

I

## IT'S NATIONAL COMMISSION

Jl. data protection

OPINION/2019/12

### 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 Social Security Convention between Portugal and Canada that is intended to come to replace and revoke the one currently in force.

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as an independent administrative entity with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and by the paragraph 4 of article 36 of Regulation (EU) 2016/679, of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of paragraph 1 of article 21. ° and no. 1 of article 22, both of Law no. 67/98, of 26 October, amended by Law no. 103/2015, of 24 August (Personal Data Protection Law - LPDP).

### II. Convention objectives

With this proposed Convention, the Parties wish to develop relations in the field of social security with each other, enshrining principles and rules that guarantee respect for acquired rights and rights in progress to be acquired under the applicable national legislation. It is intended to cover the regimes applicable to employees in general, self-employed workers and systems for optional enrollment in the social security system.

The draft convention, in article 20, also provides for the conclusion of administrative agreements that materialize the necessary measures for its execution.

### III. International contracting and transfer of personal data

This Convention presupposes transfers and exchanges of personal data between the competent Portuguese and Canadian authorities, as is clear from article 22 of the project in question. In light of Article 4(1) of the GDPR, the data subject to

AV. D. CARLOS I, 134 - 1° | 1200-651 LISBON | WWW.CNPd.pt | TEL: +351 213 928 400 | FAX: +351 213 976 832

Case No. 10851/2018 1v.

transfer constitute personal data, therefore, pursuant to Article 46 of the GDPR, the Portuguese Republic may only transfer personal data to a third country located outside the European Union, such as Canada, if that country has adequate guarantees, and provided that the data subjects enjoy enforceable rights.

Therefore, it is important first of all to analyze whether Canada ensures an adequate level of protection.

#### IV. Protection of personal data in Canada

The existence of a law on the protection of personal data and an independent administrative body responsible for ensuring internal compliance with international legal instruments for the application of personal data are essential conditions for the recognition of an adequate level of protection of a third State. .

Canada has two federal data protection laws, the Privacy Act and the Personal Information Protection and Electronic Documents Act<sup>1</sup>. The Privacy Act came into force on the day

1 July 1983 imposing duties on public services in relation to respect for private life and the Personal Information Protection and Electronic Documents Act (PIPEDA), in force since 1 January 2004, established the main guidelines for the private sector in terms of data protection. And it has a public authority called the Office of the Privacy Commissioner of Canada (OPC), led by a person appointed by the Government in agreement with the Senate and the House of Commons. The Privacy Commissioner can be removed by the same body that appointed him in the event his conduct proves to be inappropriate (Section 53.a, subsection 2.a of the Privacy Act) despite the law referring to the Privacy Commissioner's operating autonomy in relation to the executive and presents a wide range of attributions related to the supervision and enforcement of the law (cf. section 34.a, subsection 3.a). The application of the rules in force in Canada is also guaranteed by recourse to the courts under the terms of sections 12.a and 14.a of PIPEDA.

Available in their electronic versions at <http://laws-lois.justice.gc.ca/PDF/P-21.pdf> and [http://www.parl.gc.ca/content/hoc/Bills/362/Government/C-6/C-6\\_4/C-6\\_\\_4.pdf](http://www.parl.gc.ca/content/hoc/Bills/362/Government/C-6/C-6_4/C-6__4.pdf), respectively.

Case No. 10851/2018 2

#### NATIONAL DATA PROTECTION COMMISSION

Although the European Commission, through Decision 2002/2/EC<sup>2</sup>, recognized the level of protection provided by law in Canada as adequate, it limited this recognition to transfers of data from the Union to Canada in the private sector. Thus, the Decision of the European Commission does not cover the Privacy Act applicable to the public sector, in which some public

entities with powers within the scope of the Convention to be signed will be included.

It is true that, in addition to those two diplomas that are part of the Canadian legal system, there are, at the level of federal states, legal provisions that regulate the activity of public and private services with regard to the processing of personal data under their responsibility, making there reference to an authority responsible for the application and inspection of compliance and execution of legal instruments aimed at protecting the private life of citizens, with powers in both the public and private sectors.

However, since there is no set of legal rules, from the Federal State and from all the Federated States, which foresee and guarantee the binding of the Public Administration to rules for the protection of personal data and the control of their respect by an entity independent administrative authority, it is considered that the legal regime on data protection offered by Canada, although satisfactory in some areas of activity, does not guarantee an adequate level of data protection in all areas of application of the present draft Convention in analysis.

To this extent, the text of the Convention should contain the essential rules on data protection, obliging the Parties to comply with them, thus filling the deficiencies of Canadian national legislation and complying with the requirements of Portuguese legislation.

## V. Text of the proposed Convention

Article 22 of the Convention entitled "Protection of Personal Data" is the most important precept in terms of data protection, under which the parties undertake to guarantee the confidentiality of the personal data processed, protect them from

2 Decision of the European Commission of 20 December 2001 available at

<http://www.cnpd.pt/bin/legis/internacional/DecCom20-11-01-Canada.pdf>

AV. D. CARLOS I, 134 - Io | 1200-651 LISBON | WWW.CNPD.PT | TEL: +351 213 928 400 (FAX: +351 213 976 832

Case No. 10851/2018 2v.

any unauthorized access or communication, and take steps to keep the information secure and up-to-date.

It is also provided that the parties may not transmit the data received to others without the prior written consent of the party that transmitted them. Simply, insofar as it is noted in several points of the article that the processing of personal data will be carried out in accordance with the national legislation of the parties - even seeming to suffice for the transmission of data to other States such a provision in national legislation (cf. 22(3)) - taking into account that Canada does not guarantee, from a

European perspective, adequate protection of personal data processed by public sector entities, the provisions of the article are not sufficient to ensure the protection of personal data of citizens whose data are transmitted to the administrative entities of Canada.

Thus, the Convention should contain specific rules aimed at ensuring compliance with European data protection legislation, starting with clarifying that the data processed must:

- 1) Be used only for the explicit purposes of this Convention, and under no circumstances may they be treated in a way that is incompatible with those purposes at a later date;
- 2) Be adequate, relevant and not excessive in relation to the purposes for which they are collected, transferred and subsequently processed;
- 3) Be kept in such a way as to allow the identification of the persons concerned only for the period necessary for the pursuit of the purposes for which they were collected or for which they are subsequently processed, being subsequently disposed of;
- 4) The transmission of data by the receiving State to third States always depends on the authorization of the State party that transferred them.

Express mention should also be made of the duty to guarantee the exercise of fundamental rights to information, access and rectification.

Furthermore, provision should be made for the possibility for citizens to appeal to the administrative bodies responsible for data protection, when they exist, and to the courts, in the event of any refusal to exercise their rights.

Case No. 10851/2018 3

NATIONAL DATA PROTECTION COMMISSION

SAW. Conclusion

On the grounds set out above, the CNPD recommends reviewing Article 22 of the Draft Convention between the Portuguese Republic and Canada on Social Security, through the insertion of specific provisions that establish limits to the processing of personal data in terms of the principle of purpose and the principle of proportionality, and that expressly safeguard the fundamental rights of the holders.

Lisbon, March 19, 2019

Fmpa uaivao (President)

