent effect, or for the articulation of its use with the guard present in the room.

19. Because the concrete judgment on the need depends on the identification and analysis of other solutions suitable for the realization of that surveillance purpose and on the verification of whether these alternative solutions are

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more aggressive for the rights of data subjects or for other interests (public or private) affected - all this presupposing the characterization of the situation that is intended to regulate.

20. However, neither the identification of alternative solutions nor their analysis is explained in the exposition that precedes the articles of the Draft Regulation or in the AIPD report.

21. In fact, nothing is said about the consideration of other solutions such as connecting computers only to the local network and applying a signal jammer in the exam room, solutions that are capable of reducing or excluding the risk of fraud in assessments.

22. And there are no relevant elements for assessing the need for the solution chosen - which are admitted to be known to ANAC - such as the size of the room, the distance between the secretariats or tables and the potential or approximate number of candidates .

23. In fact, the AIPD is mainly reflected in the comparison between the recommendations that the CNPD issued on distance assessment in higher education establishments, dated 21 May 2020<sup>3</sup>, and the solution chosen by ANAC.

24. But this effort does not make it possible to fill the main gap highlighted here concerning the demonstration of the need for treatment.

25. It is clarified in this regard that those CNPD recommendations refer to a remote assessment scenario. And, therefore, they imply the demonstration of the need for remote assessment, a fact to which the CNPD drew attention in the aforementioned document, underlining the online context of the assessment - that the situations of confinement, quarantine and prophylactic isolation, caused by the pandemic, could justify.

26. In the case of a face-to-face assessment model, the parameters are obviously not the same, and it is therefore essential to assess and demonstrate not only the adequacy of the processing of personal data resulting from the use of a CCTV system for the purpose of examination surveillance in person, but also your need. And in the face-to-face examination model, its usefulness seems reduced, first of all because the number of pairs of human eyes does not seem to be much smaller than in an exclusively face-to-face surveillance solution.

27. But even the ANAC's option of using a surveillance model supported by the CCTV system is not sufficiently analyzed and evaluated in the AIPD report, since the type of

<sup>3</sup> See Guidelines on distance assessment in higher education establishments

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cameras to be used and their number. And this is not a negligible aspect, especially since Article 8(2) of the Draft Regulation states that the CCTV system is made up of a network of fixed or mobile video surveillance devices for capturing images.

28. Since the analysis of the AIPD by the CNPD is not the object of this case, it cannot, however, be omitted that the impact assessment of a video surveillance system depends, from the outset, on the characterization of that system,

0, which implies the identification of the type of devices to be used, so that the capacity of the system can be assessed and, therefore, the impact that it may have on the rights and interests of the holders of personal data. On all this is the AIPD's report

omitted.

29. It is insisted that the option for mobile cameras and the devices in which they can be incorporated significantly changes the impact of the processing of personal data, also from the perspective of data security.

30. In short, as the CNPD is not questioning the adequacy of the processing of personal data resulting from the use of a CCTV system to support face-to-face surveillance in the examination room, in the documents that were presented by ANAC to the CNPD there are no elements that allow affirming or validating the need for such treatment.

31. And, as in both subparagraph c) and subparagraph e) of paragraph 1 of article 5 of the GDPR, the first assumption is the need to process personal data, the CNPD concludes that the elements presented do not demonstrate any that this assumption is fulfilled.

32. It is true that the prior control of the processing of personal data, provided for in paragraphs 1 and 2 of article 36 of the RGD (in which the RGD recognizes the national data protection authority not only powers of recommendation, but also the other powers of binding intervention), but only the power of opinion in the Within the scope of paragraph 4 of article 36 of the RGD, the CNPD limits itself to recommending that the option object of this regulation be reconsidered, insisting that in the instructive elements of this process it was not demonstrated the need for the processing of personal data resulting from the use of a CCTV system to ensure surveillance of exams and prevent fraud.

iii. Analysis of the rules regarding the processing of personal data

33. Notwithstanding the foregoing, the CNPD then analyzes the provisions specifically aimed at regulating the processing of personal data, in order to point out the provisions that, if there were a legal basis for the processing, would need to be substantially corrected to guarantee its non-compliance with the provisions of the RGD or simply reformulation to prevent mistakes or

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inconsistencies with such a regime. Articles that repeat the normative content, without apparent advantage, are also indicated.

The. Project provisions without normative content

34. Thus, first of all, it is pointed out that there are provisions devoid of any normative content. In fact, some rules of the Project, with a pedagogical or informative purpose regarding certain aspects of the treatment, do not define rules, conditions or limits to the treatment, and therefore do not have real normative force. This is clearly the case with paragraph 2 of article 9 of the Project, which, due to its merely explanatory nature of the solution adopted, is believed to be better only in the explanatory prologue of the regulation, instead of appearing in the article. Article 29, on the implementation of the IAPD, deserves the same observation.

#### B. Repeated design provisions

35. Second, there are also aspects of the regime that are regulated, with few or no differences, in several articles. This is what happens with the duty of secrecy (Articles 16 and 26) or with the notification of personal data breach (Articles 24 and 25, on the one hand, and subparagraphs c) and d) of the article 35, on the other hand) - it being certain that in relation to this regime nothing is added in relation to the provisions of the RGPD (see above, at most points 5 to 7). The same is true of the provisions of paragraphs 1 to 3 of article 22, which add nothing to what is already regulated by the Project (only paragraph 4 of article 22, when it refers to Annex I the explanation of the information to be provided, seems to have autonomy, being able to be inserted in the current paragraph 1 of article 21 of the Project).

#### ç. Project provisions that need clarification

36. Thirdly, there are rules whose wording should, from the perspective of the CNPD, be revised to avoid misunderstandings in their interpretation and application.

37. First of all, paragraph 4 of article 8 of the Project, when it states that «[...] it is prohibited to capture images or sound in any way other than through the devices that make up the system of CCTV». As it is written, the precept allows the reading that it is permissible to capture images and sound through the devices that integrate the ANAC's CCTV system, when, in fact, paragraph 2 of the same article only provides for the capture of images (and in the explanatory prologue of the Project it is stated «[...] there is only capture of

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real-time image, without sound [...]»)). Therefore, it is recommended to change the wording of paragraph 4 of article 8, for example, to prohibit the capture of sound and the capture of images in any other way than through the devices that integrate

the CCTV system. .

38. Also in Article 34 of the Project, the heading Responsibilities does not reflect the content of the article, which essentially defines a set of added guarantees for the protection of the rights of data subjects.

39. Strictly speaking, only paragraph 1 touches on the issue of liability, but the terms in which it is written, and in the absence of any other provision on liability for data processing, may lead to the interpretation that the individual liability of operators of the CCTV system removes the responsibility of ANAC, as responsible for the treatment, for the execution of the processing of personal data. Bearing in mind the rest of the provisions of this article, the CNPD recommends changing the heading (for example, to Other Guarantees), as well as reformulating paragraph 1 of article 34.

40. Bearing in mind that an administrative regulation is at issue, the verb in the present tense must be indicated in the preamble to article 31: thus, instead of 'ANAC adopted the following measures [...] », must appear ANAC adopts the following measures. Articles 32 and 33 of the Project also deserve revision, in order to have a operative content, since, as they are written, article 32 contains a mere list of objectives to be achieved and article 33. ° a list of measures to be adopted. It is therefore recommended that they be densified, perhaps with the specification that ANAC is constituted with the duty to achieve such objectives and adopt such measures.

d. Project provisions that do not comply with the GDPR

41. Finally, it is recommended to review some articles to ensure their compliance with the GDPR.

42. With regard to the rights of the data subject, article 19 of the Project recognizes the right to confirm that personal data are being processed; right of access to personal data; right to limitation of treatment; right to file a complaint with the control entity, the CNPD.

43. But here doubts arise as to the personal data to which the right of access is guaranteed, because, as there is no recording of images, there is no personal data to access. Unless the rights set out in article 19 cover all personal data processing operations related to the use of the CCTV system, therefore, personal data processed within the scope of the complaint procedure.

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44. Another is the question of not including the right of opposition enshrined in Article 21(1) of the GDPR here. Based on the processing of personal data, from the perspective of ANAC, in subparagraph e) of paragraph 1 of article 6 of the RGPD, the abstract departure from that right is not compatible with paragraph 1 of article 21, ° of the GDPR.

45. In fact, in order to make the public interest pursued by the administrative authority prevail over the right of opposition, it is not enough to state that “[t]he right cannot be exercised since the processing proves necessary to fulfill the legal attributions of ANAC, which they demand the treatment, and the exercise of functions of public interest and public authority, with which ANAC is invested»; It will be necessary to demonstrate concretely, rebutting the grounds presented by a data subject when exercising the right of opposition, that there are overriding reasons of public interest for that treatment to prevail over the rights of the subject. This, moreover, is the useful meaning of the reference in Article 21(1) of the GDPR to reasons related to the particular situation of the data subject.

46. Moreover, there seems to be a contradiction in not recognizing the right of opposition and recognizing in Article 19 of the Project the right of limitation, which, under the terms of Article 18 of the GDPR, can also concern the exercise of the right of opposition.

47. Therefore, even though the guarantee of the right of opposition is difficult to enforce, given the circumstances of the treatment resulting from the real-time capture of images, the CNPD understands that such a right cannot be denied in the abstract.

48. Thus, under penalty of violating the provisions of paragraph 1 of article 21 of the RGPD, the CNPD recommends the elimination of article 20 of the Project and the inclusion of the right of opposition in the range of rights of the data subject , contained in article 19 of the Project.

49. At the same time, the rights provided for in article 19 of the Project must be added in Annex I to the Project, concerning information on data processing, and the right to object must also be included therein. Also in Annex II, the right of opposition should be added to the “Rights that you may exercise” and the section on “Rights that you may not exercise and their

justification” deleted.

50. Still on the subject of the Annexes, it is noted that in Annex II, regarding the exercise of the right, the information given on the treatment must be highlighted, under penalty of the data subject appearing to be a signatory of such information.

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and. Project provisions relating to security measures for the processing of personal data

51. Finally, with regard to security measures for the processing of personal data, in order to enhance security, it is recommended to impose a double authentication factor (e.g., electronic key and access code), in no. 1 of article 15 of the Draft Regulation.

52. In this regard, it is also recommended that the access system makes it possible to identify the entrances, exits and who was present in the room and that these records support audit reports, with an adequate retention period being foreseen.

53. Regarding the creation of records, provided for in article 31 of the Project, the traceability of activities must cover the different operations carried out in the CCTV system: start of the system, viewing of the cameras, eventual PTZ operations, any attempt to image capture. Activity logs should ideally have an integrity mechanism that prevents tampering and always include the timestamp.

54. Finally, with regard to article 11 of the Project and the approval and definition of the requirements and technical characteristics of the network circuits, it is pointed out that it is a best practice for the CCTV system network to be a network segregated from the others, only accessible from the control center and related terminals; in the event that a wireless network is used to connect the cameras to the video surveillance system, this data transmission must be done from point to point, as an exclusivity of the camera. It is also important to ensure that support and maintenance services for the video surveillance system are provided physically on site, as remote access implies opening a communication channel on the Internet, thereby exposing the system to the vulnerabilities of an open network.

### III. Conclusion

55. On the grounds set out above and in addition to other recommendations presented above, the CNPD highlights, in conclusion, the following aspects regarding the definition of rules on the processing of personal data resulting from the

installation and use of an electronic video surveillance and control system installed in the ANAC exam rooms:

The. Regarding the legal basis of the processing of personal data, the CNPD recommends that the option of using a CCTV system to pursue its public interest attributions be reconsidered, insisting that the instructive elements of this process were not

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demonstrated the need to process personal data resulting from such use to ensure surveillance of examinations and prevent fraud;

B. Regarding the rights of data subjects, the CNPD recommends the elimination of article 20 of the Project, as well as the inclusion of the right of opposition in the range of rights of the data subject, contained in article 19 of the Project (and, at the same time, , amendment of the Annexes), under penalty of violation of the provisions of paragraph 1 of article 21 of the GDPR.

Lisbon, December 17, 2021

Filipa Calvão (President, who reported)