

NATIONAL COMMISSION ON DATA DEVELOPMENT

OPINION/2019/1

I. Order

The Director-General for Foreign Policy of the Ministry of Foreign Affairs sent the National Data Protection Commission (CNPd), for an opinion, the Protocol of Amendment to the Convention for the Protection of Persons in relation to the Automated Processing of Personal Data, taking into account in view of the respective ratification process by the Portuguese State.

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 paragraph 4 of article 36 of Regulation (EU) 2016/679, of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of paragraph 1 of article 21, ° and no. 1 of article 22, both of Law no. 67/98, of 26 October, amended by Law no. 103/2015, of 24 August (Personal Data Protection Law - 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 1) and 2) of article 4 of the RGPD -, focusing on the precepts that provide for or imply processing of personal data.

II. Analysis

The Convention for the Protection of Persons with regard to the Automated Processing of Personal Data, ETS1 No. 108, was the first binding instrument of an international nature specifically dedicated to the protection of personal data. Open for accession since January 28, 1981, the Convention entered into force on October 1, 1981.

1 Acronym for “European Treaty Series”.

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year. Portugal was one of the first States to adhere to the Convention (on May 14, 1981), although it only ratified it on September 2, 1993, having been applicable in our country since January 1, 1994.

As an innovative instrument and precursor of many of the national solutions that would pontificate (above all) in the European space, this Convention, on the way to its forty years of existence, was already dated in some of the proposed concepts and solutions, a fact exponentiated by the hyper- evolution that has been witnessed in recent decades in terms of processing personal data, whether in terms of quantity, or the sophistication and complexity that they increasingly present.

The emergence of new risks, associated with the trivialization of the processing of personal data (increasingly uncritically required for any and all purposes), triggered a welcome update process that is marked by changes very much in line with those that the reform of the personal data protection legislation² assumed for the European Union (EU) space and to which Portugal, as a Member State, is already bound.

As a general note and before a more detailed view of these changes, what can be said right away is that the renewed Convention 108³ does not, in the CNPD's view, pose any obstacles to its ratification and entry into force in the national legal order.

- The most relevant modifications

In summary, we would point out as relevant some novelties of the Protocol of Amendment to Convention 108 (CETS⁴ No. 223) that project it to a higher level in the defense of the right to data protection.

The considerable decrease in exceptions to the application of the convention, now practically limited to domestic treatments⁵, is one of these novelties. At this point, the new article

² Comprised of several important legal instruments, among which the infamous RGPD (General Regulation on Data Protection) stands out.

³ Also known as "Convention 108+".

⁴ Acronym for "Council of Europe Treaty Series".

⁵ The GDPR also provides for a similar exception in Article 2(2)(c).

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Article 11 only admits them in the context of national security or the defense of freedom of expression when such purposes are framed by law and the exception itself respects the essence of fundamental rights and freedoms and constitutes a necessary and proportionate measure in a democratic society⁶. Furthermore, and with regard to specific exceptions applicable to the national security and defense sector⁷, the Convention is clear about the indispensability of independent and effective supervision and control, in accordance with the national legislation of the State party, a far-reaching novelty, even if, in the European Union, tradition already dictated the fulfillment of this prerogative.

In conceptual terms, the existing evolution is notorious, especially when considering the provision that contains the legal grounds for processing⁸, something that was absent from the original version of the Convention.

The concern with the transparency of the processing is substantially strengthened either with the mention in Article 5, paragraph 4, al. a), with regard to the principles of legitimacy⁹ for data processing and data quality, or with greater emphasis on the new article 8, where it has its own headquarters.

The evolution with regard to the special categories of data is evident, with the States parties opting to emulate the categories provided for in Article 9(1) of the GDPR¹⁰. And the same emulation can be found regarding data breaches and respective notifications¹¹; the rights of data subjects¹² (albeit with less ambition¹³); in the consecration of the principle of responsibility¹⁴; in providing for the obligation of data controllers

6 Cf. Article 11(1) of the updated Convention.

7 Particularly with regard to the information to be provided to the supervisory authorities and to the Convention Committee itself, provided for in Chapter VI.

8 Cf. Article 5(2)

9 Equivalent, but not equal, to the legality in the GDPR.

10 Cf. Article 6 of the Convention.

11 Cf. Article 7(2) of the Convention and Articles 33 and 34 of the GDPR.

12 Cf. Articles 9(1) and 12 of the Convention and Articles 15 to 17, 21 and 22, 77 and 82 of the GDPR

13 Lacking, expressly or implicitly, the right to portability and the right to limitation of treatment,

14 Article 10(1) of the Convention and Article 5(2) of the GDPR.

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and, eventually, subcontractors (in a possibility not opened by the RGPD) carry out data protection impact assessments of the treatments prior to their execution¹⁵; in implementing the principle of data minimization through the use of data protection concepts by design and by default¹⁶; in the regulation of international flows between States Parties and between States Parties and third States¹⁷; on harmonizing the powers of supervisory authorities¹⁸ and on the need for these authorities, in addition to States Parties, to cooperate to ensure the effectiveness of the Convention¹⁹; even strengthening the powers of the former Advisory Committee, now called the Convention Committee, which, like the European Data Protection Committee in the GDPR, may play a key role in the effectiveness and harmony of the application of the Convention's rules²⁰.

For the end of this list of approximation elements of the two legal instruments, we leave the clear obligation of the States parties to provide, in national legislation, mechanisms for sanctioning conduct contrary to the norms provided for in the Convention and for consequent compensation or reparation for the damages caused. As in the GDPR, such measures may eventually involve the application of administrative sanctions or fines²¹, but, unlike the GDPR²², the Convention does not seem to admit that public and private entities are distinguished, in favor of the latter, in the specific legislation that comes to be applied²³. Would you like

15 Cf. Article 10(2) of the Convention and Article 35 of the GDPR.

16 Cf. Article 10(3) of the Convention and Article 25 of the GDPR.

17 Cf. Article 14 of the Convention (with the special derogation for States belonging to regional international organizations, such as the EU, in paragraph 1 in fine of this rule) and Chapter V of the GDPR.

18 Cf. Article 15(2) of the Convention and Articles 57 and 58 of the GDPR.

19 Cf. Chapter V of the Convention and Chapter VII of the GDPR.

20 Cf. Chapter VI of the Convention and Section 3 of Chapter VII of the GDPR.

21 Cf. articles 12 and 15, no. 2, al. c) of the Convention and Articles 58(2) al. i), Articles 77, 79, 82 to 84 of the GDPR.

22 Which it allows if the Member State so deems it to be provided for in national legislation (cf. Article 83(7)).

23 Except for the exceptions already listed with regard to purposes linked to national security and defense, provided for in Article 11(3) of the Convention.

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that is to say that Portugal, after the ratification of this Convention, will find itself obliged not to embark on the path followed by the Government's Draft Law No. 120/XIII²⁴, in its article 44, no. the reservations made by the States Parties²⁵ to the text of the Protocol of Amendment, it appears that none was presented by the Portuguese State.

III. Conclusion

The amendments to Convention 108 introduced by the Protocol under analysis represent a step towards the modernization of the data protection regime within the Council of Europe and follow the path of notable approximation to the data protection standards recently approved in the EU, maximally the known ones in the General Data Protection Regulation. Furthermore, the remarkable evolution in terms of concepts, principles and grounds for the legality of processing, in addition to the convergence of the catalog of data subjects' rights with that existing in the EU and the standardization of the functions of the supervisory authorities in parallel with those foreseen in the legislation of the Union, allow, from the perspective of the CNPD, the harmonious reception of the precepts of the treaty thus revised with the legislation already in force in Portugal.

The CNPD also notes that the Portuguese State has not submitted any reservation to the text of the Protocol of Amendment to Convention 108, so it understands that the signing of the treaty represents a clear assumption that there will be no discrimination between the public and private sector in the application of the personal data protection regime, except in the strict terms allowed by the Convention, although this does not conflict (as it seems to us not to conflict) with the other obligations of equal legal dignity to which the country is obliged.

Lisbon, January 7, 2019 Ivão (Chairman)

24 That aimed to ensure the implementation, in the national legal system, of Regulation (EU) 2016/679, on the protection of

individuals with regard to the processing of personal data and the free movement of such data.

25 Available at

https://www.coe.int/en/web/conventions/recent-changes-for-treaties/-/conventions/treaty/223/declarations?p_auth=0cgjQWaE.

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