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## NATIONAL DATA PROTECTION COMMISSION

OPINION No. 5/2018

### I. Order

The Office of the Secretary of State for Infrastructure sent the National Data Protection Commission (CNPd), for an opinion, the draft Decree-Law establishing the mandatory registration and subscription of civil liability insurance for remotely piloted aircraft systems.

The request made stems from the powers conferred on the CNPD by paragraph 2 of article 22 of Law no. 67/98, of 26 October, amended by Law no. Protection of Personal Data (hereinafter, LPDP) -, and the opinion is issued using the competence set out in paragraph a) of paragraph 1 of article 23 of the same legal diploma, being restricted to aspects related to data protection personal.

### II. appreciation

#### 1. Protection of privacy

It is important, in the first place, to point out that the use of remotely piloted aircraft systems (RPAS) does not have legal discipline in Portugal, being only the object of a regulation of the National Civil Aviation Authority (ANAC), which essentially focuses on guaranteeing the air safety.

This is a matter that, due to the special impact it has on security, as well as on people's privacy, has long deserved the attention of the national legislator. In fact, since 2014, the CNPD has come to this need, drawing the attention of the political-legislative power, in particular the Assembly of the Republic, reiterating the indispensability of safeguarding and minimizing, through legislation, the affectation of the fundamental rights of citizens, in particular regarding the privacy of private life and the protection of personal information concerning them<sup>1</sup>.

<sup>1</sup> Cf. Hearing of the CNPD in April 2014 at the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, CNPD Opinions No. 41/2014 and 41/2015, accessible at [https://www.cnpd.pt/bin/decisoos/Par/40\\_41\\_2014.pdf](https://www.cnpd.pt/bin/decisoos/Par/40_41_2014.pdf) and [https://www.cnpd.pt/bin/decisoos/Par/40\\_41\\_2015.pdf](https://www.cnpd.pt/bin/decisoos/Par/40_41_2015.pdf), and, more recently, the communication dated August 29, 2017 addressed to the Committee on Constitutional Affairs, Rights, Liberties Warranties.

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In fact, as noted in Opinion No 41/2014, these aircraft may have very different technological devices attached to them, ranging from a simple video camera or microphone, to infrared sensors, facial recognition or recognition systems. of people based on morphological or anthropometric characteristics (soft biometrics), with the specificity of circulating «in any environment, without individuals realizing that they are being used, perhaps with the specific purpose of monitoring them. On the other hand, it is not always clear who is using them and their characteristic of high mobility, associated with the reduced susceptibility of being detected, makes them a potentially dangerous instrument for the privacy and freedom of citizens.

In view of this, the need for legal regulation is obviously not restricted to the use of this equipment by security forces or other public authorities, since the same reasons are felt equally or even more intensely when used by private individuals. ..»

In this regard, the Article 29 Working Group, which brings together the data protection authorities of the Member States of the European Union, also expressed its opinion, in opinion 1/2015, of June 16, 2015, on privacy issues. and data protection in the use of drones.

In fact, the proposal for a European regulation referred to in the Preamble of the Draft contains an annex which provides for the obligation to carry out an impact study on privacy and the consequent adoption of measures to mitigate the affectation of fundamental rights.

However, the present Draft Decree-Law defines the legal regime for the use of remotely piloted aircraft (also known by the abbreviation in English RPAS or drones), in order to guarantee effective supervision and inspection, establishing for this purpose the mandatory prior registration and civil liability insurance.

If concerns about security (in terms of safety and in terms of security" are somehow reflected in the draft text, privacy and the protection of rights

2 Opinion accessible at:

[http://collections.internetmemory.org/haeu/20171122154227/http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2015/wp231\\_en.pdf](http://collections.internetmemory.org/haeu/20171122154227/http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2015/wp231_en.pdf)

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fundamental issues connected with it - right to privacy of private life, right to image, right to freedom of expression, assembly and movement, as well as the right to protection of personal data - are ignored.

It is understood that the Government does not consider itself competent to define the conditions that safeguard those rights, freedoms and guarantees - in view of the provisions of subparagraph b) of paragraph 1 of article 165 of the Constitution of the Portuguese Republic (CRP) however, it should not be noted that the definition of legal rules on the use of aircraft necessarily affects this category of fundamental rights and has a direct impact on the rights mentioned above, insofar as it legitimizes such use, even when they include "material on board [...] that could be considered dangerous (as specified in subparagraph m) of paragraph 1 of article 6 of the Preliminary Project). Therefore, the limitation on the Government's legislative competence arising from subparagraph b) of paragraph 1 of article 165 of the CRP is imposed in any case in the definition of the RPAS regime, both when it defines the processing of personal data that the registration constitutes, as when setting the conditions for operating with RPAS, even with components that impact the fundamental rights of citizens.

In fact, the legal definition of a set of duties for aircraft owners, to be fulfilled prior to their use, legitimizes such use and creates the conviction that nothing else is necessary to protect other rights that may conflict with the right to operate the aircraft. . What is all the more serious considering that most RPAS are operated to capture and record image and sound.

It is therefore evident that a legal regime for the use of RPAS cannot leave out the protection of privacy, as if this were a split issue, susceptible to be considered at another stage of the legislative procedure or in the context of another legislative initiative.

To that extent, the CNPD recommends that this draft be reformulated, including provisions that minimize the impact on the rights to privacy of private life, image, freedom and the protection of personal data, in compliance with the provisions of

paragraphs 2 and 3 of article 18 of the Constitution.

Thus, the CNPD suggests the definition of certain limits and conditions for the use of RPAS, in addition to those that ensure, in the draft, security and civil liability, to protect the privacy of citizens.

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1.1. From the outset, it is recommended to introduce a rule to ensure compliance with the legal regime for the protection of personal data, whenever RPAS are used with coupled devices that may imply the capture and recording of image and sound of people, or that allow capturing other personal data (i.e., information relating to identified or identifiable natural persons) - for example, through infrared sensors or soft biometrics technology.

Not being essential, since that regime would always have application, the fact that there is a diploma specifically regulating the use of RPAS, can, as explained above, form the conviction that to operate such aircraft it is enough to fulfill the obligations defined therein, therefore reasons of clarity and legal certainty justify this express reference.

However, it should be noted the difficulty of the transmission or recording (recording) of information by the coupled devices to be legitimized by the LPDP or by Regulation (EU) 2016/679 - General Regulation on Data Protection (RGPD) -, applicable to from May 25, 2018. The explicit consent of the affected rights holders is often very difficult to obtain (only possible when the flight takes place in enclosed spaces or areas - e.g., at private events or parties), and the legitimate interest of the person in charge or a third party will hardly be able to prevail over the rights, freedoms and guarantees. On the other hand, such an interest will not even be relevant if sensitive or specially protected information is at stake, such as political or philosophical beliefs, religious faith, health or information relating to private life (cf. Article 7 of the LPDP and 9 . of the GDPR).

For this reason, a rule limiting the possibility of capturing images and sound (or other types of information) would be appropriate to cases in which the persons covered are not foreseeably identifiable; whenever personal data are collected by chance, the law must impose the obligation of immediate deletion of information relating to individuals.

Likewise, the collection of images or other information on private or public property intended to be used in a private and family context, namely gardens, terraces, etc., should be prohibited. Special precautions are also required in areas normally used by children.

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It should be noted that the legislative provision of a special regime for the use of aircraft with devices attached by journalists in the exercise of their professional activity or by other professionals (eg producers/directors) may be justified.

1.2. Another aspect of the regime that must be specifically regulated concerns the guarantee of citizens' rights in the context of the processing of personal data, in particular the right to information and the right of access; in question are rights enshrined in paragraph 1 of article 35 of the CRP and in article 8 of the Charter of Fundamental Rights of the European Union, which correspond to the minimum manifestation of the fundamental right to informational self-determination and which, therefore, do not may no longer be insured.

The guarantee of the right to information presupposes the obligation to make known to the potential affected that, in a given place or area and within a defined period of time, images and/or sound will be captured, or other information likely to affect the fundamental rights of the people covered.

This right to information, because it is instrumental in relation to the right of access and the rights of elimination or opposition, also requires knowledge of who is processing personal data and their contacts, as well as the purpose of the treatment.

Therefore, the duty of information should be foreseen, which is more easily fulfilled when the use of RPAS in fixed areas (e.g., dams, electricity production infrastructure and other risk infrastructures) is concerned, because there notices posted. In other cases, the information must be made available through an easily accessible means, namely on the Internet. In this context, it is important to define the website where the information can be consulted, which, naturally, should be related to the identification of the aircraft. To that extent, since ANAC is the public entity responsible for the registration of RPAS, it seems to be this entity best able to aggregate and disseminate this information.

Provision should also be made for the information to be made available before the start of the aircraft's flight and to be kept for a reasonable period (e.g., 30 days), in order to allow the exercise of the citizen's rights and to ensure the production of evidence in possible administrative or legal proceedings.

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It should be noted that the provision of this information is also essential for the inspection of the lawfulness of the processing of personal data.

## 2. Analysis of the Draft Draft

Considering now the content of the Draft Draft, the rules that raise doubts or deserve to be reviewed from the perspective of their compliance with the legal regime for the protection of personal data will be highlighted here.

2.1. The Draft provides for the creation of a register of RPA owners, which, in addition to identification and contact information for the owner and the aircraft, may also include information on the aircraft operators. If the information on owners and operators does not raise doubts (although it is advisable to specify the operators' data - e.g., name), paragraph 1(m) of article 6, which mentions "a list of any other material on board the RPA that could be considered hazardous» deserves several remarks.

On the one hand, it seems advisable to densify at some point in the draft what is to be understood by material that can be considered hazardous. The use of an imprecise concept in this context, without even specifying the goods that are the object of protection (e.g., life and physical integrity of people, air safety, public safety, national security), undermines the guiding function of conduct that legal norms must to fulfill.

On the other hand, one cannot fail to also demand the specification of aircraft components that may affect other fundamental rights of citizens, such as the right to respect for private life or the rights to image, protection of personal data and freedom.

Furthermore, the information collected in the case of provisional registration - for owners not residing in the national territory - seems to fall short of what is necessary for the purpose of the registration to be achieved. From the outset, it is not clear why in this case the specification of materials that integrate or are coupled to drones that could constitute a danger to the security or

fundamental rights of citizens is not required.

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The CNPD therefore recommends reformulating the wording of subparagraph m) of paragraph 1 of article 6, as well as of paragraph 6 of the same article.

2.2. With regard to the availability of information contained in the register to security forces and other public authorities, as referred to in paragraph 7 of article 6, it is strange that there is no provision for publicizing the register.

In fact, considering the purpose of this database, it seems appropriate to subject it to a publicity regime similar to that valid for the registration of goods whose use is liable to create a risk for the safety of persons, as is the case with vehicles automobiles.

It is only recommended to hide data whose knowledge is not necessary for most interested parties, i.e., the aircraft owner's NIF. In fact, if at stake are RPAs that have attached devices capable of affecting the privacy of citizens, the rules for the protection of personal data require the publication of part of that information (for example, name and contact details of the person in charge).

It should also be added that, if the intention not to publicize the information contained in the register is maintained, it is not explained, nor is it reached what it may be, the reason for the requirement of a protocol that defines the terms of making the information available to public authorities not extend to the security forces and services and the National Aeronautical Authority: where the *raison d'être* is the same, the legislative solution must be the same.

2.3. Article 10 provides for the possibility for ANAC to impose a prior registration of RPA flights, in order to maintain the safety of air navigation. The registration will be limited to a certain area, to be defined in each case by ANAC, which for this purpose must have an electronic platform that identifies the RPA registration number, the area covered and the period of flight time. Now, this is a suitable mechanism to protect privacy and for that reason it is essential that it be used, not as an occasional or occasional registration system, but whenever the use of RPA with technological devices that allow the capture, transmission or recording of personal data.

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The CNPD therefore recommends the legal obligation of prior registration of the flight, whenever equipment is attached to the drones that allows the collection of personal data, in order to safeguard other fundamental rights.

Indeed, in addition to expanding the scope of application of this rule, provision should also be made for the publication of this register, for reasons of transparency, allowing citizens to exercise some control over the eventual collection of their personal data, and for reasons of effective inspection.

2.4. Finally, article 13 deserves two observations, where the administrative offense regime is established.

The first observation is related to the convenience, once again for reasons of clarity and legal certainty, in safeguarding in paragraph 1 of this article other administrative infraction regimes, namely that resulting from the legal regime for the protection of personal data.

The second observation concerns the apparent incongruity of classification as very serious and serious of two infractions that appear to be of an equivalent nature. In fact, while in subparagraph e) of no. record the RPA flight with electronic identification equipment turned off or operational.

Since two identification obligations are at stake, therefore, with the same purpose, it seems that the second exempts the first (cf. the final part of paragraph 2 of article 8), the source of its provision (legal or regulatory) does not seem to be sufficient to justify the differentiation in terms of the seriousness of the infringement when that purpose is impaired.

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III. Conclusion

1. On the grounds set out above, the CNPD understands that the use of remotely manned aircraft, whenever they are coupled



with technologies that allow the capture of image, sound or other information relating to identified or identifiable natural persons, significantly affects privacy of the persons covered, and to that extent the fundamental rights to the privacy of private life, the image, freedom of expression, assembly and movement, as well as the fundamental right to the protection of personal data.

For this reason, the legal regime for the use of RPAS cannot be limited to safeguarding security and civil liability, leaving out the protection of privacy, as if this were an autonomous issue, even for creating the conviction that the compliance with the duties of that regime, neglecting the observance of other legal obligations, in particular, those arising from the personal data protection regime.

The CNPD therefore suggests that the present draft be reformulated, including provisions that minimize the impact on fundamental rights, in compliance with the provisions of paragraphs 2 and 3 of article 18 of the Constitution.

2. In particular, it is recommended:

The. The introduction of a rule guaranteeing compliance with the legal regime for the protection of personal data, whenever aircraft are used with attached devices that may imply the collection of other personal data;

B. Limiting the possibility of capturing images and sound (or other types of information) to cases in which the persons covered are not foreseeably identifiable; whenever personal data are collected by chance, the law must impose an obligation to immediately delete the information relating to identifiable persons.

ç. The possibility of providing for a special regime for the use of aircraft with devices attached by journalists in the exercise of their professional activity or by other professionals, within the scope of freedom of expression or artistic creation;

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d. The imposition of a duty to provide information, under the terms set out above, as a condition for exercising the rights of access, elimination or opposition to the processing of personal information, as well as for the purpose of monitoring personal data;

and. The reformulation of the wording of subparagraph m) of paragraph 1 of article 6, as well as of paragraph 6 of the same article, requiring the specification of aircraft components that affect, in addition to safety, other fundamental rights of citizens;

f. The extension of the scope of application of the prior registration of flights, provided for in article 10, as well as its publication, under the terms set out in point 2.3, in order to safeguard other fundamental rights.

Lisbon, February 16, 2018

Filipa Calvão (President, who reported)