

I. Order

1. The Directorate-General for Consular Affairs and Portuguese Communities of the Ministry of Foreign Affairs submitted to the National Data Protection Commission (CNPd), for an opinion, a draft of the Agreement on Labor Mobility (hereinafter referred to as the Agreement) to be concluded between the Portuguese Republic and the Republic of India.

II. Within the competence of the CNPD

2. 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 Data Protection Regulation - RGPD), in conjunction with the provisions of article 3, in paragraph 2 of article 4 and paragraph a) of paragraph 1 of article 6, all of Law no. internal legal order, of the GDPR.

III. Consideration of the Agreement

3. The purpose of the Agreement under analysis, under the terms of article 1 and paragraph 4 of article 2, is to define the procedures for recruiting Indian citizens to carry out a subordinate professional activity in Portugal.

4. As provided for in article 4, for the selection and recruitment process of Indian workers, as well as for communication with employers, the Portuguese Republic designates the Instituto do Emprego e da Formação Profissional, I.P. (IEFP, I.P.) and the Indian Republic designates the Protector General of Emigrants (PGE), of the Ministry of Foreign Affairs.

5. The Agreement provides for the transfer of personal data from Indian workers to Portugal and data from Portuguese employers to the Indian Republic for its implementation.

6. Since the possibility of hiring legal persons is not expressly restricted, it is possible to conclude, still in a declarative interpretation of the rule, that Portuguese individuals may also express their interest in hiring Indian workers, which will imply, to that extent, the processing and, in particular, the transfer of personal data to the Republic of India.

7. 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 Republic of India, if that country

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present adequate guarantees and on condition that the data subjects enjoy enforceable rights and effective corrective measures.

8. In the present case, the Republic of India does not benefit from an adequacy decision by the European Commission, pursuant to Article 45 of the GDPR, nor has it acceded to Convention No. 108 of the Council of Europe, open to third countries.

9. Bearing in mind that, under the terms of paragraph 6 of article 5 of the Agreement, the Parties undertake, for its implementation, to respect the domestic law of the two States, it is necessary to verify whether there is specific Indian legislation in this matter. However, it appears that the Republic of India does not yet have specific legislation on data protection¹, nor is there a national authority with supervisory powers in this area.

10. Thus, the Agreement should provide for all the rules necessary for the protection of personal data, including the rules regarding their treatment, guarantees and the way in which their rights are exercised, as well as data security measures.

11. From the analysis of the text of the Agreement, it appears that the categories of data subjects are identified, as well as, in article 5, paragraph 6, the categories of data to be processed and that the workers present a declaration of consent for the transfer of personal data, which are identified by reference to the entity to which they are transferred.

12. Since hiring and, in particular, issuing a visa requires the transfer of certain personal data of the worker, the legal basis for the data essential for the performance of the contract - and only for these - will not be the consent . In fact, it only makes sense to consider consent as a source of lawfulness when there is an alternative, that is, when data subjects can, without that data processing, obtain the same results. This is not the case since it is a matter of prior steps necessary for the conclusion of a contract decided by the data subject himself and for its execution, and also because it deals with data whose treatment the law

requires for the practice of certain acts. such as issuing visas, concluding employment contracts, registering with Social Security or complying with tax obligations.

13. In relation to all data in which there is no other legal basis, there will then be a need for the consent of the data subject, which must be free and clarified.

14. As of this date, the Personal Data Protection Bill, 2019, is still under discussion.

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14. Notwithstanding the foregoing, some situations deserve particular attention.

15. First of all, it should be established in the text of the Agreement that the transfer of personal data to the Indian Republic is exclusively for the public announcement of the job offer, recruitment and conclusion of the employment contract that the Agreement regulates. , and those data cannot be processed for any other purposes.

16. It is stated in Article 5(7) that States provide the relevant information to candidates. This rule does not seem sufficient to safeguard the right to information of data subjects. On the one hand, because it does not define what information is considered relevant for the purpose, nor who decides on said relevance. On the other hand, because it does not identify how the data subject can exercise his right, nor with which entity.

17. Therefore, the data subjects' right to information must be explicitly explained, as provided for in article 13 of the GDPR, the content of the information to be transmitted to the data subjects, as well as the way in which the right is exercised, the which implies, in particular, that the identity and contact details of the entities with which the rights can be exercised are provided.

18. Also, the right to rectification of incorrect or incomplete data must be established, as well as the right to delete data after the maximum period of conservation. This retention period must also be specified in the Agreement.

19. On the other hand, it will be necessary to establish unequivocally that both States recognize the right of data subjects to effective judicial protection, regardless of their nationality.

20. Finally, for further clarification, it is suggested that the matter relating to data protection be set aside in a separate article.

21. If so, in order not to overload the Agreement, the densification of these rights may be included in the annex to the Agreement.

IV. Conclusion

22. Bearing in mind the foregoing, and taking into account that the Republic of India does not have legislation specifically applicable to data protection, the CNPD understands that, in order for adequate guarantees for the international transfer of data to be met, in accordance with article 46 of the GDPR, the Agreement must take into account the following:

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The. Expressly enshrine the rights of data subjects and the way to exercise them, namely the right of access to information, rectification and elimination of incorrect data or the expiration of the retention period.

B. Explain the information to be provided to data subjects at the time of data collection.

ç. Provide for the data retention period, after which the data must be deleted.

d. Finally, the Agreement must include a provision that safeguards that data subjects have the right to judicial protection to guarantee their rights regarding the protection of personal data, as results from recent jurisprudence of the Court of Justice of the European Union².

Lisbon, August 2, 2021

Ana Paula Lourenço (Rapporteur)

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