National Data Protection Commission

OPINION/2021/106

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 Kingdom of Morocco in the field of preventing and combating transnational organized crime and terrorism (hereinafter 'the Agreement'),

2. The CNPD issues an opinion within the scope of its powers and competences as a 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 paragraph 1 of article 44, all of Law n.° 59/2019, of 8 August.

3. The text of this Agreement had already been submitted for pronouncement by the CNPD, which at the time issued Opinion 11/2013, of 12 February. As there has, however, been an evolution in the legal data protection regime in Portugal, as well as the Counterparty having assumed new international commitments in terms of data protection, it is justified to issue a new opinion, which incorporates the most current standards with regard to international transfers of personal data.

4. The purpose of the Agreement focuses on police cooperation, it being determined that it does not apply to extradition or mutual legal assistance in criminal matters. The Parties, through direct collaboration between their competent authorities, cooperate in the prevention, detection and investigation of terrorism and its financing, of transnational organized crime, with a list of the criminal areas involved, which correspond to crimes of a cross-border (cf. Articles 1 and 2 of the Agreement).

5. The modalities of cooperation1 are also generically described, most of which do not seem to involve the processing of personal data, with the exception of the provision in paragraph b), which provides for the exchange of operational information, location and identification of people and assistance in carrying out police actions.

6. Article 9(3) and Article 10 of the Agreement very briefly regulate the processing of personal data, with regard to onward transfers, in accordance with the principles of purpose, minimization, updating and retention. of data and the exercise of the right of access.

1 The article's proem seems to be missing.

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II. Analysis

7. Since police cooperation is the object of this Agreement, the processing of data resulting therefrom falls within the scope of application of Law no. prevention, detection, investigation or prosecution of criminal offences, transposing Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016.

8. Article 37 prescribes the principles applicable to transfers of personal data to third countries in that statute. It is in the light of these principles, which are cumulative, that we will assess whether the terms of this Agreement meet the legal requirements in terms of data protection.

9. Firstly, it is advisable to briefly assess the legislation in force in the country of destination to assess its level of data protection. The Kingdom of Morocco has had a data protection law since 2009 - Law 09-08, of 5 March 2009 - and a supervisory authority to supervise data processing2 This law, however, partially excludes from its scope of application, data processing for the purpose of preventing and repressing crimes and crimes, referring to the specific legislation of each database created for this purpose (cf. paragraph 4 of article 2 of Law 09-08).

10. More recently, Morocco has ratified Council of Europe Convention 108 and its Additional Protocol, both of which entered into force in that country on 9/1/2019. This international legal instrument on data protection is also applicable to the police sector. However, it is not possible without a more in-depth study of the whole of Moroccan legislation to assess the nature and extent of possible derogations from the general data protection regime.

11. The Kingdom of Morocco has not been the subject of an adequacy decision by the European Commission which determines that the country ensures an adequate level of protection, so the transfer of data cannot be based on the legitimacy

offered by this mechanism, provided for in article 38 of the Law No. 59/2019.

12. In the absence of an adequacy decision, pursuant to Article 39(1)(a) of Law No. 59/2019, personal data may still be transferred if adequate guarantees have been presented as to concerns data protection, through a legally binding instrument, such as this Agreement.

13. This means that such guarantees must be included in the text of the Agreement, so that the transfer does not compromise the level of protection of persons guaranteed by Portuguese law, in accordance with the principle set out in subparagraph f) of paragraph 1 of the Article 37 of the aforementioned diploma. Therefore, the existing references in the

2 Commission Nationaie de Control de la Protection des Données à Caràctère Personnel ÍCNDP1: www.cndp.ma

Articles 9 and 10 of the Agreement on international law and applicable domestic law do not provide the necessary guarantees, as Moroccan domestic law on data protection has not yet been endorsed by the European Commission.

14. Secondly, as regards the principle that data may only be transferred to controllers in the third country with competence for the prevention, detection and investigation of crime, pursuant to Article 37(1)(b). 59/2019, the CNPD considers that Article 3 of the Agreement takes care of this requirement well, including the corresponding correspondence between the competent authority and the type of crime.

15. It is understood, on the other hand, that in order to assess the need for the transfer to pursue the purposes pursued in the field of prevention and criminal investigation, in accordance with the principle of subparagraph a) of paragraph 1 of article 37. 59/2019, the Agreement should specify the categories of personal data processed, as well as the categories of data subjects whose information will be transferred. In this field, the Agreement is absolutely silent and will have to be more prescriptive. In fact, this must be done taking into account the modality of cooperation provided for in Article 4(1) of the Agreement. This listing may constitute an annex to the Agreement, forming an integral part of it.

16. It should be noted that there is a presumption in the Agreement of the existence of an initial request for information from one of the Parties, which triggers the transfer of data, but which in practice is not mentioned. In Article 4(2) of the Agreement, it

is mentioned for the first time - and as a derogation to a rule that has not yet been presented - that data may be provided without prior request.

17. Furthermore, the content of the application, described in Article 6 of the Agreement3, is manifestly insufficient. For example, it does not include the purpose of the request, which is essential to be able to refuse it in accordance with the provision of subparagraph c) of paragraph 1 of article 8 of the Agreement, if it proves to be clearly disproportionate or Irrelevant in relation to the purposes for which it was requested. This is a very important rule from the point of view of data protection, because it depends on the judgment of suitability, necessity and proportionality that allows complying with the principle of data minimization. Article 6 must therefore be amended in order to describe as closely as possible the reality of what constitutes the content of the request for information.

18. Thirdly, it is recommended that matters relating to the processing of personal data be separated from other types of information or documentation, for the sake of clarity and because different regimes apply. In the case of classified information, if it contains personal data, they will apply equally

3 It is stipulated that the request must indicate the authority that makes it and the authority to which it is addressed.

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data protection rules, regardless of whether the rules relating to classified information are additionally applicable to it, although they are not confused.

19. Therefore, Article 9(3) with regard to the processing of personal data4 should be incorporated into Article 10, which is specific. As for the content of the provision, the importance of obtaining prior authorization from the requested Party is positively highlighted whenever the requesting Party intends to carry out a subsequent transfer of data to a third country or

international organization (onward transfer).

20. In this regard, it is emphasized that the Agreement must indicate that this authorization is given in writing, after indicating the country of destination and the reasons for this subsequent transfer. It will then be up to the requested Party to assess whether the destination of the personal data offers adequate legal guarantees in terms of data protection, in accordance with the applicable domestic law. In this way, the controller that authorizes the onward transfer is responsible for the decision it takes, in light of the principle of responsibility, enshrined in Article 4(3) of Law No. 59/2019.

21. Fourth, let us analyze the content of Article 10, under the heading "Use and transfer of personal data". First of all, it is suggested to change the heading to "processing of personal data" as it is a broader expression and includes any processing operation, whether the use or transfer of personal data. The initial references to international law and applicable domestic law should also be deleted, as they call into question any provision of this Agreement. If there is a reference to the national law of the Parties, it must be made in a specific provision and when justified. As indicated above, the text of the Agreement must itself contain adequate safeguards.

22. As regards the content of subparagraph a) of paragraph 1 of article 10, it appears to be insufficient, since the purpose principle prescribes that personal data cannot be processed for purposes other than those for which they were collected. collection, in this case, to its transfer by the requested Party. Hence the relevance, already mentioned in point 14 of this opinion, of the data being received by competent authorities for the prevention and criminal investigation. This presupposes that the data will be processed within the scope of the object of this Agreement. However, two issues must be safeguarded: on the one hand, that the data are not used by these authorities for other purposes, unless there is prior written authorization from the requested Party; on the other hand, that the data are not transmitted to other entities within the territory of Morocco, for other purposes, unless there is prior written authorization from the requested Party. Just ruling out incompatible use of the data is not enough of a guarantee. It is essential that the requested Party, which transfers personal data for a specific purpose, does not

4 It is preferable, for reasons of rigor and legal certainty, to use the term “personal data” instead of “data of a personal nature”.

lose all control over the use of such data and that the data may be used outside the context of the Agreement. Consequently, subparagraph a) should be amended, essentially clarifying that the data may not be used for other purposes or communicated to third parties within Moroccan territory, without prior authorization from the requested Party, providing the justification for such use of the data.

23. Paragraphs b) to d) of paragraph 1 of article 10 appear to be adjusted, not deserving any comments from the CNPD.

24. A provision should be added regarding the security of data processing, including the means of communication that may be defined for the exchange of personal data, in the sense that the Parties must adopt the necessary and appropriate technical and organizational measures to ensure that personal data are kept confidential - and here the principle of confidentiality of data reflected in paragraph f) of paragraph 2 of article 4 of Law n° 59/2019, not referring to one of the levels of classified information - and are protected against its unlawful treatment and against its accidental loss, destruction or damage. It should also be added that, in the event of a security incident that jeopardizes this principle, the affected Party undertakes to notify the Counterparty of the data breach, its nature and extent and the measures taken to mitigate its effects.

25. With regard to paragraph 2 of article 10, regarding the exercise of the right of access and rectification, doubts arise as to whether the exercise of these rights has to be done with the Party that transferred the data. In fact, after receiving the transferred data, they are processed in the country of destination by a new controller. For example, the data subject who wants to exercise his rights with the Moroccan authorities, regarding the data processing carried out by them, has the right to address the Moroccan authorities directly, regardless of whether the data has been transferred by Portugal or not. In fact, given the police context, the data subject will not even be in possession of such information. The same applies if the data are processed by Portuguese authorities following a transfer of data by the Moroccan authorities.

26. A different matter will be the competent authority that receives a request for access or correction of data, resulting from a transfer under this Agreement, being able to consult in advance the authority that transferred the data on the application of any restriction, in whole or in part, to the satisfaction of the right. In this sense, paragraph 2 of article 10 of the Agreement must be amended, to ensure that the rights of the data subjects can be exercised with any of the competent authorities of the Parties, as controllers, which respond directly to the holder.

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27. The Agreement may provide that the authorities of the Parties may consult the other Party if the request concerns data that has been transferred. The Agreement must also expressly state the reasons that may justifiably lead to the limitation of the rights of the data subjects, if the communication of data to the data subject could harm: investigations or investigations in progress; public security or national security; or the rights, freedoms and guarantees of third parties.

28. The need to include in the list of rights, in addition to the right of access and the right of rectification, also the right to erasure of data, in case there is unlawful treatment or the principle of limiting data conservation is not being fulfilled and the data must have already been deleted.

29. Finally, in line with the jurisprudence of the Court of Justice of the European Union5, the Agreement should provide that the Parties ensure administrative and/or judicial recourse mechanisms available to data subjects so that they can assert their rights in data protection matter.

30. As final remarks, the CNPD wishes to point out that, given the sensitivity of the police data, it is fully justified to introduce a provision in the Agreement that provides that, in the event of termination of the Agreement, the personal data transferred will continue to be processed under the provisions of this Agreement or are eliminated by the requesting Party, without prejudice to the finalization of any legal proceedings in progress.

III. Conclusion

31. The adequate guarantees that legitimize the transfer of personal data from Portugal to Morocco must be included in the text of the Agreement, pursuant to Article 39(1)(a) of Law No. 59/2019. The provisions of the Agreement, because binding on the Parties, must embody these guarantees.

32. It is essential to specify the categories of holders and the categories of personal data processed, by type of cooperation

that involves the processing of personal data. This may be done in an annex to the Agreement, constituting an integral part of it.

33. Article 6 on the content of the request for information between the Parties should be developed to reflect the substance of the request itself, namely the context behind it and the purposes for which it is intended.

5 See judgment of 6 October 2017, case C-362/14, Case Schrems I, § 95, EU:C:2016:650, and judgment of 16 July 2020, case C-311/18, Case Schrems II, §§ 194 and 197, ECLI:EU:C:2020:559

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34. The provisions relating to the processing of personal data should be separated in the Agreement from those relating to other types of information or documentation that do not contain personal data, so Article 9(3) should be incorporated into Article 10. .° or in another article that specifically regulates the processing of personal data.

35. The subsequent transfer of received data to a third country or international organization must be preceded by prior written authorization from the requested Party, identifying the third party and indicating the reasons for such transfer.

36. Amend the content of Article 10 of the Agreement, as indicated in points 22, 24, 26, 27, 28 and 29 of this opinion, regarding the purpose principle, security measures, breaches of personal data, exercise of the rights of the holders.

37. Introduce a safeguard so that, in the event of termination of the Agreement, the personal data transferred are deleted or, if this is not possible, continue to be processed in accordance with the Agreement.

Lisbon, August 18, 2021

Filipa Calvão (President, who reported)

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