

THE

NATIONAL DATA PROTECTION COMMISSION

OPINION/2019/64

I. Order

The Directorate-General for Social Security (DGSS) of the Ministry of Labour, Solidarity and Social Security requests the National Data Protection Commission (CNPd) to issue an opinion on the draft Social Security Convention between Portugal and the People's Republic of China .

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as the national authority for controlling the processing of personal data, conferred by 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 Regulation on Data Protection - RGPD), in conjunction with the provisions of article 3, no. Article 4(2) and Article 6(1)(a), all from Law No. 58/2019, of 8 August.

The assessment of the CNPD is limited to the rules that provide for or regulate the processing of personal data.

II. Agreement Objectives

With this draft Convention, the Parties wish to develop relations in the field of social security with each other, enshrining the principles of equal treatment and the determination of applicable legislation, with a view to guaranteeing the rights of their respective nationals.

Furthermore, according to the system intended, the Convention will apply to all persons subject to the social security system as well as to their relatives or heirs who succeed them in the ownership of rights (cf. article 3).

III. International contracting and transfer of personal data

As it is undeniable that this Convention provides for and regulates the transfer of personal data between the two States Parties, as set out in its article 14 (cf. point 1) of article 4 of the GDPR), the Portuguese authorities must certify that the People's Republic of China ensures an adequate level of protection for

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personal data transferred in accordance with Article 46 of the GDPR.

IV. Protection of personal data in China

Despite the fact that a cybersecurity law was passed in 2017, there is no legal regime for the protection of personal data in the People's Republic of China¹.

Thus, considering that the rules in force in that State are not sufficient to affirm that an adequate level of protection of personal data is ensured there, in the light of the GDPR, the Parties must bind themselves to respect a set of conditions that guarantee that Personal data transferred by Portuguese public entities to China are subject to a level of protection equivalent to that guaranteed in the European Union.

V. Text of the Convention Draft

In article 16 of the Convention, under the heading "Confidentiality of information", regarding the processing of personal data, the parties undertake to process the data necessary for the execution of the agreement and undertake to guarantee the confidentiality of the personal data processed. and to use them exclusively for the purposes provided for in the Convention. Therefore, nothing more is said in the text of the agreement, beyond the link to the principles of necessity (minimization of data), purpose and confidentiality.

The Portuguese State intends to propose the introduction of a new number in this article to refer the definition of the personal data being processed, as well as the rules necessary for its protection, to the administrative agreement provided for in article 13 of the draft Convention. This option is justified by the difficulty for the Chinese State to accept "a framework of general rules on data protection that overlaps its national legislation", as well as the fact that the need to exchange personal data is "significantly lower than usual".

¹ In the meantime, in 2018, a document was prepared that intends to integrate personal information security standards, by a committee (National Information Security Standardization Technical Committee), but which is not yet legally binding.

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In fact, it is clarified that the personal data to be processed essentially concern the identification of the targeted natural person (as a rule, the worker) and the specification of the national legislation on social security to which the worker is subject.

Understanding the circumstances invoked, the CNPD understands that a binding administrative agreement that includes the

clauses necessary for the adequate protection of the personal data transferred to the People's Republic of China is sufficient to comply with Article 46 of the GDPR. To that extent, there is nothing to object to the fact that the present Convention contains only one norm referring to the aforementioned agreement. On condition, obviously, that no transfers of personal data take place, while this agreement is not formalized.

The CNPD underlines that the text of the aforementioned administrative agreement must, in particular, recognize the right of the data subject to access the transferred personal data, as well as the right to rectify any inaccurate data. It should also be possible for the holder to resort to administrative or judicial authority to guarantee such rights. It also recalls the importance of specifying that the transfer of data to other countries or to international bodies, by the requesting State, depends on the prior agreement of the requested State and the adequate protection given to personal data by the recipient country.

SAW. Conclusion

Although the draft Convention on Social Security between the Portuguese Republic and the People's Republic of China, involving the international transfer of personal data, does not provide sufficient guarantees of adequate protection of personal data, the CNPD has nothing to prevent the introduction of a rule that refer to a binding administrative agreement the specification of the personal data to be processed, as well as the guarantees of adequate data protection, in accordance with the principles and rules of the GDPR, in particular with regard to the rights of data subjects.

Lisbon, October 1, 2019

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