Public consultation on: Guidelines 05/2022 on the use of facial recognition technology in the area of law enforcement

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(*The comments below represent the personal point of view of the author)

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The topic of these Guidelines is intrinsically policy maker related and concerns higher constitutional balancing field in a law system.

Indeed, in a democratic society the Legislators through the legal systems have the duty to carry out always a constitutional balancing when they decide to make legislation that would impact different primary rights.

The balance to carry out – here - is among the public interest of a State to fulfil public interest security and/or prevent criminal offences and the private life / personal data protection of persons.

Both the interests represent high primary interests that each Legislator has to serve in accordance with the constitutional legal framework and principles. Actually, the topic concerns, therefore, the main old and primary general legal topic of balancing among different primary constitutional interests in a democratic society.

In fact, the Constitutional Court of a National legal system is mainly deputy to ensure that the constitutional balancing among different primary constitutional interests has been carried out by the Legislator in harmony with the Constitutional Principles of the Legal System. Otherwise, the specific law issued by the Legislator will be declared not constitutional by the Court.

The main core of the Guidelines, thus, coincides with that. The Guidelines, substantially, advertise about the fundamental importance for the Legislators and

Public Authorities to always carry out the best balance possible in relation to the specific case desired to legislate because the privacy rights of data subjects are primary and constitutional level and cannot be oppressed by general public security interests in general way without specific, necessary and proportionate reasons and means. Indeed, a general public interest "excuse" for the legislator would not only be against the main GDPR principles but at the same time would be not constitutional, at all, due to the "unfair" conflict with primary constitutional rights (privacy and data protection, indeed).

Therefore, this high important topic will be always, inevitably, potential matter for Constitutional Courts and will rise potential legal debate: at first step in the policy making field and, then (when the law is officially issued), at legal system field.

In addition, another important point affects the collateral issues. Indeed, also when the constitutional balance is rightly made and the specific law (for instance, the scenario 2 described by the Guidelines) it will be important to be prepared to face inevitable the potential risks in relation to the implementation of technology (like, for example the collateral issue regarding the security of the technology in itself, or the potential hacker attacks). Consequently, it would be challenging for the legislators also to start to legislate new laws about the collateral issues (like, for instance, the legislation of new specific criminal offences)

The Guidelines rightly whish for a collaborative spirit and coordination among Legislators, Public Authorities and the Data Protection Institutions (and all actors of the field) in order to have always a preliminary observation among different entities when legislating in this field.

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