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National Data Protection Commission

OPINION/2022/8

I. Order

1. The Directorate-General for Social Security submitted to the National Data Protection Commission (CNPD), for an opinion, the proposal for a Convention on Social Security (hereinafter referred to as the Convention) to be concluded between the Portuguese Republic and the State of Israel.

2. The request is further accompanied by a "Framing Note" and a "Model Provision on Data Protection" (hereinafter Model Provision),

II. Within the competence of the CNPD

3. 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 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, paragraph 2 of article 4 and of subparagraph a) of paragraph 1 of article 6, all of Law no.

III. Consideration of the Convention

4. The Convention under analysis aims to regulate the relationship between the two signatory States (hereinafter States Parties) in the field of Social Security, enshrining rules that guarantee acquired rights and rights in the process of being acquired under the applicable national legislation in relation to to the matters listed in Article 2 for each of the States Parties.

5. Thus, in relation to Israel, it is established that the Convention applies to the following matters provided for in Law 5755-1995, which are discriminated against: old age, survival, disability, accidents at work and maternity. In relation to Portugal, it applies to social security benefits to be granted in the event of maternity, paternity, adoption, occupational diseases, disability, old age, death, as well as compensation for accidents at work, both to employees and employees. to workers and self-employed workers.

6. Pursuant to article 3, this Convention applies to all who are or have been subject to the legislation identified in article 2, as well as to members of their families, including survivors and dependents as to rights that derive from those of those persons under the terms of the legislation indicated above, specifying in more detail the terms of this application depending on whether they are persons exercising public functions, employed or self-employed, whether

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carry out their work activity only in the territory of one of the States Parties, or in both simultaneously, as well as workers in the air and maritime sector (in Articles 6 to 9),

7. As is clear from article 22 of the text under analysis, the implementation of this Convention presupposes the transfer of personal data from one State Party to another through the competent Israeli and Portuguese authorities, that is, the Minister of Social Affairs and Social Services by the Israeli Party, and the member or members of the Government that, at any given time, is responsible for the aforementioned areas of Social Security, by the Portuguese Party (Article 1(c)).

8. 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 State of Israel, if that country has adequate guarantees and under the condition data subjects to enjoy enforceable rights and effective corrective legal measures.

9. Therefore, it is important first of all to analyze whether Israel ensures an adequate level of protection.

10. In the specific case, it appears that Israel has specific legislation on the protection of privacy1, as well as legislation on the transfer of data to other States2 and that a national authority has been established with regulatory and supervisory powers in matters of protection of personal data3, both in the private and public sectors.

11. Furthermore, it appears that Israel has not acceded to Convention No. 108 of the Council of Europe, open to third

countries, but benefits from an adequacy decision of the European Commission of 31 January 2011, which, despite having been adopted by the Commission under Directive 95/46/EC, remains in force, as provided for in Article 46(5) of the GDPR.

IV. From data protection

12. Pursuant to Article 22, the parties undertake to guarantee the confidentiality of the personal data processed, to use them only in accordance with the purposes determined in the Convention and not to transmit them

1 Protection of Privacy Law, 5741-1981. Available in https://www.gov.il/BlobFolder/legalinfo/legislation/en/ProtectionofPrivacyLaw57411981unofficialtranslatio.pdf ; and Protection of Privacy regulations (data security) 5777-2017, available at https://www.gov.il/en/Departments/legalInfo/data_securityjegulation

2 Privacy Protection (Transfer of data to databases Abroad) Regulations, 5761-2000. https://www.gov.il/BlobFolder/legalinfo/legislation/en/PrivacyProtectionTransferofDataabroadRegulationsun.pdf

3 The Israel Privacy Authority ("IPA"), established in September 2006, by determination of Government Decision No. 4660, of January 19, 2006.

to third parties (n° 4), as well as to take the necessary measures to guarantee its protection against unlawful or accidental destruction, loss, accidental disclosure or modification, as well as to prevent unauthorized access (n° 5).

13. It should be noted that the provisions of paragraphs 2 and 6 raise reservations and should not be adopted. In fact, it does not make sense for the transferred data to be processed - stored and protected - in the State of destination, according to the legislation of the State that transfers, so they must be deleted.

14. The wording of the rule enshrined in paragraph 1 deserves clarification. In fact, it says that the Parties are authorized to exchange personal data necessary for the implementation of the Convention, in accordance with the provisions of article 22 and "only at the request of the beneficiary person".

15. On pages 2 of doc. 7, the DGSS presents a proposal for an article, which aims to ensure that the transmission of personal

data is only maintained as long as there is adequate protection in the two States Parties, explaining that adequate protection must be considered, in relation to Portugal, as long as it is Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (GDPR) applies and, in the case of Israel, while the Adequacy Decision of the European Commission of 31 January 2011 is in force, in terms of Directive 95/46/EC.

16. The intention is to ensure that the Convention only remains in force as long as both States have a regulatory framework with a certain degree of protection. However, the proposal as it stands may be counterproductive. This is because it may happen that the regime in force in one of these States is replaced by one that provides greater guarantees at this level, which would inevitably lead to the cessation of validity of the Convention.

17. Furthermore, since the Adequacy Decision was issued under the Directive, it is foreseeable that the European Commission will proceed with a reassessment of Israeli legislation under the terms of the GDPR, which could eventually lead to an even more effective legislative change, if such if necessary.

18. Therefore, it is suggested that, as an alternative to the current wording, it is envisaged that, in the event of a change in the regulatory framework on which the Convention was built, which jeopardizes the adequacy of the level of data protection, the State in which this occurs must communicate this change to the other State Party, for assessment of the need for a possible revision of the Convention.

19. It is provided, in paragraph 1 of art. 22. that the Parties are authorized to exchange among themselves personal data necessary for the implementation of the Convention, in accordance with the provisions of the Convention and "only at the request of the beneficiary person". In this regard, the interpretation of the DGSS, found in paragraph 2 of the Note of

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Framework, as it is understood, in an integrated reading of the norm, that it is a guarantee norm that aims to safeguard that the transfer of data takes place only when there is an impulse from the beneficiary/insured to request the benefit provided for in the Convention and not consent for data transfer.

20. Furthermore, under the combined terms of subparagraph a) of paragraph 1 of article 6 and subparagraph 11 of article 4 of the GDPR, consent can only constitute a legal basis when it demonstrates a free, specific, informed and unequivocal, on which the provision of a service or benefit does not depend. However, consent given under these conditions cannot be considered free, and, therefore, the transfer of personal data cannot be based on consent.

21. Considering that the legislation in force in both States offers an adequate level of protection and also applies to this Convention, there will be no need for this Convention to contain an extended precept on data protection.

22. Nevertheless, and regardless of whether the applicable data protection legal framework allows the transfer of data to Israel without restrictions due to the adequacy decision of the European Commission, it is essential that the data protection article includes safeguards in the sense that States agree that the transferred data may not be used for purposes other than those strictly provided for in the Convention.

23. Furthermore, the Israeli proposal supports the need for a rule to establish that transferred personal data cannot be shared with third parties in the territory of the receiving State, without at least prior authorization from the transferring State.

24. In addition, there must be an express provision that data transferred to the other Party are not subsequently transferred to third countries or international organisations.

25. The inclusion of the principle of data security and confidentiality (proposed by the counterpart in paragraph 4) is also accepted, insofar as, although both legislations contain this principle, it reinforces the importance for the signatories of the adoption of adequate security measures at a time when there is no need to raise awareness of the security issues of data processing.

25. It is understood that the Convention chose to refer the procedural rules to an Administrative Agreement, however, it is emphasized that all rules relating to data protection must be inscribed in the text of the Convention and not in the Administrative Agreement, due to the non-binding character of this for the Parties.

V. Conclusion

27. Bearing in mind that the State of Israel benefits from an Adequacy Decision of the European Commission, has specific legislation on data protection and a data protection authority has been established in that territory, the CNPD believes that the following guarantees necessary for the transfer of data, although the Agreement must contain the safeguards set out above.

Approved at the February 1, 2022 meeting

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