

National Data Protection Commission

OPINION/2021/18

I. Order

1. The Ministry of Foreign Affairs, through the Directorate-General for Foreign Policy, asked the National Data Protection Commission (CNPd) to comment on the draft Cooperation Agreement between the Portuguese Republic and the State of Qatar in terms of internal security ('the Agreement')¹.

2. The CNPD issues an opinion within the scope of its attributions, as the national authority to control the processing of personal data, conferred by paragraph 2 of article 30, in conjunction with paragraph 1 of article 43 and with subparagraphs a) and c) of no. 1 of article 44, all of Law no. 59/2019, of 8 August.

3. The object of this Agreement is technical cooperation and exchange in matters of internal security (cf. Article 1). Article 2(1) identifies the following areas of cooperation: management of migratory flows and border control; proximity policing; management of major sporting events; road safety and prevention; civil defense; criminal investigation of tactical police incidents; airport security; personal security; maintenance of public order; Drug dealing; analysis of criminal information and police cooperation, scientific police; cybersecurity.

4. Other areas of cooperation, provided that they fall within the scope and object of this Agreement, may be defined through specific agreements between the Parties (cf. Article 2(2)).

5. Judicial cooperation in criminal matters and extradition are expressly excluded from the scope of the Agreement (see Article 2(3)).

6. Pursuant to Article 3, forms of cooperation include: staff training actions; supply of materials; carrying out studies on equipment and organization; execution of services²; exchange of methodologies, professional experiences and technical and scientific information.

7. Article 4 of the Agreement, on the modalities of cooperation, prescribes that cooperation under this Agreement may cover cooperation programs whose scope, objective, purposes and responsibility for implementation will be defined on a case-by-case basis and subject to the approval of the competent authorities of the Parties, indicated in article 11 of the

Agreement, that is, the Ministry of Internal Administration, for Portugal, and the Ministry

1 The text of the Agreement now under consideration concerns a “consolidated version” sent by the MNE in January 2021.

The text initially sent to the CNPD corresponded to a version of February 2020, substantially different in terms of personal data.

2 In the text of the draft Agreement, which is written in English, “Execute Services”.

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of the Interior (department of international cooperation), by Qatar, who coordinate the cooperation activities carried out under this Agreement.

8. Article 4(2) provides that additional terms applicable to cooperation activities may be determined by specific instruments to be concluded between the Parties.

9. Articles 6 and 7 of the Agreement govern the form of requests for cooperation and eventual refusals. Thus, it is foreseen that any request must be transmitted in writing and include a summary description of the reasons that justify it; it may be transmitted by any means of communication that allow its reception and registration by the requested Party. In urgent cases, the Parties may submit a request orally, which must be followed by a written confirmation within 24 hours.

10. The Agreement also prescribes that the Parties may refuse, in whole or in part, the request for cooperation if the requested Party considers that its execution may violate the principles of sovereignty, security, public order or any other essential interest or is contrary to the its national law or its international commitments or could prejudice investigations or proceedings underway in its territory.

11. Under the heading "Confidential Information", Article 8 provides that the Parties must notify each other that information provided under this Agreement is confidential under applicable national and international law.

12. Article 8(3) provides that confidential information and documents received by the competent authorities of the Parties may

not be transmitted to third parties without the prior authorization of the other Party and without adequate legal guarantees, in accordance with the law international law and applicable domestic law.

13. As for the protection of classified information that will be exchanged, this will be done in accordance with the terms of the agreement between the Parties on the matter (cf. Article 8(4)).

14. Among the remaining articles of the Agreement (from 9th to 19th), the provisions relating to the duration and termination of the Agreement, provided for in Article 16, stand out. The Agreement has a duration of three years, automatically renewable, for equal and successive periods; any Party may terminate the Agreement at least 180 days prior to its expiry, terminating it only at the end of the current period. However, Article 16(4) provides that the termination of the Agreement does not affect projects or programs initiated under this Agreement but still unfinished at the date of termination.

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II. Analysis

15. The object of this Agreement, as it relates to matters of internal security, implies its legal assessment in light of Law No. 59/2019, of August 8, which regulates the protection of individuals with regard to the treatment of personal data by the competent authorities for the purpose of preventing, detecting, investigating or prosecuting criminal offenses or enforcing criminal sanctions³.

16. The CNPD has recently commented on other draft agreements on internal security, which are being negotiated by Portugal, and which contain similarities with the text now under consideration. This was the case of Andorra (Opinion/2020/20), whose text was very generic and there was no reference to the processing of personal data, as in the consolidated version of the text of this Agreement.

17. In fact, in a previous version of the text, there were two articles related to the processing of personal data, along the same lines as the text of the agreement with Tunisia, which was also the subject of a pronouncement by the CNPD (Opinion/2020/54).

18. Although the clause on the protection of personal data in the version initially sent to the CNPD was insufficient and needed

much improvement, in line with the observations already made regarding the opinion on the agreement with Tunisia, the elimination of any mention of the processing of personal data in this latest consolidated version does not allow, on the one hand, the pronouncement of the CNPD and, on the other hand, makes the transfer of personal data unfeasible due to lack of legality condition.

19. As already highlighted in its Opinion/2020/54, the CNPD reiterates that “the provisions of the Agreement do not expressly provide for the processing of personal data. In fact, both the object of the Agreement and the forms of cooperation are so general and vague that it is not possible to achieve if it is only a matter of cooperation at a technical, training, advisory level, with the exchange of information of a general nature, as to policies, methodologies and practices, or, if on the contrary, this Agreement also covers the communication of personal data in matters of internal security”.

20. However, if we look at some of the areas of cooperation indicated, such as drug trafficking and the analysis of criminal information and police cooperation, it would seem that it is very difficult for such cooperation to take place without the communication of information containing data personal.

3 Law transposing Directive (EU) 2016/680 of the European Parliament and of the Council, of 27 April 2016.

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21. It is also clear from the terms of Article 7 of the Agreement, on the grounds for possible refusal of requests for cooperation, that, while the prejudice of an investigation or an ongoing proceeding can be invoked as a justification for not responding positively to a request by the other Party, the processing of personal data will take place.

22. Therefore, the absence in the Agreement of rules on data processing, essential to regulate the transfer and subsequent use of personal data, in compliance with the general principles of data protection, enshrined in article 4, as well as in the requirements of articles 37 and 39, all of Law no. 59/2019, implies non-compliance with legal requirements regarding the processing of personal data.

23. The rule on confidential information⁴ does not, without further ado, entitle the requested Party to transmit information that, for reasons of its national law, Union law or international law, it may not be able to transmit, which will be the case with the version Agreement, if that information contains any personal data. Indeed, with regard to personal data, the qualification as 'confidential' of the information that it may transmit does not legitimize Portugal to transfer personal data, without all legal requirements being verified, especially the basis of legitimacy for the international transfer of data.

III. Conclusion

24. If the State of Qatar does not enjoy an adequacy decision by the European Commission, it would be necessary that adequate guarantees be presented in the text of the Agreement, as a legally binding instrument, as required by subparagraph a) of paragraph 1 of the article 39 of Law 59/2019, of August 8.

25. The text of the Agreement does not make any reference to the processing of data, and therefore does not regulate the transfer of personal data and its subsequent use to the State of Qatar, so it does not constitute a legitimate basis for any transfer of personal data.

26. Therefore, based on the current text of the Agreement, in its consolidated version, personal data cannot be transferred from Portugal to the State of Qatar.

Approved at the February 9, 2021 meeting

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⁴ It is also unclear whether it is a question of applying a general principle of confidentiality applicable to the transferred information, or whether it concerns classified information, as may be assumed by paragraph 4 of the article, which would be insufficient since "confidential" corresponds to only at one rating level.