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OPINION/2019/2

## I. Order

The Economy, Innovation and Public Works Commission sent the National Data Protection Commission (CNPd), for an opinion, the Draft Law n.º 173/XIII/4a (GOV) that regulates the operation of civil unmanned aircraft systems ('drones') in national airspace.

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as an independent administrative entity with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and by the no. 4 of article 36, of Regulation (EU) 2016/679, of 27 April 2016 (General Data Protection Regulation - RGPD), in conjunction with the provisions of no.

1 of article 21 and paragraph 1 of article 22, both of Law no. 67/98, of 26 October, amended by Law no. 103/2015, of 24 August (Law of Personal Data Protection - LPDP).

The assessment of the CNPD in this opinion is restricted to aspects of the regime relating to the processing of personal data, that is, operations that focus on information concerning natural, identified or identifiable persons - cf. lines a) and b) of article 4 of the RGPD -, focusing on the precepts that provide for or imply processing of personal data.

## II. Analysis

This Draft Law is presented after the publication of Decree-Law No. 58/2018, of July 23, on whose draft the CNPD had the opportunity to issue Opinion No. 5/2018<sup>1</sup>.

It takes the opportunity to point out the fact that some of the recommendations then presented by the CNPD in the aforementioned opinion were followed in the final wording of Decree-Law no. from now on, through this Draft Law, if it intends to fill the gaps and the organic and formal insufficiency of that Government diploma to regulate the impact that the use of these aircraft can have on the fundamental rights to respect for private life and freedom when they

<sup>1</sup> Accessible at [https://www.cnpd.pt/bin/decisooes/Par/40\\_5\\_2018.pdf](https://www.cnpd.pt/bin/decisooes/Par/40_5_2018.pdf)

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devices capable of capturing sound or image or even biometric data of people are attached.

However, there are still some doubts about the regulation contained in the proposed law here, which should be clarified.

#### 1. The operation of drones and the processing of personal data arising therefrom

The Draft Law regulates the operation and inspection of unmanned civil aircraft systems in national airspace that are used for recreational purposes or in the context of a professional activity. In this context, it defines rules on the operation of the aforementioned aircraft, commonly known as drones, both in public spaces and on private properties.

In the scope of public spaces, the Proposal foresees, in its article 3, different types of places or areas, differentiating the legal regime of the operation of drones depending on those. Thus, it provides for the definition of public spaces by the central, regional or local administration, in which the authorization for the operation of drones for recreational or recreational purposes will not be necessary. It also provides for a technological free zone, to be defined by decree, and authorized places for the practice of model airplanes, where prior administrative control by the National Civil Aviation Authority (ANAC) is also waived.

##### 1.1. The operation of drones for recreational or recreational purposes in public spaces and the impact on privacy

If the CNPD has nothing to comment on the remaining areas indicated, the regime for operating drones in public spaces to be defined by the central, regional or local public administration raises some reservations.

As for these spaces, Article 5(1) of the Proposal sets out as requirements for their delimitation that they are 30 meters away from third-party infrastructure and that they allow the necessary visibility for line-of-sight flights. . However, considering that, as specified in paragraph 4 of article 11 of the Proposal, in relation to these spaces, the capture of images in the context of operations with unmanned aircraft is allowed, the minimum distance of 30 meters in relation to ' third-party infrastructure' is or

may be insufficient to prevent the capture of images that could intolerably restrict privacy. Having

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taking into account the resolution capacity of the photographic and video cameras that can be coupled to the drones, and if you think that such infrastructures can, for example, be residential homes, especially with gardens, schools, outdoor recreational areas, or hospitals, you cannot ignoring the high impact on privacy and freedom, and above all in relation to people who are in a situation of greater fragility, allowing the capture and eventual transmission of personal data that enhances discriminatory treatment.

It is true that the waiver of authorization by the National Aeronautical Authority (AAN) to capture images in these public spaces does not remove the legal regime for the protection of personal data, nor does it preclude the duty to guarantee respect for the reservation of private life and the right to image, as highlighted in paragraph 5 of article 11 of the Proposal. But, it is insisted, the definition of those places by the Public Administration cannot ignore that it also has the duty to guarantee that third parties do not affect the rights, freedoms and guarantees, of which the rights to reserve private life stand out, image and protection of personal data. And in this aspect of these fundamental rights, i.e., in the dimension of the right to action by the Public Power to guarantee their respect in relations between private parties, it is more than recommended that the law binds the central, regional and local Public Administration, in the definition of such spaces, to guarantee respect for those rights. For this purpose, it is also suggested that the duty to consult the CNPD be added to paragraph 2 of article 5, or in a separate number in the same article, so that the imperative of safeguarding such fundamental dimensions becomes clear.

In fact, it is important to bear in mind that the performance of the CNPD a posteriori\ in the context of inspection of the capture of images by drones operated in these public spaces for recreational or recreational purposes, is hampered by the terms of the regime discussed here, in particular by the difficulty of identification. of the same (only by reference to the registration number on the device itself, not visible to anyone who is 30 meters from the place where it operates) and the impossibility of traceability of its use (which is limited to operations subject to ANAC authorization - see article 10 of the Proposal). In this way, the compatibility of the regime contained in this Draft Law with the RGPD and, specifically, with the principle of preventing the risk of irremediable damage to private life, freedom and the right to non-discrimination, justifies the imposition of a judgment prior assessment of this impact, which, it is reiterated, falls on the Public Administration and in whose formation the CNPD can

play an important guiding role.

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In fact, because the delimitation of these public spaces has an indeterminate set of recipients and is intended to be applied successively over time, the definition of these spaces by the different administrative bodies (central, regional or local) has the nature of an administrative regulation. As such, and insofar as it delimits areas where the collection of personal data can occur through the capture of sound and images or other types of personal information, it must be object, under the terms of paragraph 4 of article 6. of the RGPD, prior consultation with the national supervisory authority for the processing of personal data (cf. paragraph 4 of article 36 of the RGPD).

Secondly, it is essential, in order to guarantee the principle of transparency in the processing of personal data (enshrined in Article 5(1)(a) of the GDPR), that the delimitation of the public spaces in question be publicized - not only in the places in question, but also on the websites of each administrative body responsible for fixing it and on the website of the ANAC and, perhaps, of the AAN. In this way, we contribute to a greater awareness of people about the risks of moving in these areas or in their proximity, thus recognizing some autonomy to lessen the impact of such treatments in their legal sphere.

It should be noted that the duty imposed on ANAC, in paragraph 4 of article 12, to make the identification of these public spaces available on the platform referred to in that article only benefits aircraft operators and not potential data subjects. personnel affected by its use.

Therefore, it is recommended that a new number be added to article 5 to impose that duty of publicity.

## 1.2. The operation of drones in private spaces or spaces with public access

Also with regard to the areas in which drones can operate, article 4 defines a specific regime for the overflight of private spaces and public or private spaces with public access. According to this regime, the operation of such aircraft in private spaces depends on the “consent of the owner or its legitimate owner”, while the operation in spaces with public access depends on “the prior express consent of the owner or responsible person”.

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First, it is pointed out that the reason for specifying the prior and express attribute for consent in the second case and its absence in the first case is not clear. Perhaps it is related to the fact that, in the first case, a person is involved whose image and personal data are being processed and, there, the requirements of Article 4(11) of the GDPR are always imposed, that cover those attributes, which in the second hypothesis may not be verified.

In any case, the CNPD believes that it is useful to reiterate such attributes of consent in paragraph 1 of article 4, so that there are no doubts about the interpretation of the different wording of the precepts.

Secondly, the CNPD recalls that the application of the regime provided for in Article 4 of the Proposal concerns only the operation of a drone over those areas, and not the capture of images or the processing of other personal data due to the use of devices attached to the drone. In other words, the consent referred to in article 4 does not exempt the verification of one of the conditions of lawfulness of processing of personal data provided for in article 6 of the GDPR (which may be a specific declaration of consent for the processing of personal data intended, to be obtained from each of the persons affected by it). In the same article, the requirement to obtain prior consent is waived when the operation is subject to authorization by ANAC. While this solution is not directly questioned, attention should be drawn to the fact that obtaining authorization from the AAN may still be required if the capture of images is at stake.

For this reason, the CNPD recommends that the specific regime for capturing images, provided for in article 11 of the same draft diploma, be noted in paragraph 3 of article 4 of the Proposal.

### 1.3. The absence of regulation of other ways of collecting personal data by drones

Finally, the CNPD cannot help but regret that in a diploma of this nature the concern to regulate the processing of personal data resulting from the operation of drones is limited to capturing images, ignoring the capture of sound - which can have an even more significant impact on privacy - and the processing of other types of

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information relating to persons thus identified or, relating to other personal information, capable of identifying them. In fact, drones can be operated with attached devices that allow the capture and recording of sound and, therefore, conversations between people, or that allow the capture of other personal data - for example, through infrared sensors or soft technology. biometrics

To that extent, the CNPD recommends that the regime provided for in article 11 on image capture be extended to other forms of capturing and further processing of personal data.

## 2. The competence to supervise the processing of personal data resulting from the operation of drones

Another aspect of the regime that should be highlighted concerns the competence for inspection. Considering that it is up to the national authority to control the processing of personal data to be responsible for monitoring, applying corrective measures, including monetary sanctions (defined in the GDPR), so that the provisions of paragraph 1 of article 17. ° does not seem to exclude this competence in relation to the processing of personal data carried out with the operation of unmanned aircraft, it is recommended that, at the beginning of the precept or in an autonomous number in the same article, the competence of the CNPD to supervise the processing of personal data that take place in the national territory in this context.

## 3. Other processing of personal data under the responsibility of ANAC and AAN

Finally, it should be noted that the processing of personal data arising from the procedure of prior administrative control of the drone operation is regulated in this Draft Law.

Indeed, in paragraph 4 of article 10, the categories of data collected for the purpose of issuing authorization by ANAC are foreseen, which appear to be adequate and necessary for the purpose of the treatment.

Article 12(1) provides for an electronic platform for processing information, under the responsibility of ANAC, which ensures interconnection with the AAN.

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And in paragraph 3 of article 12, permanent access by entities with authority to authorize or supervise “data on the platform” is foreseen. The reference to the legal regime for the protection of personal data makes clear the need to observe the principles and rules of protection of personal data in the context of these treatments.

In any case, it should be noted that the reference to accessing data on the platform is not the most correct, because the data, as far as the article is written, are not on the platform but kept in a specific database. And, therefore, it would be better to talk about access to the database that the platform feeds or access to the platform for querying data.

### III. Conclusion

1. On the above grounds, the CNPD understands that the proposed Law in question fills in the gaps and the organic and formal insufficiency of Decree-Law No. 58/2018, of 13 July, to regulate the impact that the The use of unmanned aircraft ('drones') may have the fundamental rights to respect for privacy, image and freedom, when devices capable of capturing sound or image or even biometric data of people are attached to them.

2. The diploma, however, lacks occasional revisions, especially with a view to guaranteeing the principle of transparency in the processing of personal data, as well as legal certainty and certainty in the application of the regime established therein. Thus, the CNPD recommends the following:

i. Regarding the operation of drones for recreational or recreational purposes in public spaces, in the definition of these spaces by the central, regional or local Public Administration, it must be ensured that the rights, freedoms and guarantees of third parties are not affected, especially those who live or are in buildings or infrastructure located at a distance of only 30 meters; therefore, recommends that the duty of prior consultation with the CNPD in the administrative procedure for setting such spaces be added to paragraph 2 of article 5, or in a separate number in the same article;

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ii. It also suggests that a new paragraph be added to Article 5 to impose the duty to publicize, on the Internet, public spaces intended for the operation of drones for recreational and recreational purposes;

iii. In relation to private spaces and spaces with public access, the CNPD considers it useful to explain in paragraph 1 of article 4 the attributes prior to and express consent, so that there are no doubts about the interpretation of the different wording of paragraph 1 and no. 2;

iv. Recommends that the specific regime for capturing images provided for in article 11 of the same law be noted in paragraph 3 of article 4 of the Proposal, in order to clarify that the authorization of ANAC does not waive other duties provided for therein;

v. It suggests clarification, in article 17, that the provisions of paragraph 1 do not exclude the CNPD's powers of inspection and adoption of corrective measures regarding the processing of personal data carried out with the operation of unmanned aircraft.

3. Finally, considering that the devices attached to the drones allow not only the capture of images, but also of sound and, therefore, of conversations between people, and that they may also allow the capture of other personal data (for example, through infrared sensors or soft biometrics technology), the CNPD recommends that the regime provided for in article 11 on image capture be extended to other forms of capturing and further processing personal data.

Lisbon, February 5, 2019

Filipa Calvão (President)