Unmanned aircraft in the EU: A regulatory landscape fragmented?

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Introduction

- With the ever-increasing growth of the civilian drone market, it is imperative that the challenges that drones pose to the EU's fundamental rights scheme are addressed.
- Conversely, it is important that the EU's fundamental rights framework, particularly the right to privacy and data protection, are sufficiently pliable enough to capture its novel challenges under its ambit.
- The new Basic Regulation (Regulation (EU) 2018/1139) creates a comprehensive set of regulations of all civilian drones across the European Union. Among the risks the new Regulation is attempting to address, particular emphasis has been placed on allaying the risks that drones pose to privacy and the protection of personal data.

What does privacy mean in the context of drone use?

- Three categories of privacy (Rossler):
  - Decisional privacy, which establishes a space for manoeuvre in social action that is necessary for individual autonomy,
  - Informational privacy, i.e., who knows what about a person and how they know it (control over information relating to that person),
  - Local privacy, i.e. privacy of the household, of one's flat or room and thus privacy of personal objects

- What does privacy mean in the context of surveillance of public spaces?

UAVS as Threat to Privacy

- UAVs offer a means for surveillance with an ubiquity that far surpass their technological forebears
- Whereas the exercise of decisional autonomy –in this case, making decisions on where to go or where not to go– could determine on what terms one subjects oneself to conventional forms of surveillance (i.e., knowing that if you enter the premises of particular locations, you accept the possibility of being monitored), UAVs have a mobility that challenge older spatially-fixed notions of surveillance
- Unhindered, easily adaptable and “persistently present” 'drone gaze' can impose a degree of psychological pressure that was not present in more systematic and predictable forms of surveillance(1)
- "personal autonomy may be fundamentally threatened if people are structurally mistaken about the possibility that other people may have information about them.“(2)
- unlike conventional surveillance systems, people are usually not able to evaluate the aims of the particular UAV activity, the modalities of the specific system, or if there is even any monitoring going on at all.

Risks to Data Subject Rights

- Risks to data subject rights may emerge in relation to:
  - Which data processing equipment is onboard
  - For what purposes personal data is being collected and by whom

- Several privacy risks in relation to the processing of data collected by equipment onboard the UAV
  - Lack of transparency due to difficulty of being able to view drones from ground
  - Difficulty of knowing for what purposes personal data is being collected, by whom and where they will be stored
  - Small drones can collect wide range of info without direct line of sight

Background to the New Basic Regulation

- The EASA, established in 2002, governed by European public law and has been granted specific regulatory and executive tasks in the field of civil aviation
- Regulation 216/2008 on Common Rules in the Field of Civil Aviation (Basic EASA Regulation) granted the EASA the competence to regulate all aircraft with a maximum take-off mass of more than 150kg
- Consequently, the regulation of those UAVs with a mass of less than 150 kg were under the competence of respective EU member states.
- Move to a risk-based approach: In a Workshop in 2011, the idea for a risk- and proportionality-centric approach to the regulation of small UAVs first emerged. This represented a shift away from the ‘aircraft’-centric approach to regulation in the past towards an ‘operations-centric’ approach to regulation. (1)
- In September 2018, the new Basic Regulation came into force, putting drones under 150 kg under the competence of the EU. The associated technical and implementing Regulations are expected to come into force sometime this year.

Regulation (EU) 2018/1139: Relevant Provisions

- Recital 28:
  - The rules regarding unmanned aircraft should contribute to achieving compliance with relevant rights guaranteed under Union law, **and in particular the right to respect for private and family life, set out in Article 7 of the Charter of Fundamental Rights of the European Union, and with the right to protection of personal data, set out in Article 8 of that Charter and in Article 16 TFEU**, and regulated by Regulation (EU) 2016/679 of the European Parliament and of the Council.

- Recital 31:
  - In view of the risks that unmanned aircraft can present for safety, **privacy, protection of personal data**, security or the environment, requirements should be laid down concerning the **registration of unmanned aircraft and of operators of unmanned aircraft**. It is also necessary to establish digital, harmonised and interoperable national registration systems in which information, including the same basic data, about unmanned aircraft and operators of unmanned aircraft registered in accordance with this Regulation and the implementing acts adopted on the basis thereof should be stored. Those national registration systems should comply with the applicable Union and national law on privacy and processing of personal data, and the information stored in those registration systems should be easily accessible.

Regulation (EU) 2018/1139: Relevant Provisions

- Annex IX(1.3.)
  - If necessary to mitigate risks pertaining to safety, privacy, protection of personal data, security or the environment, arising from the operation, the unmanned aircraft must have the corresponding and specific features and functionalities which take into account the principles of privacy and protection of personal data by design and by default. According to the needs those features and functionalities must ensure easy identification of the aircraft **and of the nature and purpose of the operation**; and must ensure that applicable limitations, prohibitions or conditions be complied with, in particular with respect to the operation in particular geographical zones, beyond certain distances from the operator or at certain altitudes.

How the Basic Regulation Furthers the Principles of the GDPR and Data Subjects' Rights

- Summary

Principles and Rights of the GDPR	Provision in the Basic Legislation
Data minimization:	
Transparency:	Recital. 31 (national registration systems)
Accountability:	Annex IX (1.3) (privacy and protection of personal data by design and default)
Rights of access, correction, erasure:	Recital 31 (national registration systems)
Purpose Limitation:	Annex IX (1.3) (?)
Data Protection by design and default:	Annex IX (1.3) (privacy and protection of personal data by design and default)

Suggestions

- The Basic Regulation, in Recital 8, gives member states considerable freedom to make its own conditions for the purposes of data protection as needed, without necessarily relying on the EU.
- WP29 has emphasized Codes of Conduct that can help industry and different categories of operators prevent infringement, and apply sanctions in the case of non-compliance with the Code.
- Finally, there should be Cooperation between Civil Aviation Authorities and DPAs for raising awareness among manufacturers, operators, and pilots on the data protection issues.

Key messages from the risk analysis

- Define personal data through a notion of risk
- Transparency is essential
  - Build public trust
  - A key element of meeting data protection obligations
- Data minimisation is a key privacy-by-design feature, and may release RPAS operators from data protection obligations
- General risks related to RPAS use are difficult to pin down, and a case-by-case analysis is necessary

Good practice recommendations for industry

- Give members of the public information about the activities being undertaken,
- Minimise the amount of data that is collected,
- Anonymise data that is collected,
- Ensure that the data is only used for the original purpose for which it was collected, eliminating or reducing the storage of personal data, and
- Ensure that data that is processed or stored is properly secured.

Policy recommendations for all stakeholders

- Raise awareness of privacy and data protection requirements in the RPAS industry
- Enact information and transparency protocols (signs, leaflets, Internet tools)
- Conduct mandatory assessments of privacy and data protection issues for each type of operation (privacy impact assessments)
- Identify stakeholders (CAAs and DPAs) to monitor good practice in privacy and data protection.