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## § NATIONAL COMMISSION ON DATA PROTECTION

OPINION/2020/73

### 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 to use mobile video cameras for the collection of images by the Public Security Police", authorization, presented by the Public Security Police (PSP), refers specifically to the «use of means of portable cameras attached to unmanned aircraft to capture images, in the development of the mission assigned to the Public Security Police and resulting from of the declaration of the situation of calamity

The request is made under subparagraph c) of paragraph 1 of article 2 of Law no. 1/2005, of 10 January, amended and republished by Law no. 9/2012, of 23 February (hereinafter, Law No. 1/2005), which regulates 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 claims that this is the "most appropriate means of maintaining public security and order and preventing the practice of crimes [...], as well as supporting the prevention of the spread of the COVID 19 pandemic, as well as as in the restrictive measures imposed by the declaration of calamities in the Resolution of the Council of Ministers No. 33-A/2020, of 30 April.

The request is accompanied by an annex with the technical information on the equipment (Annex I) and also by the impact assessment on data protection.

### II. appreciation

The authorization request for the use of 18 equipment, which correspond to video cameras attached to remotely manned aerial vehicles (known for short as RPAS and, commonly, drones), referring, in point IV of the reasoning that integrates the

authorization request of the PSP, that no more than two will be used at the same time. It remains to be clarified whether this maximum limit is for the entire national territory, if

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for each municipality or if for each location or area within a municipality, the latter being the probable meaning of the statement.

In point III, "the main places where the Public Security Police may use video surveillance cameras attached to unmanned aircraft" are indicated. These places, in a total of 34 municipalities, refer, in most cases, to the center of the cities (indicating in some cases, the historic center or downtown) and also «road access to the seafront and surrounding pedestrian areas», river areas , access to road and rail terminals and leisure parks. As explained in the reasoning that forms part of the request, what is at stake "namely, areas where there is usually a large concentration of people, access to road and rail terminals, places commonly used for sports and pedestrian transit, parks and public gardens" .

There is also the possibility of resorting to equipment in other locations, «in case of extreme need», to be «previously communicated with a view to obtaining the necessary authorization».

In point IV.2., it is stated that it is intended to be used «exclusively in temporary periods while the declaration of the disaster situation in national territory is in force».

It is further specified, in point IV.1., that remotely manned aircraft will be used "at an altitude of more than 120 meters" and it is determined that, when this is not sufficient to prevent the capture of images of the interior of the dwellings, "the devices may raise their altitude.

Finally, in point IV.8., it is clarified that «capturing and images is fundamentally aimed at identifying agglomerations of people that may contribute to the increase in cases of people infected with SARS Cov2, [...] it is not intended to identify citizens, individually, but rather the movement of groups of people who are in breach of the provisions of RCM No. 33-A/2020, of 30 April»». In addition, some of the cameras do thermal reading.

With regard to the capture and recording of sound, in point IV.5., it is stated that "the capture and recording of sound will not be carried out", but with regard to the recording of images, the authorization request is less precise, assuming, in point IV.1., that

'whenever the recording of images captured by cameras coupled to

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unmanned aircraft, such procedure will be requested in advance from the holder of the authorization authority. The request does not materialize what could fulfill the imprecise concept of need, but the impact assessment shows that, as a rule, there will only be "real-time transmission of images to the Command and Operational Control Center of the Police Command territorially competent and , if necessary, to the Strategic Command and Control Center of the National Directorate of the PSP». It is not clarified, in cases where images are recorded, where this takes place, since it refers to «a video server», but it is also clear from Annex I that the cameras have the functionality of recording in internal memory and in card SD.

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 remotely manned aircraft, enhancing the impact of such use on people's private lives and on their freedom of movement.

In fact, and as the CNPD explained in the past, the use of video surveillance cameras attached to such aircraft, due to the special mobility of these devices, has a much greater impact on the privacy and freedom of citizens than that of 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. In fact, this type of equipment facilitates and promotes the possibility of controlling people's movements and, therefore, knowing their location and tracking their action - even without the use of automatic tracking technologies.

As the CNPD maintained in Opinion No. 41/2014, of May 27, the use of RPAS has such potential, with such scope and with such intensity, the restriction of rights

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fundamental 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 left 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 also mentioned in Opinion No. 41/2015, of 29 May<sup>2</sup>, the absence of a law providing for and regulating the use of remotely manned aircraft by security forces implies leaving the duty of decision to the competent administrative entities 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 discretion in a more focused way in a matter as sensitive as it is\*.

The CNPD's understanding is well known that Law No. underlying video surveillance with that scope and impact and the scope and intensity of restriction of the fundamental rights of individuals<sup>3 4</sup>.

1 Accessible at [https://www.cnpd.pt/home/decisoos/Par/40\\_41\\_2014.pdf](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](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 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 remotely manned aircraft is in the object of this diploma, the consideration of the other hermeneutical elements rules out 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. legal regime is not suitable for the use of remotely manned aircraft with

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It is true that, recently, in Opinion n.° 2020/41, of 1 April<sup>5</sup>, the CNPD admitted the use of cameras using remotely manned aircraft for the same purpose, but based on Decree of the President of the Republic n. 14-A/2020, of March 18, 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 implement measures to prevent and combat the epidemic, including compulsory confinement at home or in a health facility, the establishment of sanitary fences, as well as, to the extent strictly necessary and proportionately, the ban on travel and staying on public roads that are not justified" (cf. Article 4).

As the CNPD explained in Opinion no. in constitutionally framed terms, thus serving to legitimize the use of video surveillance cameras by resorting to RPAS insofar as it proves to be adequate, necessary and not excessive for those purposes. To that extent, the Presidential Decree makes it possible to overcome the legal iacu 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, in the absence of a constitutional framework for restrictions on freedom of movement, "necessary to reduce the risk of contagion and to implement the measures of video coupled. 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 a 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/Par/PAR\\_2020\\_41.pdf](https://www.cnpd.pt/home/decisooes/Par/PAR_2020_41.pdf)

6 Accessible at [https://www.cnpd.pt/home/decisooes/Par/PAR\\_2020\\_32.pdf](https://www.cnpd.pt/home/decisooes/Par/PAR_2020_32.pdf).

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preventing and combating the epidemic", also the restriction of privacy, in the strict dimension that is directly dependent on that freedom, is constitutionally framed.

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 remotely manned aircraft may imply.

However, in the present case, the situation that justifies the capture of images from remotely manned aircraft by the PSP is not framed in the same terms.

In fact, Council of Ministers Resolution No. 33-A/2020, of 30 April, invoked by the PSP to justify the request, declares the situation of calamity, determining in paragraph 6 that "[...] It is incumbent upon the security forces and services and the municipal police to monitor compliance with the provisions of [referred to] resolution, through: a) Community awareness of the civic duty of collection; [...] e) Advice on not concentrating people on public roads and dispersing concentrations of more than ten people, unless they belong to the same household; f) The recommendation to all citizens to comply with the civic duty of home collection [...].».

In addition to the attribution of this essentially pedagogical function, the same Resolution determines that «.the recommendations and orders determined by the health authorities and by the security forces and services must be respected, namely those regarding the distances to be observed between people»<sup>1</sup>. But the truth is that such a prediction was not preceded by the suspension of the exercise - or the restriction - of freedom of movement <sup>7</sup>

<sup>7</sup> The declaration of calamity has been successively renewed, with some changes (e.g., the maximum number of people), by

the Council of Ministers, through Resolutions No. 43-B/2020, of June 12, and No. 45-B/2020, of June 22. On the 30th of June, the state of calamity ceases, with the national territory going to a state of alert, with the exception of the Lisbon Metropolitan Area, where the state of contingency will be in force and also that of calamity in some parishes, under the terms of Resolution No. -A/2020, of June 26. In any case, limits to the concentration of people on public roads and in spaces open to the public are maintained.

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in terms recognized as legitimate by the Constitution of the Portuguese Republic (CRP). 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 another natural person", a condition that assumes the immediate protection of such vital interests as a direct consequence of carrying out the processing of the data, which in this case does not occur.

Furthermore, the capture of images supported by remotely manned aircraft with the scope and territorial extension identified in the request covers all the district capitals of mainland Portugal and also some cities or areas in municipalities on the coastal strip, covering the areas where people typically circulate. on their way to the workplace or to places intended for the provision of goods and services, as well as where they go for physical activity or other leisure activities.

While this may prove to be adequate and consistent with the objective of monitoring clusters of people, it still has a very significant impact on the lives of citizens, which should not be forgotten here. And this impact, it is important to clarify, is not restricted to the fundamental right to image as the PSP seems to intend in its authorization request, when it only opposes this right to the fundamental right to life and the fundamental (social) right to health (cf. point II ). In the context of the rights, freedoms and guarantees that may be in tension in the situations object of the authorization request, it is not, as the security forces and services do not ignore, the right to image that raises or should raise the greatest concerns, but rather the

fundamental dimensions of privacy and freedom (individual and collective) that are or can be restricted with the use of video surveillance systems with this enormous reach and impact.

In short, not questioning the goodness of the intention behind the use of this equipment, nor the importance for public health of the functions performed by the security forces and services, the CNPD does not find a legal basis for the use

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of remotely manned aircraft for the purpose of video surveillance of people insofar as their use implies the restriction of fundamental rights to respect for private life and the protection of personal data.

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

Even so, it is important to analyze to what extent, in the specific case, the equipment to be used by the PSP allows the identification of people, in order to understand the intensity of the affectation of the fundamental rights of citizens. This is because the role of the CNPD is limited to the defense of the rights, freedoms and guarantees of natural persons in the context of the processing of personal data (therefore, when the persons are through the identifiable treatments). However, the CNPD recalls that drones with video cameras are instruments capable of controlling society or social groups, insofar as they allow the collection of information regarding members of society (even when they are not uniquely identifiable), and This makes it easier to control their movement and reaction.

To this end, it is necessary to consider, on the one hand, the purpose or purposes of using video cameras supported by remotely manned aircraft; on the other hand, the technical characteristics of the equipment in order to assess its ability to identify the people captured in the images.

In the specific case, despite the fact that, in the authorization request (cf. point IV.8), it is stated that the PSP does not intend to "identify citizens, individually, but rather the movement of groups of people who are in breach of the provisions of [Resolution of the Council of Ministers]n.º33-A/2020, of 30th of April» - referring, in point II, to «essentially the aim of monitoring places where there is likely to be a large concentration of people [...]that require an effective control of the mobility of people, in order to prevent agglomerations and promote the safety and protection of people» -, it is also stated that if «the recording of the captured images is considered necessary, this procedure will be requested in advance [...] (cf. point IV.4)'.

Considering what was stated in the request, it appears that the purpose pursued «fundamentally» by the use of the video



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remotely manned does not justify the identification of the people captured by the images. However, the circumstance of admitting the need to record images is not suitable for this purpose, since recording images is only adequate and necessary for the purpose of identifying any citizens who do not comply with the limits defined in that Resolution and proof of the corresponding fact. illicit. And, in fact, in the authorization request it is indicated, in point IV. 4 d), that “the recorded data will be preserved only for the period strictly necessary (in criminal and criminal procedural terms)”.

In these terms, it can only be concluded that the use of this system is not excluded for the purpose of identifying possible violators of the rules whose compliance it is up to the security forces to ensure. What, moreover, is confirmed in the same authorization request, in point IV.8.a), when it is stated that «[-4/ capturing images is fundamentally aimed at identifying agglomerations of people», recognizing that there is a fundamental or main purpose , next to one another. In other words, the use of drones with video cameras will also aim, albeit in the background or with an eventual nature, at the identification of people.

And, in fact, the analysis of the technical characteristics of the cameras reveals their aptitude for this purpose. It is true that, in the impact assessment, an attempt was made to mitigate this possibility, with the definition of a minimum flight altitude of 120 meters - after stating that it is not possible to apply masks to prevent the identification of people captured by the images.

However, the characteristics of video cameras, in particular the optical and digital zoom functionality, do not allow to rule out the possibility of identifying the people captured by the images, and this even if the aircraft flight limit is fixed at a higher altitude (e.g. , 150 meters or more). A clear example of this are the ZENMUSE Z30 cameras attached to some of the aircraft models indicated in Annex I, which guarantee the identification of the people captured in the images. And it is accepted that when using other cameras equipped with a zoom function, a minimum flight altitude of 120 meters does not prevent this identification. Therefore, at least some of the equipment to be used by the PSP does not make it possible to rule out the existence of a processing of personal data and, above all, the risk of affecting the privacy of the people covered in the images.

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Indeed, and under the terms of subparagraphs c) and d) of paragraph 1 of article 3 of Law n° 59/2019, of 8 August, in order to determine whether there is a processing of personal data, it is sufficient for it to be processed information that only indirectly identifies the person, 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”<sup>8</sup>.

Furthermore, the fact that the equipment allows the recording and conservation of images is a means of facilitating the identification of people. Thus, even if the recording is not already being requested, the fact that the request is admitted that it will prove to be necessary and that the cameras attached to the aircraft always allow this recording, also on an SD card, there is no guarantee that that recording does not actually take place. Mainly because, as the CNPD has already noted<sup>9</sup>, this type of video surveillance systems does not offer guarantees of auditability. Indeed, even if some of these features are susceptible to deactivation, the possibility of reactivating them by the drone operator, regardless of authorization for that purpose, and the absence of records of such operations jeopardize any verification of compliance with any conditions set for the use of the video surveillance system (e.g. deactivation of zoom functions, image recording, sound capture and recording). In other words, neither the CNPD nor the entities that inspect the activity of the security forces are able to verify whether any limits or conditions imposed on the use of this type of equipment have been effectively respected. And the guarantee of citizens' fundamental rights, in the context of the use of video surveillance systems, largely depends on the system's auditability, so that the limits and conditions that aim to safeguard those rights can be verified.

Thus, it is not possible to ensure that citizens who circulate or are on public roads and who are captured by the images are not susceptible to identification. Moreover, under the terms in which the monitored locations are characterized (e.g., city centers, riverside or river areas, road access to the seafront), there is a risk that aircraft fly over the open spaces of private houses (terraces

<sup>8</sup> Cf. Judgment Patrick Breyer v. Federal Republic of Germany of 19 October 2016 (C-582/14), §§ 40 to 43.

<sup>9</sup> Cf. Opinion No. 2020/41, p. 5v., already quoted.

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and gardens), where people have the right to be unattended by security forces and services.

Even cameras that capture thermal images can pose an increased risk to citizens' privacy (depending on their scope, which, however, is not specified in Annex I), as they can monitor the behavior of citizens inside buildings, perhaps of housing, making it possible to identify people through their relationship with the images captured on the public road.

Thus, it can only be concluded that the video surveillance system supported by remotely manned aircraft to which this authorization application relates does not effectively prevent the identification of the persons covered by the images, so it does not rule out the processing of personal data and the risk of affecting privacy<sup>10</sup>.

In short, taking into account that the cameras attached to remotely manned aircraft to be used by the PSP have a high approach capacity (zoom), in addition to the image recording functionality, and it is not possible to apply technical measures that guarantee the effective deactivation of those functionalities or other technical measures susceptible of auditability, which would make it impossible to identify the people filmed, the use of those cameras supported by the aforementioned aircraft implies the restriction of the fundamental right to the protection of personal data and, in particular, the fundamental right to respect for private life not provided for by law, under the terms constitutionally required.

In addition, as explained above, the possible recording of images, not excluded in the present authorization request, aims precisely to identify any citizens who do not comply with the limits defined in the Resolution of the Council of Ministers that declares the

<sup>10</sup> It should be noted, in this regard, that the Conseil d'État - the French Supreme Administrative Court - recently ruled in this same vein on the use of a video surveillance system supported by drones in the current context of a pandemic, considering that it corresponds to a processing of personal data and that affects the right to respect for privacy, despite the security forces declaring the non-activation of zoom, non-recording of images and a flight altitude of 80 to 100 meters - cf. Decision of May 18, 2020 in the case opposing the Association La Quadrature du Net and Ligue des Droits de L'Homme à République Française (r.°s 440442, 440445), pp. 7 and 8, in particular, §§12 and 16.

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public calamity, so even if it were possible to apply measures that would prevent the identification of the people captured by the images, this would defeat this purpose.

### 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 (drones) for the purpose of video surveillance of people, as their use may result in the restriction of fundamental rights to respect privacy and the protection of personal data; Indeed:

1. Law no. 1/2005 does not serve as a basis of legitimacy for the use of cameras using drones, as neither its literal content nor its ratio reflects the balance between the underlying interests of video surveillance with that 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 the state of emergency, the restriction of rights, freedoms and guarantees that arise from the use of video surveillance system supported by drones can only be determined by law of the Assembly of the Republic or by decree-law. 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 further that:

i. The technical characteristics of the cameras do not make it possible to rule out the possibility of identifying the people captured by the images (it is not possible to apply technical measures that prevent this identification, with guarantees of auditability), the risk of affecting their privacy is not excluded; and

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ii. The possible recording of images, not excluded in the present authorization request, is precisely aimed at identifying any citizens who do not comply with the limits defined for the calamity situation, even if it were possible to apply measures that would prevent the identification of the people captured by the images, this would frustrate this goal;

The CNPD issues an unfavorable opinion on the request for authorization to capture images of people on public roads using video cameras attached to remotely manned aircraft, in the various areas throughout the national territory, with a special focus

on city centers and accesses. to the coast, due to lack of legal basis for this purpose and because it is not possible, through technical measures, to prevent the privacy of citizens who are there.

Approved at the meeting of June 29, 2020

Filipa Calvão (President)

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