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f NATIONAL COMMISSION ON DATA PROTECTION

OPINION/2019/93

## I. Order

1. On October 4, 2019, by order of the Assistant Secretary of State and Internal Administration, an opinion was requested for the National Data Protection Commission (CNPd) on the request for authorization to expand the video surveillance system in the Municipality of Leiria, submitted by the Public Security Police (PSP).

Having meanwhile reiterated the interest in issuing this opinion within the scope of the authorization procedure within the competence of the member of the Government responsible for the requesting security force or service, the CNPD assesses the project 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 video camera surveillance systems by security forces and services in public places of common use, for capture and recording of image and sound and their subsequent treatment.

The request is accompanied by a document containing the reasons for the request and the technical information of the system, hereinafter referred to as "Rationale".

## II. ASSESSMENT

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 and, 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,

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are, 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 dependence, or when this capture affects, directly and immediately, privacy, or results in conversations of a private nature being recorded.

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. Video surveillance in public places of common use in the Municipality of Leiria for the purpose of protecting people and property and preventing crimes

2.1. previous point

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 extension of the video surveillance system in the Municipality of Leiria 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 the municipality of Leiria. In fact, as will be better developed below, there are several aspects and characteristics of this system that justify the CNPD's apprehension regarding

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to a special impact of this processing of personal data on the fundamental rights of the respective holders. Let's see.

Firstly, it is intended to increase the number of cameras in relation to the current video surveillance system, more than tripling the current number of cameras - to the current nineteen cameras, it is intended to add forty-two cameras (cf. page 2 and Annex A, page 7, of the Rationale) in a total of sixty-one video surveillance cameras. 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. , which adds the possibility of capturing sound.

But above all, the fact that the cameras have “advanced video pattern detection and license plate reading technology stands out.” and the system is equipped with the functionality of «video analytics and license plate recognition», «motion detection and search filter by motion or pattern, with activation of alarms and markers.» and “video analytics with self-learning” (cf. Annex B, point 1, of the Rationale). However, the use of soft recognition technology, and even machine learning, may prove to be useful in certain circumstances for the prevention and repression of criminals and, therefore, may eventually be considered adequate for the purpose of protecting people and property. . What does not seem adequate or, at least, necessary is its use for road traffic management, a purpose that is also aimed at in this data processing as stated in the reasoning (see page 2 of the Justification).

In fact, starting with the soft recognition technology, it is not possible to achieve, through the insertion in the video surveillance system of people's physical characteristics or of vehicle registrations, a better traffic management or even the prevention of accidents or more efficient provision of assistance in the event of a road accident. In particular, when considering that, in relation to several cameras, only arguments are presented for their installation regarding “traffic control”, also declaring, but only secondarily, the protection of people and property as an objective to be pursued, it seems difficult to conclude on the suitability and necessity of that technology in this video surveillance system (cf., for example, Annex A, pages 36 to 44, and 70 of the Rationale).

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But, even for the pursuit of the purpose of protecting people and property, the use of technology that allows tracking of people's movement and behavior requires a specific demonstration of the need for its use, which in this case does not happen.

In fact, nowhere in the reasoning is the need for this specific technology and functionality explained, generically invoking (for the entire system) the need for repression and also for the prevention of crimes, due to the "deterrent effect on the practice of certain illicit acts". criminal and anti-social behavior" (p. 4), to which there is added road accidents and "the constant international terrorist threat to Western countries" (cf. p. 30). Therefore, a set of very different purposes, which evidently do not justify measures restricting privacy of equal intensity - there are even points in the Grounds in which the fight against mere «incivilities» is invoked (pages 2 and 22).

In this diversified context of the use of the video surveillance system, with the scope and incidence of sixty-one cameras, it is up to the CNPD to highlight the need to consider the use of these types of technology, considering the impact that it may have for the people covered by the radius. camera capture.

It is not, therefore, an absolute rejection of the use by security forces of the technology that science and the market make available today. It is only intended that the use of video surveillance systems and, in particular, soft recognition technology be preceded by a careful consideration of its consequences for people's privacy, as well as for other fundamental dimensions of the human being directly put in crisis with this type of processing of personal data, such as freedom and the right to equality (here in crisis, since the risk of traceability of behaviors and habits, as well as the selection of physical characteristics for soft recognition, can generate conditioning freedom of action and discriminatory controls based on certain profiles).

Likewise, and even for a fortiori argument, the reference to the use of self-learning video analytics has to be preceded by particularly rigorous consideration. In effect, video analytics works through an algorithm that is programmed to respond to specific stimuli and movements, a matter on which the Rationale is completely silent. In fact, at no point in the

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Justification It is clarified which algorithm to use, which assumptions it will start from and which answers (outputs) are intended to be achieved.

Note that what is now presented here is an artificial intelligence (AI) and computer vision solution. Such a reality may, prima

facie, seem not to be very different from traditional methods of analyzing information, but self-learning AI does not analyze it in the way it was initially programmed; on the contrary, its novelty is reflected in the ability of machines to “learn” from the information they are processing, in order to respond autonomously (in an “intelligent” way), generating new information. To that extent, its use must, obviously, be properly framed with pre-defined assumptions and criteria (perhaps with programming of inadmissible information analysis criteria, given the current legal regime), otherwise it will not be possible to understand whether the results presented by the system, and on the basis of which the PSP will make decisions about the citizens concerned, are discriminatory and, therefore, inadmissible under the Constitution of the Portuguese Republic.

It is therefore clear that the use of AI, especially in the field of machine learning, especially when used in an environment of systematic and large-scale control of publicly accessible areas, must be preceded by a careful consideration of the consequences of it. , not only for people's privacy, but also for freedom, personal identity and the right to non-discrimination. However, these considerations can and should be made by the legislator, in a desirable regulation of these technologies, since the regime contained in Law no. , but above all it has to be done within the scope of the authorization procedure for the installation and operation of specific video surveillance systems, such as the one at issue here.

The weighting judgment is evidently guided by the principle of proportionality, not only regarding the use of the video surveillance system with this extension and incidence in the municipality of Leiria, but also specifically regarding the technologies of soft recognition and machine learning, so that its suitability and necessity (and proportionality) to the pursuit of the purposes pursued with this use are evaluated, and whether or not there is an effective correspondence between the advantages

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or potentialities of the use of that system and that technology and the protection of personal data and other associated fundamental rights.

When developing, it is necessary to assess, first in relation to the video surveillance system with the 61 cameras, then specifically in relation to soft recognition, AI and machine learning technologies, what type of crimes or infractions justify its use and to what extent prove adequate to prevent or repress these illicit acts, whether this suitability and need is manifested in all

territorial areas of the municipality covered by the system or if only in some more delimited areas, etc. Also bearing in mind that the impairment of the fundamental right to respect for private life is irreversible, and is not subject to reinstatement.

In fact, the new Law no. (EU) 2016/680 of the European Parliament and of the Council, of 27 April 2016, requires the person responsible for these processing of personal data to carry out an impact assessment on data protection when there is a high risk for the rights, people's freedoms and guarantees.

In this regard, it is important to remember that Article 2(2) of Law No. 1/2005 determines that the processing of personal data resulting from the use of the video surveillance system is governed by the provisions of Law No. 67 /98, of October 26, in everything that is not specifically provided for in this law, and that this law, regarding the treatments carried out for the purposes of prevention, detection, investigation or repression of criminal offenses or execution of criminal sanctions, was revoked and replaced by Law No. 59/2009, of 8 August. Considering also that, in paragraph 3 of article 67 of this last piece of legislation, it is determined that "All references made to the Law on the Protection of Personal Data, approved by Law n.0 67/98, of 26 October, consider - if made for the regime of this lei, when they concern the protection of natural persons in relation to the processing of personal data by the competent authorities for the purposes of prevention, detection, investigation or prosecution of criminal offenses or the execution of criminal sanctions, including safeguarding and the prevention of threats to public security, can only be concluded by directly applying the provisions of article 29 to the processing of personal data resulting from the use of video surveillance systems.

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Thus, taking into account that this treatment implies a systematic control on a large scale in the municipality of Leiria, and that it promotes the tracking of people and their behaviors and habits, as well as the identification of people from data related to physical characteristics , it is undeniable the high risk it poses to the rights, freedoms and guarantees of individuals, in particular the fundamental rights to data protection and respect for private life, as well as freedom of action and the right to non-discrimination.

For all these reasons, the CNPD considers that article 29 of Law no. of people and the careful assessment of the measures planned to mitigate them. In fact, taking into account that the use of most cameras is primarily aimed at traffic management

(and only secondary and residually the protection of people and property is invoked), the impact assessment on data protection would always be mandatory in pursuant to paragraph 1 and paragraph c) of paragraph 3 of article 35 of Regulation (EU) 2016/679 of 27 April 2016 (RGPD).

In particular, in this assessment, each of the intended purposes must be considered autonomously and attention must be paid to the aspects of the treatment that the analysis of the technical characteristics of the equipment and other elements contained in the Grounds allow for the time being to be highlighted and which are set out below.

The data protection principles and rules must also be applied by design and by default, pursuant to article 21 of Law No. 59/2019, of 8 August, and article 25 of the GDPR. .

## 2.2. The technical characteristics of the system

Before starting the assessment of the system's technical characteristics, it is important to note that the request to extend the video surveillance system is not sufficiently instructed, thus not allowing the CNPD to assess compliance with the different aspects of the regime indicated in paragraph 2 of article 3 of Law No. 1/2015 and in Ordinance No. 372/2012, of 16 November. This omission of the description of important characteristics of the system cannot be filled, perhaps, by way of referring to the elements that instructed the

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previous authorization procedure and which gave rise to order No. 7531/2015, by the Assistant Secretary of State and Administration, which authorized the installation of 19 cameras, since the elements presented to the CNPD for issuing the respective opinion were already insufficient, as noted in Opinion No. 34/2014, of 6 May1.

In particular, the reference to the use of AI, machine learning and soft recognition, without explaining in what terms, under what assumptions and under what criteria these technologies will be used, prevents any type of assessment of respect for the limits and conditions relating to the protection of the privacy - under the terms defined in paragraphs 6 and 7 of article 7 of Law n.º 1/2005, but also prevents a consideration, by the body with authorizing competence, of the adequacy, necessity and respect for the prohibition of excess regarding the use of this video surveillance system with these attributes.

The. From the outset, therefore, the lack of transparency or opacity of the information analysis process not only does not allow

to satisfactorily guarantee, under the terms imposed by law, the right of information to data subjects, but, ex ante, does not allow understanding the consequences of its use and therefore the real reach and impact of using this video surveillance system.

As mentioned above, in 2.1., in addition to not finding, in the reasoning presented, arguments specifically designed for the use of this technology for the purpose of protecting people and property and its inadequacy and unnecessary for road traffic management, the situations that will justify their use are not fixed, nor is it stated that they will be fixed, nor the assumptions and criteria that will be the basis for the insertion of physical characteristics or other information related to people, and that type of criteria may underlie the analysis of information in self-learning and the creation of profiles.

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 with

1 Available at [https://www.cnpd.pt/bin/decisoes/Par/40\\_34\\_2014.pdf](https://www.cnpd.pt/bin/decisoes/Par/40_34_2014.pdf)

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Based on these data<sup>2</sup>, the CNPD understands that the use of this type of technology must, at the very least, be preceded by a set of precise rules for its users, in order to limit the risk of discrimination and violation of Article 6. of the said law.

B. The Rationale now presented is silent on the security measures applied to the information transmitted between the video cameras and the central server. The CNPD therefore recommends that, following the impact assessment on data protection, the appropriate security measures for the transmission of information should be defined.

ç. With regard to safeguarding the privacy and intimacy of private life, Annex B of the Grounds states that the minimum requirements for video surveillance cameras are that they have "the ability to program filters to capture image and sound (to avoid capture of image and sound in impermissible circumstances, respecting the right to privacy)" (cf. point 1) and, as regards the installation software, the ability to "create/edit/delete image/sound fUtros, namely the placement of masks to avoid capturing and recording images in areas where the system's zoom range may conflict with people's right to privacy.» (cf. point



4).

It is further stated, in Annex F, that the "equipment and software used will guarantee the use of masks/filters so as not to capture and record images of private places, preventing the visualization of, in particular, doors, windows and balconies, guaranteeing the right to people's privacy, and the sound bar, only unlocked in circumstances where there is a situation of real danger to the safety of people and property».

However, in light of the above, it cannot be said that the privacy and other fundamental rights of the people eventually covered by the cameras' capture radius are safeguarded.

On the one hand, it is not explained whether the masks to be applied are physical or logical, emphasizing here that, as they are PTZ cameras, capable of

2 And, within the scope of the processing carried out for the purpose of traffic management, the personal data provided for in paragraph 1 of article 9 of the GDPR and the limits imposed by paragraphs 2 and 4 of article 22 thereof University Degree.

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image magnification and rotation, the most suitable masks appear to be logical. For the rest, only some cameras are exemplified where masks will be placed (e.g., page 70 of the Rationale), so it is not possible, by the analysis of the Rationale presented, to determine if they will be placed in all the places where they are necessary, nor will they be effective. To that extent, the CNPD's assessment of compliance with the limits defined in Article 7(6) of Law No. 1/2005 is impaired.

On the other hand, the provision of the functionality to edit and eliminate the image/sound filters, apparently by any user of the system, without defining, in advance, the circumstances justifying such a measure, does not offer guarantees for the protection of the rights, freedoms and guarantees of persons. And as for sound capture - for which, strangely, there is no justification in the Grounds - the lack of densification of the circumstances in which the sound bar can be unlocked does not allow us to assess whether the compression of the right to respect for private life is proportionate, as required by Article 7(7) of Law No. 1/2005.

d. In Annex B, point 2, it is indicated as minimum requirements of the video server, "Recording and reproduction rate and live transmission (while recording simultaneously) up to 450 Mbps".

Assuming that this means the possibility of reproducing the recorded images, it is underlined that such functionality seems to

violate the provisions of paragraph 1 of article 9 of Law No. 1/2015, which requires the codification of the record of the images, precisely to prevent agents authorized to view the images in real time from accessing the recorded images or reproducing them. In any case, it will always be essential to implement yogs so that it is possible to audit the interventions in the recorded images.

For this reason, the CNPD recommends that measures be adopted to ensure compliance with the provisions of Article 9(1) of Law No. 1/2015.

### 2.3. The rights of information, access and deletion of data

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Regarding the rights of data subjects, attention is drawn to the fact that they are currently defined in Law No. , detection, investigation or prosecution of criminal offenses or enforcement of criminal sanctions, transposing Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016. The right to information is specifically addressed of data subjects, further defined in article 14 of Law No. 59/2019, of 8 August.

It is noted as positive that, in this new project now being appreciated, in addition to declaring that the warning and symbology models to be used respect the provisions of Ordinance no. information on the installation of the video surveillance system in digital media for disseminating information from the PSP (cf. Annex E, page 82 of the Grounds).

However, considering the AI, machine/earn/ng and soft recognition technologies that are intended to be associated in the analysis of the information that the system collects, it is evident that the right to information has to be much more densified, at least when it comes to pursuit of traffic management - because the right to information here follows the rules of article 14 of the GDPR.

With regard to the rights of access and deletion of data, it is stated, in Annex F of the Justification, that they will be guaranteed in accordance with the provisions of paragraph 1 of article 10 of Law no. 1/2015.

### 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 Municipality of Leiria, the CNPD, with the arguments set out above:

1. It considers that the fulfillment of the duty, provided for in article 29 of Law no. .° of the GDPR, to carry out a prior

assessment of the impact of the processing of personal data on the rights, freedoms and guarantees of individuals, within the scope of this authorization procedure, in particular regarding the use of Artificial Intelligence, machine learning and soft recognition technologies ,

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2. Within the scope and following the aforementioned impact assessment, considers

especially pertinent:

- i. The consideration of the different rights and interests in tension, not only regarding the video surveillance system with the declared extension, but also regarding the level of intrusion on the privacy and freedom of citizens, as well as the right to non-discrimination, resulting from the use of Artificial Intelligence, machine learning and soft recognition, depending on each of the purposes pursued - namely, the protection of people and goods and the control of road traffic;
- ii. Understanding that compliance with the legal regime of data protection and privacy is achieved by the way data processing is designed and implemented and not by the use of a specific type of technology;
- iii. The prior definition of a set of binding rules for the use of these technologies, in order to limit the risk of discrimination and violation of article 6 of Law No. 59/2019, of 8 August;
- iv. The presentation of reasons and elements that allow understanding the real scope and impact of the use of those information analysis technologies in the context of this video surveillance system, under penalty of not being possible to judge proportionality by the body with authorizing competence, nor the CNPD judgment to issue regarding the limits defined in paragraphs 6 and 7 of article 7 of Law no. 1/2005;

3. As part of and following the impact assessment, it recommends:

- i. The definition and implementation of adequate security measures for the transmission of images between the cameras and the central server;
- ii. The specification of the type of filters and masks to be applied to images and sound, to mitigate the impact on privacy, otherwise it will not be possible for the CNPD, nor the body with authorizing competence, to assess compliance with the limits defined in no. s 6 and 7 of article 7 of Law no. 1/2005;

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iii. Adoption of measures that guarantee compliance with the provisions of paragraph 1 of article 9 of Law no. 1/2015, with regard to the reproduction of images;

iv. The densification of the right to information, also in the light of the provisions of article 14 of the RGPD, taking into account the use of AI, machine learning and soft recognition technologies, in particular with regard to cameras aimed at managing road traffic.

In these terms, the CNPD issues a negative opinion on the request for authorization to extend the video surveillance system in the Municipality of Leiria.

The need for further consultation with the CNPD is also highlighted, regarding the aspects omitted in the request now presented, and on which, under the terms of paragraph 2 of article 3 of Law no. your pronouncement.

Lisbon, December 27, 2019

Filipa Calvão (President, who reported)

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