

Drones, a new means of proof?

The use of drones, once reserved for the military, is now widespread.

In fact, drones are receiving a high level of interest from investigation services. Even more, they are now becoming indispensable security tools, as shown by the recent acquisition by the City of Toulouse of several drones to protect its inhabitants.

But can these drones be used to secure evidence in a criminal case?

The Criminal Chamber of the *Cour de Cassation* (French Supreme Court) ruled on this question on November 15, 2022^[1].

The facts of the case at hand were as follows: an individual had been indicted for various drug offenses. During the judicial inquiry, he filed an application for the rejection of some pieces of evidence, arguing that the incriminating images had been captured by a drone and were, therefore, inadmissible.

The Investigation Chamber of the Bordeaux Court of Appeals, in a decision dated December 16, 2021, dismissed this application for rejection of procedural exhibits.

The accused lodged an appeal and sought the annulment of the decision of the Investigation Chamber of the Bordeaux Court of Appeals, in particular on the grounds that only fixed image capture devices were authorized, not aerial capture devices. It added that in any case the judge had authorized such an aerial capture without specifying how the circumstances excluded any possibility to use another device.

As such, the issue at stake was: can the use of a drone be authorized in order to capture images for securing evidence during a judicial enquiry?

In its decision of November 15, 2022, the Criminal Chamber of the *Cour de Cassation* took a stand on this

issue.

It first recalled that the use of an image capture device, notably an aerial capture device, is an active interference in the right to respect for one's private and family life, and home, as provided for in Article 8 of the European Convention on Human Rights^[2].

Consequently, such an interference can be justified only if two conditions are met:

- the interference must have a sufficient legal basis;
- the interference must pursue a legitimate aim in a democratic society and must, therefore, be necessary and proportionate.

Regarding the sufficient legal basis

Relying on EU case-law^[3], the *Cour de Cassation* specified that a legal text, in order to be foreseeable, does not necessarily have to foresee all the situations that it must cover.

It added that Article 706-96 of the French Code of Criminal Procedure, which provides for the use of image capture, does not distinguish between fixed and mobile devices, and that, therefore, according to the classic adage, one should not distinguish where the law does not^[4].

Moreover, the use of such a device is limited to criminal investigations or those concerning an offence committed in an organized gang.

It thus considered that there was a sufficiently clear, predictable, and accessible legal basis.

Regarding the necessity and proportionate nature of image capture by drone

The *Cour de Cassation* pointed out that the Investigation Chamber reported the conditions in which the investigators had, before setting up the recording of images by airborne camera, discovered and ascertained the existence of the narcotics trafficking network in which the accused took part.

It added that said capture had been authorized for 4 months by an investigating judge, at the request of the public prosecutor and that the investigators acted under authority delegated by the judge.

It concluded that the layout of the premises made it difficult to carry out another type of surveillance and that the investigating judge had specified why this image capture was essential for the inquiry.

As such, according to the *Cour de Cassation*, in light of all these elements, the decision of the Investigation Chamber that dismissed the accused's petition was perfectly in line with the provision of the European Convention on Human Rights and the legal texts invoked by the accused in that it was necessary and proportionate.

It is, therefore, perfectly possible for investigating services to use drones within the framework of Article 706-96 of the French Code of Criminal Procedure.

[1] Criminal Chamber of the Cour de Cassation, November 15, 2022, No. 22-80.097

[2] Article 8 “Right to respect for private and family life” of the European Convention on Human Rights

[3] ECHR, judgment of May 8, 2018, Ben Faiza v. France, No. 31446/12

[4] “*Were the law does not distinguish, neither should we distinguish*” (Ubi lex non distinguit nec nos distinguere debemus)

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