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/ NATIONAL COMMISSION

DATA PROTECTION

OPINION/2020/107

I. Order

The Ministry of Foreign Affairs, through the Directorate-General for Foreign Policy, asked the National Data Protection Commission (CNPd) to comment on the proposed Cooperation Agreement between the Portuguese Republic and the Republic of Guatemala in the field of Police Policing. Proximity (hereinafter 'the Agreement'),

The purpose of the Agreement is the mutual provision of technical cooperation and exchanges in the field of proximity policing (cf. Article 1). Article 2 identifies the areas of technical cooperation and exchange to be developed under the Agreement: models and policing tactics used for crime prevention and neighborhood policing, juvenile delinquency, school violence and dating violence, and local partnerships and, under the terms of number 2 of the same article, other areas related to proximity policing, established by mutual agreement later on, may be covered.

Under the terms of Article 3, the following constitute modalities of cooperation, within the areas referred to in Article 2: providing the exchange of knowledge and good practices; conduct staff training; provide specialized technical advice; hold working meetings for the provision of technical assistance, aiming, whenever necessary, to collaborate in the implementation of coordinated actions and, also, exchange legislation, literature and scientific and technical data on the functions of the competent authorities.

The remaining text of the Agreement, up to Article 17, generically regulates the issues related to the identification of the competent authorities for the coordination and implementation of the Agreement, the contact points, the content, procedure and decision of the cooperation request, the creation of a Joint Commission, the financing and sharing of costs, the

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language to be used, as well as matters relating to the settlement of disputes, review, validity and termination of the Agreement, as well as entry into force and registration.

Articles 7 and 8 refer respectively to 'Confidential information, documents and personal data' and 'Use and transfer of personal data'. Since the forecast of these articles does not make it clear which categories of data are processed, nor which holders are related to the categories of data, the CNPD requested clarification from the Directorate-General for Foreign Policy of the Ministry of Foreign Affairs, which informed, additionally, that such data “respect only the elements of the authorities involved in its implementation”.

II. appreciation

Although the purpose of the Agreement is cooperation within the scope of proximity policing, it appears, taking into account the complementary information from the Directorate-General for Foreign Policy, that the execution of the Agreement does not involve the processing of data that require analysis under the terms of Law no. criminal sanctions¹, since personal data of a police or criminal nature will not be at stake, but only data relating to the identification and contacts of trainers and experts, so Regulation (EU) 2016/679 - Regulation is applicable to the international transfer of data General on Data Protection (RGPD), under which the CNPD issues its opinion (cf. subparagraph c) of paragraph 1 of article 57).

¹ Law transposing Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016.

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The analysis of the text of the Agreement, with regard to the processing of personal data, raises some questions.

First of all, this Agreement covers the processing of personal data and its transfer to a third country, Guatemala, a third country that does not benefit from an adequacy decision by the European Commission on its level of data protection, nor does it have legislation specific in this field. In view of the foregoing, the CNPD considers that the transfer of such personal data will only be possible if this Agreement, as a binding legal instrument for the Parties, contains adequate guarantees that overcome the lack of an adequate level of protection on the part of Guatemala. Therefore, in order to respect the general principle of transfers, enshrined in Article 45 of the GDPR, it is necessary that the data protection regime be fully and unequivocally explained in the text of the Agreement, in terms of the considerations that follow.

As regards Article 7, there seems to be no correspondence between the heading 'Confidential information, documents and

personal data' and the regime enshrined therein. In fact, if both Articles 7 and 8 deal with the matter of data protection, it seems to result in a duplication of regimes that are not compatible with each other, since Article 8 intends to enshrine in the Agreement itself a regime specific, while article 7 determines that this matter will be "regulated by a specific agreement for the exchange and protection of classified information in force", so the reference to personal data in the final part of the epigraph of this article should be deleted.

The 'Use and transfer of personal data' regime, regulated under the terms of Article 8, appears to be incomplete and imprecise, requiring a thorough review.

Firstly, paragraph 1 of the aforementioned article provides that the use and transfer of personal data is carried out "in accordance with international law and domestic law" and establishes the right of access of data subjects and the right to correction thereof, "except where such a request may be refused under international law and the

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Applicable domestic law', which should be amended. On the one hand, as noted above, Guatemala's domestic law does not offer an adequate level of protection, so the applicable regime must be expressly provided for in the text of the Agreement, and references to domestic law must be eliminated. On the other hand, the data processing in question here does not apply restrictions to the exercise of rights, therefore, it is not possible to refuse access to the data subject.

In addition, the right of access to data by the data subject must be recognized in the Agreement; the right of rectification, whenever the data is not accurate or current; the right to erase data, whenever they are no longer necessary for the execution of the Agreement or are processed in any way unlawfully (cf. Articles 15, 16 and 17 of the GDPR).

It must also expressly enshrine the right of holders to independent administrative or judicial appeal mechanisms to guarantee their rights.

Secondly, the Agreement does not provide for the categories of personal data that will be transferred and processed further, nor the categories of subjects, by reference to the data processed, nor does it indicate the specific purpose of the data processing. This information must be clearly explained in the Agreement, so that it can be concluded whether it is "adequate, relevant and not excessive".

As for the conservation period, paragraph d) of article 8 is unintelligible, not allowing to clarify the period during which they will

be kept and, as it is dependent on that, also the time limit for their destruction, a regime that must be equally clear in the text of the article.

For greater guarantee, it is suggested the insertion of a rule that enshrines the duty of secrecy and the inadmissibility of the use of personal data for other purposes except when authorized by its holders.

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Thus, the CNPD considers that the article does not comply with the legal requirements in terms of data protection.

III. Conclusion

The Agreement submitted to the CNPD for consideration involves the transfer of personal data to a third country, Guatemala, which does not enjoy an adequate level of protection with regard to data processing. In this sense, the CNPD understands that in order for it to comply with the legal regime for the protection of personal data, in particular Chapter V of the GDPR, the Agreement must be amended as set out above.

Approved at the meeting of September 8, 2020

Filipa Calvão (President)

AV. D. CARLOS 1, 134- 1º | 1200-651 LISBON | WWW.CNPD.PT | TEL:+351 213 928 400 | FAX: +351 213 976 832