

I. Order

1. The Ministry of Foreign Affairs (MNE), through its Department of Legal Affairs, asked the National Commission for Data Protection (CNPd) to pronounce on a proposal for a Convention for international cooperation in the investigation and repression of the crime of genocide , crimes against humanity, war crimes and other international crimes (hereinafter "the Convention").

2. The CNPD issues an opinion within the scope of its attributions, as the national authority for the control of the processing of personal data, conferred by paragraph 2 of article 30, in conjunction with paragraph 1 of article 43 and with paragraphs a) and c) of paragraph 1 of article 44, all of Law no. 59/2019, of August 81.

3. This Convention results from the joint initiative of Belgium, Argentina, the Netherlands, Senegal, Esiovenia and Mongolia concerning the Multilateral Treaty on Mutual Legal Assistance and Extradition for national criminal proceedings for the most serious crimes with an international scope. Currently, the initiative has the support of several dozen States, including Portugal.

4. The text now submitted for opinion corresponds to the version of 11/30/2022. The CNPD had already ruled, in Opinion/2020/58, on a previous version of the Convention, having pointed out the important shortcomings of the text in terms of protection of personal data, and how it would be possible to largely overcome them, namely through the support for a specific Swiss proposal that was under discussion.

5. The MFA noted that the observations on data protection had been transmitted to the other States during the course of the negotiations.

II. Analysis

6. Analyzing the most recent version of the Convention, it appears that there is not a single clause in the text on the protection of personal data, which supports the transfer of data to third countries that the implementation of the Convention implies. As

this is a matter of investigation and prosecution of criminal offences, the legal framework applicable here in terms of data protection is that of Law No. 59/2019, in particular its Chapter V on transfers of personal data to third countries or international organizations.

1 Law approving the rules relating to the processing of personal data for the purposes of preventing, detecting, investigating or repressing criminal offenses or the execution of criminal sanctions, transposing Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016.

Av. D. Carlos 1,134,10 1200-651 Lisbon

T (+351) 213 928 400 F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

PAR/2023/24

1v.

7. In accordance with Article 37(1)(d) of Law No. 59/2019, the competent national authorities may only transfer personal data to a third country, based on a decision on the suitability of the European Commission, or adequate guarantees have been provided pursuant to Article 39, or if the derogations provided for in Article 40 apply.

8. In the present case, it will not be possible to transfer personal data based on the legally provided for derogations, firstly because such transfers would not be of an exceptional nature, insofar as they would occur in the context of an international cooperation Convention, thus not offering Article 40 of Law No. 59/2023 an admissible legal transfer mechanism.

9. On the other hand, the European Commission, so far, has only adopted one (1) adequacy decision under Directive (EU) 2016/680, considering that the United Kingdom offered an adequate level of data protection, which allows the transfer of personal data to that third country without the need for any additional measures or requirements. As this is a multilateral treaty involving dozens of States, this transfer mechanism appears to be very limited, as it only legitimizes the transfer of personal data to a single third country.

10. Article 39(1)(a) of Law No. 59/2019 prescribes that, in the absence of an adequacy decision, personal data may be transferred to a third country if they have been submitted adequate guarantees with regard to the protection of personal data through a legally binding instrument.

11. Now, a multilateral convention is a legally binding instrument within the meaning of this rule, which is why this instrument should contain the adequate guarantees referred to by law, in order to provide the personal data transferred with a level of protection essentially equivalent to that of guaranteed in the Union, as interpreted by the Court of Justice²

12. In a context of multilateralism such as the one at issue here, in which transfers of data to a large number of third countries are foreseen, it is more important that these transfers of data, which are inseparable from the execution of the terms of the Convention, are properly regulated in the same instrument, which would even allow the introduction of norms tailored to the specific content of this treaty.

2 The CJEU came to establish the legal standard of essential equivalence, in its judgment of 16 July 2020, in the Schrems II case (C-311/18), in relation to data transfers carried out under Regulation (EU) 2016/ 679 (GDPR). Such a standard can also be applied in the framework of Directive (EU) 2016/680, since, in both Union Law instruments, the general principle of transfers provides that the transfer of data is only possible if it does not compromise the level of protection of people ensured by the respective legal instruments.

PART/2023/24

two

CTM-®

National Data Protection Commission

13. In this sense, in the absolute absence of data protection rules in the text of the Convention and in the absence of a supplementary binding legal instrument that provides for them, it is the understanding of the CNPD that the Convention does not comply with the legal requirements of national law and Union law , as there is no lawful condition for the transfer of personal data from Portugal to third countries that are Parties to this Convention (with the exception of the United Kingdom), which is a sine qua non condition for Portugal to comply with the terms of the Convention.

14. Indeed, it is not possible to implement the provisions of the Convention in the field of mutual legal assistance and extradition without transferring personal data from Portugal to any third country that is also a Party to the Convention. As this is a new legal instrument, it will already have to meet all the legal requirements of Law No. 59/2019.

15. Only international agreements concluded prior to the date of application of Directive (EU) 2016/680, and only to the extent that they comply with the legal framework of data protection in force at the time of their signature, remain valid until they are

revised or revoked (cf. Article 61 of Directive (EU) 2016/680).

16. Since national law is the transposition of a Union Directive, the same question will arise for other Member States that intend to be a Party to this Convention, namely three of the proponents of this Initiative.

17. However, if the Convention does not contain adequate guarantees in terms of the protection of personal data, as required by article 39, paragraph 1, subparagraph a), of Law no. 59/2019 (to which the Article 37(1)(a) of Directive (EU) 2016/680), it is not possible to comply with the general principles applicable to the transfer of personal data and listed in Article 37 of that law, therefore it will not be possible for Portugal to transfer personal data to third countries under this Convention for manifest non-compliance with the law.

18. Any transfer of personal data to be carried out under the Convention under analysis will lack legitimacy if specific data protection rules are not introduced that contain all the adequate guarantees to ensure that the personal data transferred to third countries enjoy the a level of protection essentially equivalent to that guaranteed in the European Union and guaranteed by Law No. 59/2019.

III. Conclusion

19. Based on the above, the CNPD considers that the Convention submitted for its consideration does not meet the requirement set forth in article 39, paragraph 1, subparagraph a) of Law no. 59/2019, regarding the guarantees adequate measures regarding the protection of personal data that must be included in the legally binding instrument, which is

Av. D. Carlos 1,134,1o T (+351) 213 928 400 geral@cnpd.pt

1200-651 Lisboa F (+351) 213 976 832 www.cnpd.pt

PAR/2023/24

2v.

This is evident because it does not contain any rules governing the processing of personal data transferred, including the creation of obligations for the Parties regarding the recognition and guarantee of the rights of the holders and the existence of independent remedies.

20. The absence of appropriate safeguards inserted in the text of the Convention implies that transfers of personal data to third countries lack legitimacy, insofar as they cannot comply with the principles set out in article 37, paragraph 1, of Law no. 59/2019, namely that the transfer does not compromise the level of protection of individuals guaranteed by national law.

21. For all these reasons, the CNPD understands that the legal conditions for Portugal to be a Party to this Convention are not met, unless the identified legal obstacles are overcome.

Approved at the meeting of May 9, 2023

Filipa Calvao (President)