

National Data Protection Commission

OPINION/2023/51

I. Order

1. The Directorate-General for Social Security requested the National Data Protection Commission (CNPd) to issue an opinion on the draft Convention between Portugal and the Republic of Korea on matters of Social Security (hereinafter "Convention"), which is under negotiation.

2. The CNPD issues an opinion within the scope of its attributions and competences as an independent administrative authority, with powers to control the processing of personal data, conferred by article 57, paragraph 1, point c), and by article 36. 4 of Regulation (EU) 2016/679 - General Data Protection Regulation (GDPR), in conjunction with the provisions of article 3, article 4, paragraph 2, and in article 6, no. 1, point a), all of Law no. 58/2019, of August 8, which ensures the implementation of the RGPD in the national legal order.

3. This Convention contains some provisions relating to data protection (Article 1 - Definitions and Article 17 - Protection of Personal Data), which it is important to analyze, as well as the Korean counter-proposal, in the sense of a possible compatibility of the proposals from both parties.

4. The rest of the provisions of the Convention are similar to other conventions in terms of social security, on which the CNPD has already ruled, naturally safeguarding the specificities of the regime of the other Party, therefore it is not necessary to analyze these norms in this present case, for the reasons explained below.

II. Analysis

5. The Republic of Korea enjoys a decision by the European Commission¹ pursuant to Article 45(3) of the GDPR on the adequacy of the level of data protection ensured by the Korean law on the protection of personal information².

6. It is therefore a matter of an adequacy decision on a specific law, covering only its scope of application and the conditions laid down therein, and not the existence of an adequate level of data protection in general. However, the Korean law on the protection of personal information is applicable to public institutions, which include the counterpart of this Convention in matters of social security, so the Decision of the

1 Commission Implementing Decision (EU) 2022/254 of 17 December 2021 (OJ L 44 of 24.2.2022).

2 Law No. 10465, of March 29, 2011, as last amended by Law No. 16930, of February 4, 2020.

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Commission covers transfers of personal data from a controller in the Union to a controller in the Republic of Korea (cf. Recital 5 of the Commission Decision).

7. Therefore, it is necessary to assess whether the provisions of the Convention, in terms of data protection, comply with the general principle of transfers, enshrined in article 44 of the RGPD, taking into account the limits of Korean legislation as described in the Decision of the Commission.

8. First, regarding the definitions listed in Article 1 of the Convention, Korea understands that the definition of processing of personal data, contained in paragraph j) of paragraph 1, is not necessary, as it is analogous to that of Korean law. The CNPD follows this understanding, since the Commission's adequacy Decision establishes that the concept of 'treatment' in Korean law is the same as that of the RGPD (cf. point 2.2.2 of the Commission's Decision).

9. Let us now analyze the content of Article 17 of the Convention, proposed by Portugal, and which was the object of a counter-proposal by Korea.

10. Paragraph 1 of the article provides that the competent authorities of the Parties shall exchange personal data for the implementation of this agreement only following a request from data subjects. Paragraph 2 establishes that the transfer of personal data is subject to the data protection legislation of the transferring Party, while paragraph 3 establishes that the processing of personal data by recipient entities is subject to data protection legislation. of the receiving Party. Here it is added that this legislation must not be less demanding than the legislation of the State transferring the data.

11. Article 17(4) refers to respect for the principle of finality, as well as the prohibition of sharing data with third parties of the receiving Party, without previously informing the Party transferring the data, unless such communication is necessary to fulfill the purpose of the Convention. Paragraph 5 of the article limits the further transfer of personal data to third countries or international organizations, without prior authorization of the Party transferring the data or consent of the data subject, and provided that the same level of data protection can be guaranteed by the party third recipient of the data. Lastly, paragraph 6 of this article provides that personal data are confidential and that Parties must take necessary and appropriate measures to protect data processed under the Convention from destruction, loss, modification, unauthorized access or disclosure, whether accidental or unlawful.

12. The Korean proposal for this article boils down to a single paragraph, which establishes respect for the principle of purpose, referring everything else to the respective personal data protection legislation of the Parties to the Convention.

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13. First of all, it should be noted that, without prejudice to the need to apply other provisions of the GDPR, an adequacy decision of the European Commission only provides, under Chapter V of the GDPR, a legal mechanism for data transfers (and even thus subject to the limitations of the Commission Decision itself). As stipulated in Article 44 of the GDPR, all provisions of this chapter are applied in such a way as to ensure that the level of protection of natural persons guaranteed by this regulation is not compromised.

14. In this context, the CNPD considers relevant the provision of paragraph 1 of article 17 that the exchange of personal data always has as a premise the submission of a request by the natural person related to the object of the Convention. Secondly, the reference made to the respective data protection legislation, as is done in the Portuguese proposal (paragraphs 2 and 3), is correct and is more precise about the application of the legal framework of each Party, provided the transfer of data until further processing by the recipient of the data, than the similar proposal made by Korea. It is only noted that the last sentence of paragraph 3 can be deleted, since the legislation of the third State is already known.

15. As for paragraph 4 of article 17, the CNPD understands that its maintenance is necessary, since the principle of purpose

has several exceptions in Korean legislation, including the possibility of sharing data with other entities within the same country, and in some cases this may result from legal obligation. The same is stated in point 2.3.1 of the Commission Decision (cf. recitals 37 and 40).

16. Hence, a provision that provides for a principle of non-disclosure, unless necessary for the implementation of the Convention, and that provides for Korea to inform Portugal in advance of any communication of data to third parties in other situations, appears to be reasonable, because it admits this possibility, and suitable for effective control of the personal data transferred, constituting an important safeguard from the point of view of data protection and compliance with the RGPD.

17. As for paragraph 5 of article 17 of the Convention, the CNPD also considers that it is essential to maintain this rule, as Korean legislation allows the subsequent transfer of data to a third country or international organization, even for other purposes, only subject to a (subjective) assessment by the person responsible, as described in point 2.3.9 of the Commission Decision (cf. Recitals 88 and 89).

18. It is therefore understood that the limitation provided for requesting prior authorization from the Party transferring the data must be maintained in the text of the Convention. Indeed, it is essential that there is a priori control of any subsequent transfers of data, also to ensure that the legal regime of international data transfers of the RGPD is not circumvented by the existence of an adequacy decision, which facilitates the exit of personal data of the Union that may end up in countries without an adequate level of protection. The proposal of

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Portugal is adjusted, as it does not outright prohibit this possibility, but rather subjects it to a prior assessment of its legitimacy and its conditions by the person who transferred the data and who, in accordance with the RGPD, is responsible for ensuring

that the level protection of natural persons is not compromised.

19. As for paragraph 6 of article 17, on the security of data processing, it follows from the Commission Decision that Korean legislation is quite developed in this field, with rules very similar to those of the RGPD (cf. point 2.3 .6, Recitals 61-66), so that the reference to national law provided for in Article 17(3) is sufficient to bind the Parties. In this sense, the CNPD considers that this provision can be eliminated.

20. In short, it is possible to partially reconcile the proposals of the Parties, but it is essential to maintain the safeguards indicated in the article. The existence of an adequacy decision does not, in itself, mean complete freedom in the transfer of personal data to that country. It is necessary to assess the very limits of the European Commission Decision and to take into account the remaining legal requirements of the RGPD, namely those with regard to the conditions of lawfulness of the treatment (e.g. communication of data to third parties), to the subsequent transfers of data to countries that do not enjoy the same level of protection, and, in general, the principle of responsibility, recognized in Article 5(2) of the GDPR, which the controller is obliged to respect.

III. Conclusion

21. For the above reasons, and considering the proposals of the Parties, the CNPD considers the following:

The. The definition of 'processing' in Article 1(1)(j) may be deleted;

B. Paragraphs 1, 2 and 3 of Article 17 must be maintained, the last sentence of paragraph 3 may be deleted; the wording of the Portuguese proposal regarding the reference to national data protection legislation is identical to the Korean one, but the recognition of the purpose principle must be kept separate from the reference to the laws of the Parties;

w. Paragraphs 4 and 5 of Article 17 should be kept as they are, as they constitute important safeguards in weaker aspects of Korean legislation, as described in Commission Implementing Decision (EU) 2022/254, it is the responsibility of the Party transferring the personal data to control the use and destination that the data may have outside the strict context of the Convention.

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d. Paragraph 6 of Article 17 on the security of processing can be deleted, the reference to the data protection legislation of the Parties being sufficient, since this area is well developed in Korean law and equivalent to that guaranteed in the Union .

22. The existence of a decision on the adequacy of the level of data protection, issued by the European Commission, does not prevent the Parties from establishing specific rules adjusted to the processing of personal data in question, in particular when compliance with other provisions of the GDPR, a situation in which this even implies an obligation.

Approved at the meeting of June 6, 2023

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