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./ NATIONAL COMMISSION

DATA PROTECTION

OPINION/2020/58

I. Order

The Ministry of Foreign Affairs, through the Department of Legal Affairs, asked the National Data Protection Commission (CNPd) to comment on a proposal for a Convention on International Cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity and of war (hereinafter 'the Convention').

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

This proposal is the result of a joint initiative presented by Argentina, Belgium, Slovenia, Mongolia, the Netherlands and Senegal with a view to improving the international legal framework for mutual legal assistance by opening the negotiation of an international convention on extradition and legal assistance mutual respect for more serious crimes (crimes against humanity, war crimes and the crime of genocide).

Currently, in addition to the six proposing States mentioned above, this initiative has the support of another 66 States, including Portugal.

The Group of States that created the initiative prepared a draft text, based on informal discussions, and the Swiss delegation presented an alternative proposal. Both texts were submitted to the CNPD for an opinion.

Given the still very preliminary stage of negotiations, so it is likely that the text will still undergo significant changes, the CNPD will essentially focus on articles that clearly regulate the processing of personal data, in the two versions of the proposal: original version and the Swiss version.

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II. appreciation

For the sake of ease and better understanding, each version of the text will be analyzed separately and, finally, a consolidated perspective will be given.

In the original version of the Convention, Articles 10 (Protection of information and evidence) and 11 (Exchange of spontaneous information) stand out as they contain the most relevant rules for the data protection regime. .

Incidentally, it should be noted that in those articles there is only a reference to “personal data” in paragraphs 6 and 7 of article 10 and “data protection” is never mentioned. However, the information transmitted, at the request of the requesting Party or provided spontaneously, will contain personal data in view of the object of the Convention. Both articles are inspired by article 18 of the United Nations Convention against Transnational Organized Crime (UNTOC)¹, which however does not regulate the processing of personal data, but only the information in general transmitted, although there is evidence of the existence of coincidences and the application of principles that are equivalent to the protection of personal data.

However, for the sake of transparency, clarity and legal certainty, it is considered, first of all, that data protection issues should be the subject of autonomous rules in the text of the Convention, which is not the case in the original version.

We will now comment in more detail on the content of Article 10, from the perspective that the information and evidence in question contain personal data, within the meaning of Article 3(1)(c) of the Law No. 59/2019.

1. Original version - article 10

Paragraph 1 provides that information may not be transmitted or used for a purpose other than that indicated in the request without the prior authorization of the requested State Party. This rule concerns the principle of purpose, provided for in subparagraph b) of paragraph 2 of article 4 of Law no.

¹Approved by Resolution 55/25, of January 8, 2001, of the United Nations General Assembly. Portugal ratified the Convention by Resolution No. 32/2004 of the Assembly of the Republic, of 2 April, available at <https://dre.pt/pesquisa/-/search/216918/details/maximized>.

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59/2019. However, in order to comply with this principle, together with the principle of liability in paragraph 3 of that article, it is

necessary to add some additional safeguards, in particular the fact that any subsequent use of personal data cannot be incompatible with the initial purpose. for which the data were transmitted to the requesting State Party. This safeguard must be included in the text, if only to be applied when the national law of the requested State so requires, as is the case in Portugal. In addition, requests (and the respective responses) to obtain prior authorization must be made in writing and be duly justified, and must include their purpose, which must be determined and explicit, the identification and nature of the data recipient, specifying, where applicable, whether it is a third State or an international organization, as well as reflecting any restrictions on use that may apply to personal data.

Indeed, the entire process must be documented both in the requesting Party and in the requested Party. In this way, it will be possible to verify whether the State that transmitted the data, and from which prior authorization is requested, has duly taken into account in its decision the set of national legal obligations that affect it in terms of protection of personal data, namely if the destination entities are competent authorities within the meaning of domestic law (cf. subparagraph i) of paragraph 1 of article 3 of Law no. (cf. Articles 37 to 40 of the same diploma). As the requesting State, it is important to be able to verify whether it uses the data that may be transmitted to it in compliance with national law.

Paragraphs 2, 3 and 4 of Article 10 are considered to have a very specific application outside the context of the personal data protection regime.

No. 5 essentially concerns the accuracy and reliability of the information transmitted, in what is the principle of accuracy, enshrined in subparagraph d) of paragraph 2 of article 4 of Law No. 59/2019, which prescribes that personal data must be accurate and updated whenever necessary, and all reasonable steps must be taken to ensure that inaccurate data are erased or rectified without delay. It is envisaged that, in the event that the data transmitted is incorrect or should not have been transmitted, the requesting State Party must be notified, and the requested State Party is obliged to correct or delete the information without delay.

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However, the obligation to erase or correct should fall, in the first place, on the requesting State that received the erroneous information. It is precisely for this purpose that the requesting State is notified. It could just be a bug, but it should be fixed.

Article 10(6) provides that, upon request, the data subject must be informed about the transmission of personal data

concerning him, about its purpose and its intended use. However, this information may be withheld or deferred to avoid jeopardizing the prevention, detection, investigation or prosecution of criminal offences. In practice, this is the exercise of the right of access by the holder, without the necessary qualification. Although the possibility of derogating from the right is admitted, in line with the provisions of national legislation (cf. Articles 15 and 16 of Law No. 59/2019), the obligation to respond to the holder in a reasonable period, justifying the partial or total refusal of access.

The right to rectification of data and the right to erasure of personal data must also be added to the catalog of rights, in case of error of fact and error of law.

Paragraph 7 governs the period of storage of personal data and does not merit comments.

2. Original version - article 11

Article 11 regulates the spontaneous provision of information to another State Party, even when a request to that effect is not made. If there is a specific article for the protection of personal data, this would include the transmission of information regulated herein, without the need for any additional rule.

In any case, as the text of the Convention is drafted, it would be necessary to add in Article 11 a rule of a general nature providing that the basic rules provided for in Article 10 would apply; otherwise the information transmitted in this spontaneity framework would no longer be subject to the precepts of information transmitted following a specific request from a State Party.

3. Swiss version - Article 7

Unlike the original version of the Convention, the alternative version presented by Switzerland apparently distinguishes the rules concerning the use of information and evidence

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of the rules on the protection of personal data, which is in line with the above and, therefore, the CNPD believes that this proposal should have the support of Portugal.

Despite this division between Articles 7 and 8 of this version, paragraphs 6 and 7 were left unchanged in Article 7, relating respectively to the exercise of the right of access and the retention of data, leaving partially redundant with Article 8(4) and

Article 8(2)(f) of the Swiss proposal.

Therefore, paragraphs 6 and 7 of Article 7 should be deleted from the Swiss version, as they have already been incorporated and improved in Article 8.

4. Swiss version - Article 8

This article is entitled “Data Protection” and, in fact, systematizes and densifies data protection rules.

Paragraph 1 concerns the principle of purpose and its wording is more appropriate, although it is still necessary to add some aspects that have already been mentioned in the comments made to paragraph 1 of article 7 of the original version, regarding the compatible use, and regarding the need for prior authorization requests (as well as the respective responses) to be made in writing and duly justified, so these observations are reproduced here.

Regarding the wording of paragraph 2, the CNPD considers it to be very positive, due to its clarity and scope, since it transposes in practical terms into the context of the Convention the principle of minimization, the principle of data quality, the obligation to register of /ogs relating to the transmission and reception of personal data, which makes it possible to audit in the requested State and in the requesting State the use of personal data and the principle of limiting data retention. As for the empowerment of subsequent transfers (paragraph e) of no. prior notice must be made in writing and duly substantiated, indicating the purposes, recipients and, in the case of the response, any restrictions on the use of the data.

Paragraph 3, concerning the obligation to protect data against accidental loss, accidental or unauthorized destruction or modification, unauthorized access, use or disclosure or any other abusive use, is an indispensable and very welcome rule. in

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Convention of this nature, in accordance with article 31 of Law No. 59/2019, regarding security measures.

Paragraphs 4 and 5 regulate the exercise of the rights of the holders in a much more comprehensive way than in the original version, including the right to rectification, erasure and limitation of treatment in certain cases, as well as the right to judicial recourse. The reasons for restricting these rights are also better identified and, in accordance with national law and Union law, conditioning the derogation to the necessity and proportionality of the measure, which blocks preliminary refusals to satisfy the rights.

III. Conclusion

Based on the above observations, the CNPD understands that:

1. It is essential that the rules on the processing of personal data are subject to autonomous rules in the text of the Convention, so as not to be confused with the specific rules, already consolidated in international law, in the context of mutual legal assistance in criminal matters; therefore, full support for the Swiss delegation's proposal to that effect;
2. Requests for prior authorization for onward transmission of personal data received by the requesting State Party must be made in writing and duly substantiated, and must contain essential information for the requested State Party to be able to decide on the request, in light of all legal obligations which his national law imposes on him; the entire process, including the response, must be documented by both States.
3. Although specific improvements may still be made, as mentioned above, article 8 of the Swiss version of the Convention very satisfactorily meets the legal requirements from the point of view of data protection, for which reason it is considered a duty deserve full support from Portugal.

Lisbon, June 1, 2020

Filipa Calvão (President, who reported)