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OPINION/2020/60

I. Order

The Assistant Secretary of State and Internal Administration requested the opinion of the National Data Protection Commission (CNPd) on the "application for authorization for the use of video surveillance cameras in the monitoring of the land border, during the period of replacement of documentary control, in the context of the COVID-19 disease pandemic". The authorization request, presented by the Guarda Nacional Republicana (GNR), refers specifically to the "use of video surveillance means from portable cameras coupled to Remote/Puoted Aircraft Systems".

The request is made under Law no. 1/2005, of 10 January, amended and republished by Law no. 9/2012, of 23 February (hereinafter, Law no. the use of video camera surveillance systems by security forces and services in public places of common use, for capturing and recording images and sound and their subsequent processing. The use of mobile cameras, under the terms of this law, is subject to authorization by the member of the Government responsible for the requesting security force or service, preceded by an opinion from the CNPD.

The request also invokes the current calamity situation and the reintroduction of internal border controls between Portugal and Spain, which temporarily delimits the use of this video surveillance system. And it is explained that this is the means «that proves to be the most adequate for the maintenance of security and public order and for the prevention of the commission of crimes».

The request is accompanied by two annexes where the territorial areas subject to border control are indicated, as well as technical information on the equipment. The impact assessment on data protection was also sent.

II. appreciation

The authorization request refers to the use of 14 equipment listed in Annex A, which correspond to video cameras attached to Remotely PUoted Aircraft Systems (remotely manned aerial vehicles, henceforth RPAS). It is intended to be used during the

period determined by the Government for border control procedures,

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«at the places indicated in the list in Annex B, as well as on the border line between them». It is stated that the use of this video surveillance system «[is] of crucial importance for the monitoring of land, sea and river borders [...], essentially to support surveillance, patrol and control carried out by the GNR device in the detection entry of people and vehicles outside the legally authorized places". It is declared that the cameras only capture images, which are viewed by the aircraft operator on the equipment's own hardware, with no data transmission to any other location, and that there is no recording of images or capture and recording of sound.

It is further specified in the request that «[the] RPAS video surveillance system will be operated at a minimum altitude of 50 meters above the ground, no personal identification will be carried out, but only the visualization of spaces».

1. Lack of legal basis for the use of remotely manned aerial vehicles for the purpose of video surveillance of people

Law no. 1/2005, in article 6, provides for and regulates the use of portable video cameras for the purposes listed in paragraph 1 of its article 2, among which the mentioned in paragraph c) and invoked in the request: guaranteeing the safety of people and goods, public and private, and preventing the practice of crimes, in places where there is a reasonable probability of their occurrence. However, the present application for the use of portable video cameras has the specificity of being coupled or integrated into RPAS, enhancing the impact of this use on people's private life and on their freedom of movement.

In fact, and as the CNPD explained in the past, 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 a mobile video camera carried by a police officer, and is therefore likely to affect to a very high extent the fundamental rights to respect for private life, the 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,

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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 fact, as was also mentioned in Opinion No. 41/2015, of 29 May^{1 2}, the absence of a law providing for and regulating the use of RPAS by the security forces implies leaving to the competent administrative entities the duty of decision and the duty to issue an opinion (by the Minister of Internal Administration and by the CNPD, respectively), in procedures of an urgent nature, which require consideration in a very short period of time, without precise objective criteria that allow the aforementioned administrative bodies to exercise the discretionary power of in a more focused way in a matter as sensitive as this³.

Now, it is well known that the CNPD understands that Law No. 1/2005 does not serve as a basis of legitimacy for the use of cameras using RPAS, since neither its literal content nor its ratio reflects the balance between the interests underlying video surveillance with that scope and impact and the scope and intensity of restriction of the fundamental rights of individuals⁴.

1 Accessible at https://www.cnpd.pt/home/decisoos/Par/40_41_2014.pdf

2 Accessible at https://www.cnpd.pt/home/decisoos/Par/40_41_2015.pdf

3 It is because, as has been said, the intensity and scope of the harmful potential of those fundamental rights that the use of remotely manned aircraft for the purposes of video surveillance of people entails is not compatible with the exercise of a wide discretionary power, without limits or legal criteria more precise and specific to the type of impact resulting from such use.

4 In fact, as the CNPD has already had the opportunity to explain in the opinions cited above, even if it were admitted that the literal content of Article 1(2) of the diploma allows the conclusion that the use of RPAS falls within the scope of of this diploma, the consideration of the other hermeneutical elements excludes 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 guarantees its execution - Ordinance no.

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It is true that, recently, in Opinion No. 2020/32, of 26 March⁵, the CNPD admitted the use of cameras using RPAS for the same purpose, but based on Decree of the President of the Republic No. 14 -A/2020, of 18 March, which, in the context of the current pandemic, determined the partial suspension of the right to travel and settle in the national territory, legitimizing the necessary restrictions on this right "to reduce the risk of contagion and carry out the necessary measures". measures to prevent and combat the epidemic, legitimizing the establishment of "border controls on people and goods, including health controls at ports and airports, with the aim of preventing entry into national territory or making such entry subject to compliance with the necessary conditions to avoid the risk of spreading the epidemic" (cf. Article 4).

As the CNPD explained at the time, the partial suspension of freedom to travel and settle in the national territory, as well as the authorization to restore borders thus decreed, allows the adoption of appropriate, necessary and proportionate police measures to prevent and combat the pandemic. in constitutionally framed terms, thus serving to legitimize the use of video surveillance cameras using RPAS to the extent that it proves to be adequate, necessary and not excessive for those purposes. To that extent, the Presidential Decree makes it possible to overcome the *iacu na ilegal* regarding the use of RPAS with video cameras and regarding the control, in this way, of the movement and location of the people captured in the images. Thus, within the framework of the aforementioned presidential decree, the CNPD admitted that, given that there is a constitutional framework for restrictions on freedom of movement "necessary to reduce the risk of contagion and implement measures to prevent and combat the epidemic", the restriction of the

withdraws that the legal regime is not suitable for the use of remotely manned aircraft with attached video cameras. 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 security of people and property and the prevention of commission 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).

If, as results from the joint reading of the two diplomas, video surveillance aimed at protecting the security of people and property and preventing the practice of crimes requires the possibility of recognizing and identifying individuals, it cannot be ignored that video surveillance by technology that only aims to ensure the prevention of crimes without personal identification

is not capable of carrying out the purposes for which the law allows its use. Thus, it is evident that the use of cameras by air does not fulfill the purpose for which Law No. 1/2005 is the basis, not falling within the aforementioned legal framework.

5 Accessible at [https://www.cnpd.pt/home/decisooes/Pai7PAR 2020 32.pdf](https://www.cnpd.pt/home/decisooes/Pai7PAR%2032.pdf).

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privacy, in the strict dimension that is directly dependent on that freedom, is constitutionally framed.

The CNPD further clarified that, in the exceptional situation in Portugal, the suitability and need to use a video surveillance system supported by RPAS to control national borders, especially «on the border between the points indicated in the list in annex i', as is alleged, with reasons, in the GNR's request.

However, the CNPD recognized the proportionality of this measure only during the period of the state of emergency, as there is a constitutional framework, based on article 4 of Decree of the President of the Republic No. 14-A/2020, of 18 March, for the suspension of the exercise of freedom of movement and for the establishment of border controls of people and goods, thus concluding by the constitutional framework of the restriction of privacy that the capture of images from RPAS may imply.

However, in the present case, the situation that justifies the monitoring of borders by the GNR is not framed in the same terms.

In fact, Council of Ministers Resolution No. 34-A/2020, of 12 May, determines the extension of the replacement period, on an exceptional and temporary basis, of document control at borders, in the context of the declaration of situation of calamity by resolution of the same body (Resolution no. in Portuguese territory in terms recognized as legitimate by the Constitution of the Portuguese Republic (CRP)⁶. Thus, for a period that is not covered by the presidential decree of a state of emergency, the restriction of rights, freedoms and guarantees can only be determined by the Assembly of the Republic or the Government, provided that it is provided with an authorization law (cf. no. 2 of article 18 and subparagraph b) of paragraph 1 of article 165 of the CRP).

59/2019, of 8 August, in its article 5, requires a specific law that provides for and regulates the processing of personal data, only admitting that this takes place without law when it is "necessary" for the protection of the vital interests of the data subject or of

6 It should be noted, moreover, that in the authorization request, surely by mistake, reference is made to the suitability of this means to «ensure the suspension of rights to move and settle in any part of the National Territory», which, objectively, is not check more.

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another natural person", a condition that assumes the immediate protection of such vital interests as a direct consequence of carrying out the treatment, which in this case does not occur.

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 people, insofar as their use may result in the restriction of fundamental rights to the respect for privacy and the protection of personal data.

2. The purpose pursued with the use of remotely manned aircraft and the identity of persons

In this case, despite the fact that, in the authorization request, the GNR declares that no personal identification is carried out, but only the visualization of spaces, the technical characteristics of the cameras, maximum zoom functionality, as well as the minimum flight altitude indicated (50 meters from the ground), do not allow to rule out the possibility of identifying the people captured by the images and, therefore, do not allow to rule out the risk of affecting their private lives. Incidentally, one of the aircraft listed in Annex A has an altitude of 30 meters as a characteristic, which seems to contradict what is stated in the text of the application regarding the minimum flight altitude.

Furthermore, the fact that the equipment allows the recording and conservation of the images is a means of facilitating the identification of people, so that, despite the intention, declared by the GNR, not to proceed with the recording, this identification is not prevented.

Thus, it can only be concluded that the video surveillance system supported by RPAS to which this authorization request relates does not effectively prevent the identification of the people covered by the images, so it does not rule out the risk of affecting privacy. .

It is worth mentioning that the Conseil d'État - the French Supreme Administrative Court - has recently ruled on the use of a video surveillance system supported by RPAS in the current context of a pandemic, considering that it corresponds to a

treatment of personal data and which affects the right to respect

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privacy, despite the security forces declaring the non-activation of the zoom, the non-recording of images and a flight altitude of 80 to 100 meters⁷.

In fact, the purpose of using the video surveillance system supported by RPAS depends on the possibility of detecting people crossing the border and of possible tracking for the purpose of intercepting them on the ground by the security forces, which is why it can never be said that there is a processing of personal data.

This is because in the field intercept operation, carried out following an alert given by the RPAS operator, these people will always be identified by the security forces. Indeed, in order to determine whether there is a processing of personal data, it is sufficient that information that only indirectly identifies the person is processed, since, as the Court of Justice of the European Union explains, "it is not necessary that all the information that makes it possible to identify the person concerned must be in the possession of a single person"⁸.

In these terms, the CNPD does not see how it is even possible to apply technical measures here that would make it impossible, or very difficult, to identify the people filmed, as this would jeopardize the purpose of this use of the video surveillance system supported by RPAS.

III. Conclusion

1. Having ended the state of emergency, the CNPD does not find a constitutional and legal basis for the use of remotely manned aircraft (RPAS) for the purpose of video surveillance of people, insofar as their use may result in the restriction of fundamental rights to respect for privacy and the protection of personal data; Indeed:

i. Law no. 1/2005 does not serve as a basis of legitimacy for the use of cameras using RPAS, as neither its literal content nor its ratio reflects the balance between the underlying interests of video surveillance with that

7 Cf. Decision of 18 May 2020 in the case against the Association La Quadrature du Net/Ligue des Droits de L'Homme against the République Française (n° 440442, 440445), pp. 7 and 8, in particular, §§12 and 16.

8 Cf. Patrick Breyer judgment *i/l.* Federal Republic of Germany, of October 19, 2016 (C-582/14), §§ 40 to 43.

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specific scope and impact, on the one hand, and the scope and intensity of restriction of the fundamental rights of individuals, on the other hand; ii. In the current period, which is not covered by the presidential decree of a state of emergency, the restriction of rights, freedoms and guarantees that result from the use of a video surveillance system supported by RPAS can only be determined by law of the Assembly of the Republic or by decree- Government law, duly preceded by an authorization law, to provide for and regulate such data processing, which in this case is not the case.

2. Considering that the technical characteristics of the cameras do not allow to rule out the possibility of identifying the people captured by the images and, therefore, do not allow to rule out the risk of affecting their privacy, and also taking into account that the purpose of this use of RPAS with video surveillance cameras is precisely to detect, to prevent or suppress the entry of people into the national territory, there are no technical measures that make it impossible, or very difficult, to identify the people filmed without frustrating the intended purpose.

Approved at the meeting of June 3, 2020

Filipa Calvão (President)