

f NATIONAL COMMISSION ON DATA PROTECTION

OPINION/2020/20

I. Order

The Ministry of Foreign Affairs, through the Directorate-General for European Affairs, asked the National Data Protection Commission (CNPd) to comment on the draft Cooperation Agreement between the Portuguese Republic and the Principality of Andorra in terms of internal security. (hereinafter 'Agreement'),

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.

The purpose of this Agreement is the mutual provision of technical cooperation and exchanges in the field of internal security (cf. Article 1). They are identified, in article 2, as areas of technical cooperation and exchange to be developed, namely: prevention and fight against crime in general; management of major events; proximity policing; management of migratory flows, combating irregular migration and trafficking in human beings; prevention and road safety.

Under the terms of Article 3 of the Agreement, technical cooperation will include, between the provision of materials, advisory and training actions and the carrying out of studies, the exchange of information and methodologies and information systems.

The exchange will comprise the modalities defined by the programs mentioned in Article 4 of the Agreement, under the heading "Cooperation Modalities", which, in turn, refers to programs whose scope, objective and responsibility for execution will be defined on a case by case basis, being the terms of this cooperation are also deferred for relevant regulation through the signature of specific Agreements or Protocols.

The remaining text of the Agreement, up to Article 16, generally regulates issues related to financing, costs, creation of a Joint Commission, contact points, dispute settlement, review, validity, termination and suspension of the Agreement.

II. appreciation

Firstly, it should be noted that the object of this Agreement, as it relates to matters of internal security, implies its legal assessment in the light of Law No. 59/2019, of 8 August,

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which regulates the protection of individuals with regard to the processing of personal data by the competent authorities for the purpose of preventing, detecting, investigating or prosecuting criminal offenses or enforcing criminal sanctions. the Agreement does not expressly provide for the processing of personal data. In fact, both the object of the Agreement and the forms of cooperation are so general and vague that it is not possible to achieve if it is only a matter of cooperation at a technical, training, advisory level, with the exchange of information of a general nature, as to policies, methodologies and practices, or, if on the contrary, this Agreement also covers the communication of personal data in matters of internal security.

Therefore, if the processing of personal data is not foreseen under this Agreement, the CNPD does not comment on its terms, because it is outside its range of competences.² If the Agreement is only of a general nature, in order to establish an understanding cooperation between the two countries, referring to the elaboration of other specific agreements, to be defined on a case-by-case basis, which may eventually imply the processing of personal data, namely the transfer of personal data from Portugal to Andorra, then these agreements or regulations shall be subject, in accordance with paragraph 2 of article 30 of Law no. 59/2019, to prior consultation with the CNPD and contain specific rules regarding the protection of personal data. Finally, if this Agreement is intended to cover the processing of personal data, in particular the transfer of personal data from Portugal to a third country, as may result, by way of example, from the application of subparagraphs e) and f) of paragraph 1 of article 3 of the Agreement, the CNPD considers that the article does not comply with the legal requirements regarding the protection of personal data.

First of all, because it does not contain rules on the processing of personal data, which are essential to regulate the transfer and subsequent use of personal data, in

¹ Law transposing Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016.

² This is without prejudice to the natural exchange of personal data regarding the identification and contact of representatives of the Parties and which are strictly necessary for the execution of the Agreement (namely, members of the Joint Commission and other personnel). This data processing is subject to Regulation (EU) 2016/679 - General Data Protection Regulation (RGPD). In this context, the Principality of Andorra, as a third country, benefits from an adequacy decision by the European Commission on its level of data protection, so the transfer of such personal data enjoys adequate guarantees.

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respect for the general principles of data protection, enshrined in article 4, as well as the requirements of articles 37 and 39, all of Law No. 59/2019.

In fact, Andorra does not offer an adequate level of data protection in the police context, as its internal data protection legislation - Law 15/2003, of 18 December - excludes from its scope of application the «investigation and prevention of penalties' (cf. Article 5 of the aforementioned Andorran law).

Thus, the Commission Decision of 19 October 2010 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the level of protection of personal data in Andorra³ does not extend to the processing of personal data that may be carried out under this Agreement.

Furthermore, although Andorra ratified, in 2008, the Convention for the Protection of Persons with regard to the automated processing of personal data (Convention No. 108), of the Council of Europe, and its additional protocol, and already signed the Protocol of amendment to the Convention (Protocol No. 223)⁴, on 10/2/2019, did not produce legislation that effectively implements the Convention, which also applies to the processing of personal data for prevention and investigation purposes criminal.

Therefore, in accordance with Article 39(1)(a) of Law No. 59/2019, in the absence of an adequacy decision, personal data can only be transferred to a third country. if adequate guarantees have been presented with regard to the protection of personal data through a legally binding instrument.

However, this does not happen in this Agreement, which does not even mention the processing of personal data.

Based on the above, the CNPD understands that there is no legitimate basis for the transfer of personal data from Portugal to the Principality of Andorra, within the scope of this Agreement.

III. Conclusion

If the Agreement submitted for consideration by the CNPD involves the processing of personal data, it is considered that it

does not fully comply with the legal regime for the protection of personal data, and the transfer of personal data to Andorra is not lawful.

3 https://www.cnpd.pt/bin/legis/internacional/Dec_19_10_2010.pdf

4 <https://www.coe.int/en/web/conventions/fulltext/-/conventions/treaty/223/signatures>

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If the processing of personal data only takes place within the scope of specific programs or agreements to be developed later, then these agreements will have to be previously submitted to the CNPD and respect the principles applicable to data processing and transfers to third countries, provided in particular in the articles 4 and 39 of Law No. 59/2019, of 8 August.

Approved at the plenary meeting of March 3, 2020

Filipa Calvão (President)