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CNPD

National Data Protection Commission

OPINION/2022/34

I, Order

1. 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 'the Agreement'),
2. The CNPD issues an opinion within the scope of its attributions, as the national authority to control the processing of personal data, conferred by paragraph 2 of article 30, in conjunction with paragraph 1 of article 43 and with subparagraphs a) and c) of no. 1 of article 44, all of Law no. 59/2019, of 8 August.
3. The purpose of this Agreement is the mutual provision of technical cooperation and exchanges in the field of internal security (cf. Article 1). In paragraph 1 of article 2, the areas of technical cooperation and exchange are identified, which include, namely: prevention and fight against crime in general, management of migratory flows, procedures and systems for border control, management of large events, document fraud, prevention and road safety, training, police training, proximity policing; civil protection, protection of nature and the environment.
4. The forms of cooperation are varied and include, among others, advice and training of personnel, supply of materials, carrying out studies, exchange of crime prevention in general, exchange of information and methodologies (cf. article 3. °).
5. Regarding the modalities of technical cooperation, it is foreseen that this will be integrated in cooperation programs to be defined on a case-by-case basis or in specific protocols to be concluded in any of the areas provided for in the Agreement.
5. The rest of the provisions of the Agreement concern costs, financing, displacement of personnel, contact points and other provisions relating to the resolution of disputes, the review, suspension, validity, termination, entry into force and registration of the Agreement.

II. Analysis

7. The CNPD had already commented, through Opinion/2020/20, of March 3, 2020, on a similar Agreement between Portugal

and Andorra with the same object of the Agreement now under consideration. In this sense, the CNPD reiterates its understanding then expressed.

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

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8. Firstly, the Articles of the Agreement do 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.

9. If the Agreement is only of a general nature, in the sense of establishing an understanding of cooperation between the two countries, referring to a later moment 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 will have to be subject, in accordance with Article 30(2) of Law No. 59/2019, to prior consultation with the CNPD and contain specific rules regarding the protection of personal data.

10. 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 Convention, the CNPD considers that the article does not comply with the legal requirements regarding the protection of personal data.

11. 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 compliance with the general principles of data protection, enshrined in Article 4, as well as the requirements of the articles 37 and 39, all of Law No. 59/2019.

12. Regarding the level of adequacy of Andorra's data protection in terms of internal security, reference is made to what is explained in Opinion/2020/20.

13. Naturally, the exchange of personal data relating to the identification and contact of the representatives of the Parties and which are strictly necessary for the implementation of the Agreement (namely, members of the Joint Committee and other staff) is naturally excluded. 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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III. Conclusion

14. Based on the foregoing, the CNPD considers that, if the Agreement now submitted to its consideration involves the processing of personal data, it does not fully comply with the legal regime for the protection of personal data, not legitimizing the transfer of personal data to Andorra (which would thus be illicit).

15. If that is the case, the Agreement must include the appropriate guarantees for the transfer of personal data and subsequent processing, which offer a level of data protection essentially equivalent to that existing in the European Union, in accordance with European Union Law, the case law of the Court of Justice of the Union and national law.

16. 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 submitted to the CNPD's prior pronouncement and respect the principles applicable to data processing regarding transfers to third countries , provided in particular in articles 4 and 39 of Law No. 59/2019, of 8 August.

Approved at the meeting of April 19, 2022

Filipa Calvão (President)

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