

National Data Protection Commission

OPINION/2022/7

I. Order

1. The Directorate-General for Social Security has submitted to the National Data Protection Commission (CNPD), for an opinion, the proposal for a Convention on the processing and transfer of data to be carried out between the Portuguese Republic and the Russian Federation in terms of Social Security (hereinafter referred to as the Convention).
2. The Application is also accompanied by a Framework Note (doc.5)

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 Agreement

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 the matters listed in article 2 in relation to each of the Parties and in relation to the persons identified in article 3.
5. As is clear from article 23 of the text under analysis, the implementation of this Convention presupposes the transfer of personal data from one Party to another through the competent authorities, which are not specified.
6. Pursuant to 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 Russian Federation, if that country has adequate guarantees and on condition that

the data subjects enjoy enforceable rights and effective corrective legal measures.

7. In the specific case, the Russian Federation does not benefit from an adequacy decision from the European Commission, under the terms of Article 45 of the GDPR, although it has acceded to Convention No. 108 of the Council of Europe, open

Av. D. Carlos 1,134.1º 1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

PAR/2022/3

1 v.

to third countries, so it is necessary to verify if there is specific legislation of the Russian Federation in this matter and if it guarantees the same protection as the Portuguese legislation

8. In fact, it appears that the right to the protection of information related to privacy is constitutionally protected (Articles 23 and 24), and that the Russian Federation has specific legislation on the protection of personal data¹ which regulates the processing of personal data by federal, local and municipal government bodies, legal entities and individuals, by automated means or not (Article 1(1)), for the protection of the rights and freedoms of citizens in the processing of data and the inviolability of personal and family privacy (Article 2).

9. It is also noted that the Russian Federation has provided its legal system with a data protection supervisory authority².

10. Notwithstanding the foregoing, some situations deserve attention.

IV. From data protection

11. The convention dedicates two articles exclusively to data protection: article 1, which takes care of the definition of the concepts "personal data", "processing of personal data" and "disclosure of personal data" [paragraphs 11) to 13)], and article 23, concerning the "right to information", whose wording, according to the information provided by the DGSS in the Framework Note (page 1 of doc. it is to be appreciated.

12. The care taken in defining the concepts used in the area of personal data protection is welcomed, ensuring that the Parties have a univocal understanding in this area. This does not prevent some observations from being addressed to the terminology

adopted in the Portuguese version presented and which should be taken into account in a definitive version.

13. Thus, in paragraph 11, the concept of personal data is defined for the purposes of this Convention. A first observation concerning the use of the expression "personal data subject", which in the Portuguese version should be replaced by "personal data holders", as the legal terminology has long been established.

14. Also, personal data are defined as "any information that relates to a specific individual directly or indirectly". This definition should also be changed, suggesting the adoption of the

1 Federal Law No. 152-FZ of July 27, 2006 on Personal Data (Personal Data Law), which regulates the processing of personal data by federal, local and municipal government bodies, legal entities and individuals, by automated means or not. Federal Law No. 149-FZ of July 27, 2006 on Information, Informational Technologies, and the Protection of Information (Information Law).

2 Resolution No. 228, of March 16th.

PAR/2022/3

two

||JV

CNPD

National Data Protection Commission

definition provided for in paragraph 1) of article 4 of the GDPR and of Convention 108, of the Council of Europe - "identified or identifiable natural person" - which, moreover, is compatible with the definition provided for in the Data Protection Act of the Russian Federation³. In this way, it would be clearer that it is personal data, even when the person is not yet determined, but when the available information allows it to be determined, that is, when it is possible to achieve their identification, even if by crossing of data.

15. The terminology adopted to define data processing also needs to be changed. By way of example, use should be replaced by use and elimination by destruction, systematization by structuring, and explain what is meant by lifting, accumulation or blocking, by way of example, as well as explaining whether by depersonalization is meant anonymization or pseudonymization, which seems to be the case.

16. Article 23 deals exclusively with data protection, so the heading should be changed to "protection of personal data", since

the current heading "information protection" is inappropriate.

17. It is established in Article 23 that the transfer of personal data is subject to the legislation of the Party carrying out the transfer (paragraph 2). Furthermore, that the Party to which the data are transferred must guarantee, regarding the processing and disclosure of data, a level of protection at least as rigorous as that of the Party that transfers (paragraph 4).

18. It should be said at this point that the reference to "treatment and dissemination" is not understandable.

19. On the one hand, because, under the terms of the definition explained in paragraph 12) of article 1, the processing of data includes the transmission of data, in the modalities of "dissemination, transfer and access", so there is no reason to for now,

20. On the other hand, because an integrated reading of the established rules of Article 23(4) and Article 1(13), which defines disclosure of personal data as "actions with a view to revealing personal data to an indefinite number of persons" would lead to the conclusion that there are situations in which, under this Convention, a Party may transmit the personal data of a given subject to an indeterminate number of persons, which cannot, in any way, admit up.

21. Furthermore, such an option is contrary to the provisions of paragraph 5 of article 23, which prescribes the confidentiality of data and its exclusive use for the purposes of the Convention.

3 Article 3, paragraph 1): "personal data" meaning any information directly or indirectly concerning a natural person defined or is being (personal data subject)".

Av.D. Carlos 1,134.1° 1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

PAR/2022/3

2v.

22. This rule should be complemented in order to ensure, not only that the data are not transferred to third parties within the territory of the States Parties, but also that there is an express provision that the data transferred to the other Party are not subsequently transferred to third countries or international organisations.

23. It is provided, in paragraph 9 of the article under analysis, that the violation of the provisions on data protection by the

Parties gives rise to the liability provided for in their legislation, and it is convenient to establish unequivocally that both States recognize the right from data subjects to judicial protection, regardless of their nationality.

V. Conclusion

24. In view of the foregoing, bearing in mind that the Russian Federation is a Party to Convention 108 of the Council of Europe and considered its data protection legislation, the CNPD understands that the adequate guarantees are met for the international transfer of data, in accordance with with Article 46. However, on the grounds set out above, the CNPD recommends reviewing articles 1 and 23 of the Draft Convention to be concluded between the Portuguese Republic and the Russian Federation.

Approved at the February 1, 2022 meeting

Filipa Calvão (President)