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NATIONAL DATA PROTECTION COMMISSION

OPINION/2020/136

I - Order

The Director-General for Consular Affairs and Portuguese Communities of the Ministry of Foreign Affairs submitted to the National Data Protection Commission (CNPd), for an opinion, the Counter-proposal of Morocco to the draft Agreement on the Permanence of Moroccan Citizens to Provide Work (hereinafter referred to as the Agreement) concluded between the Portuguese Republic and the Kingdom of Morocco.

II - Within the competence of the CNPD

The CNPD issues this opinion within the scope of its attributions and powers, as the national authority to control the processing of personal data, in accordance with the provisions of subparagraph c) of paragraph 1 of article 57 and paragraph 4 of article 36 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of article 3, no. article 4 and paragraph a) of paragraph 1 of article 6, all of Law n.º 58/2019, of 8 August (which aims to ensure the implementation, in the domestic legal order, of the GDPR).

III - Consideration of the Agreement

The purpose of the Agreement under analysis, as established in article 1, is to define the procedures for permanence and employment applicable to Moroccan citizens who wish to exercise, in the Portuguese Republic, a professional activity subordinated to a Portuguese employer.

As provided for in article 3, the recruitment of Moroccan workers is carried out jointly by the Government of the Portuguese Republic and the Government of the Kingdom of Morocco which, for the execution of the recruitment and selection process of workers, as well as for communication with the employers, designate, under the terms of article 4, respectively, the Employment and Vocational Training Institute (IEFP), the Ministère du Travail

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

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et de l'insertion Professionnelle et TAGence de Promotion de l'Emploi et des Competences (ANAPEC).

The Agreement provides, for its implementation, to transfer personal data from Moroccan workers to Portugal and data from Portuguese employers to Morocco. Since the possibility of contracting only by legal persons is not established, it seems to be possible to extract, even in a declarative interpretation of the rule, that Portuguese individuals can also express their interest in contracting, which will imply, to that extent, the transfer of personal data for the Kingdom of Morocco.

However, under Article 46 of the GDPR, the Portuguese Republic can only transfer personal data to a third country located outside the European Union, such as the Kingdom of Morocco, if that country has adequate guarantees and on condition that the data subjects enjoy enforceable rights and effective corrective legal measures. In the specific case, the Kingdom of Morocco does not benefit from an adequacy decision from the European Commission, under the terms of Article 45 of the GDPR, nor has it acceded to Convention No. 108 of the Council of Europe, open to third countries.

Bearing in mind that, under the terms of paragraph 2 of article 3, that the Parties undertake, in the execution of the Agreement, to respect the domestic law of the two States, it is necessary to verify whether there is specific Moroccan legislation in this matter. In fact, it appears that the Kingdom of Morocco has specific legislation for the protection of personal data¹ and a National Authority with supervisory powers in this area has been established.

The aforementioned Moroccan law applies to the processing of personal data, whether they are fully or partially automated, whether they are on non-automated media, even if in manual files (art. 2, n°1) and expressly states, in article 3, the principles that must govern the processing of data, namely, the principle of fairness and lawfulness, proportionality and the prohibition of excess and timeliness, accuracy and the elimination and correction of inaccurate or incomplete data. Such principles come to find regulation in the article of that law, as well as the rights of data subjects (art. 5 to 11), and the

¹ Loi 09-08 concerning the protection of personnes physiques à l'égard du traitement des données à caractère personnel, available at <https://www.cndp.ma/images/lois/Loi-09-08-Fr.pdf>.

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duties of data controllers (art. 12 to 26), in the sense of safeguarding these rights.

It can also be seen that the Kingdom of Morocco has provided its legal system with a national data protection control commission, which works together with the Prime Minister, with functions to monitor compliance with the aforementioned law

(art. 23 to 31).

Notwithstanding the foregoing, some situations deserve particular attention. On the one hand, Moroccan national law excludes certain matters from its scope of application, namely, in the third point of paragraph 4 of article 2, it establishes the inapplicability "to personal data collected in application of a special legislation", so it will be necessary to guarantee that the specific legislation applicable to this type of relationship does not conflict with the protection of personal data that the general law enshrines. On the other hand, although the Agreement identifies the categories of data subjects whose data will be transferred, it is silent on the categories of data to be processed, and it is desirable that this be explained in the text of the Agreement. Likewise, it must be expressly stated in the text of the Acrodo that the data will be transferred exclusively with a view to the public announcement of the job offer, recruitment and conclusion of the employment contract that the Agreement regulates, and cannot be processed for other purposes. . Furthermore, it will be necessary to establish unequivocally that both States recognize the right of data subjects to judicial protection, regardless of their nationality.

IV - Conclusion

In view of the foregoing, and taking into account the personal data protection legislation in the Kingdom of Morocco, the CNPD understands that, in order to have adequate guarantees for the international transfer of data, in accordance with article 46 of the RGPD, the Agreement must include the categories of data processed, by reference to the categories of holders, the condition that the data cannot be processed for other purposes or, at least, never for incompatible purposes and subject to the prior authorization of the other Party.

Finally, the Agreement must include a provision that safeguards that data subjects have the right to judicial protection to guarantee their

AV. D. CARLOS I, 134 - 1º | 1200-651 USBOA | WWW.CNPD.PT | TEL:+351 213 928 400 | FAX: +351 213 976 832
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rights relating to the protection of your personal data, as reflected in recent jurisprudence of the Court of Justice of the European Union 2

Approved at the meeting of November 10, 2020

Filipa Calvão (President)

2 Judgment of 16 July 2020, Schrems II, C-311/18, nos. 186, 187 and 189.