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CNPD

National Data Protection Commission

OPINION/2022/14

I. Order

1. The Directorate-General for Social Security submitted to the National Data Protection Commission (CNPD), for an opinion, the proposal to amend the Convention on Social Security (hereinafter referred to as the Convention) signed between the Portuguese Republic and the Canadian Province of Quebec (henceforth Quebec).

2. The order is accompanied by a “Framing Note”.

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. from order

4. The Convention under analysis aims to modify the Convention on Social Security concluded between the Portuguese Republic and the Province of Quebec (hereinafter the Parties), signed in Montreal on March 20, 1981, in relation to the matters that are listed in the Convention.

IV. Analysis of the Convention on the Processing of Personal Data

5. As is clear from article 18-A, the implementation of this Convention presupposes the transfer of personal data from one Party to another through the competent entities of Quebec and the Portuguese Republic that are identified in paragraphs a) and c) of article 1, °.

6. Under Article 46 of the GDPR, the Portuguese Republic can only transfer personal data to a third country located outside

the European Union, such as Quebec, if that country has adequate guarantees and on condition that the data subjects enjoy enforceable rights and effective corrective legal measures.

7. The adequacy of the level of data protection must be assessed in light of all the circumstances surrounding the transfer of data, taking into account, in particular, the nature of the data, the purpose and duration of the planned treatments, the country of origin and the country of final destination, the rules of

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law, general or sectoral in force in the State in question, as well as the rules and security measures that are adopted.

8. In the case of Quebec, it appears that, as a Province of the State of Canada, it does not benefit from a decision of adequacy of the European Commission and cannot be a signatory of Convention 108 of the Council of Europe, therefore it is necessary to take into account the internal legislation.

9. Therefore, it is important first of all to analyze whether Quebec offers an adequate level of protection. In the specific case, it appears that Quebec has specific legislation on access to information and data protection1 and that an entity has been established with regulatory and supervisory powers in matters of personal data2.

10. Article 18-A is fully dedicated to data protection. No. 1 defines the concepts of personal data and personal information, which it equates, as all information about an identified or identifiable natural person registered in any form.

11. The purpose principle is established in paragraph 4, making it clear that personal data or information communicated "to an organization of a Party" can only be used for the purposes provided for in the Convention (verification of rights and granting of security benefits The reference to “an organization” of the other Party is unclear, since the transfer is only legitimate when it is carried out to the other Party through the competent institutions. Thus, it is suggested that that expression be replaced, in all

numbers where it is used, by "competent authority" or "competent institution", in accordance with the definitions explained in paragraphs a) and c) of article 1.

12. It is provided in paragraph 5 that a Party may use the data collected under the Convention for different purposes, if there is the consent of the data subject or, in the absence of such consent, provided that one of the following three conditions is met: " a) when the use is compatible with a direct link and relevant to the purposes for which the data were collected, b) when it is in the manifest interest of the interested beneficiary; c) when the use is necessary for the application of a law of the Party that receives [and is not contrary to the data protection laws and regulations of the transmitting Party]".

13. The provisions of this number suffer from some weaknesses. First of all, it is not justified that the use for different purposes by a public authority is based only on the consent of the holder.

1 Loi sur 1'accès aux documents publics https://www.leqisauebec.gouv.qc.ca/fr/pdf/lc/A-2-1.pdf

2 Commission d'Access to Information du Québec. I

et sur la protection des renseignements personnelles.

14. In fact, under the combined terms of subparagraph a) of paragraph 1 of article 6 and subparagraph 11 of article 4 of the GDPR, consent can only constitute a legal basis when it demonstrates a free, specific, informed will and unequivocal. However, it is unlikely that in this case the consent will be given voluntarily, taking into account the position of manifest imbalance between the data subject and the administration. Thus, although this possibility is not excluded, it is absolutely convenient that consent can only be considered when it results in a clear benefit for the data subject.

15. On the other hand, re-use of personal data for a purpose other than that for which it was collected, not being excluded outright, must always depend on prior written authorization from the Party transmitting the data, upon a contextualized request from the Party that receives them. Ultimately, if there are legal requirements regarding the use of data for other purposes, these situations must be made explicit in the Convention. This will make it possible to assess, still in the negotiation phase, its

relevance. As it stands, the clause of no. 5 is excessively open, allowing the processing of data for any purpose. However, the purposes must be explicit, specific and legitimate in the light of subparagraph b) of paragraph 1 of article 5 of the RGPD, so these are previously explained in the Agreement in order to assess their legitimacy or the reuse of the data must be subject to the prior authorization of the transmitting Party.,

16. As regards the communication of data to third parties, paragraphs 6 and 7 govern the communication of data to another body of the same Party and paragraph 14 regarding the international transfer of data to a third country.

17. Pursuant to paragraph 6, personal data transmitted to a Party may not be communicated to bodies of the same Party except for the execution of the Convention, except for the situations provided for in paragraph 7 and which are also inconsistent with the desirable for effective data protection.

18. First of all, it is foreseen that this communication can still be carried out when it is manifestly for the benefit of the data subject. Although this rule replicates Quebec law, the CNPD understands that the Administration's judgment regarding the benefit for a given subject should not be sufficient, and the consent of the data subject must be required for that communication. Obtaining the consent of the holder in this case will be even more justified, with the communication of data to third parties being for their benefit.

19. Furthermore, the admissibility of that communication of data is established when it is necessary for the exercise of the attributions of a body of the Party that receives them or is necessary for the execution of a law of the Party that receives them. Also here, according to information from the DGSS, there was no consensus on the consecration of the excerpt that required non-compliance with the laws and regulations on data protection of the party that transmitted them.

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20. In this context, the CNPD understands that the communication of data to third parties must depend on the prior authorization of the Party transmitting the data, after a duly justified request from the receiving Party, in which it must identify the third party and the purpose of the communication, so that the another Party can assess its suitability. It is also accepted that the communication can be carried out with the consent of the data subject, only on condition that this communication to third parties within the other Party results in an obvious benefit for the data subject.

21. With regard to the transfer of personal data outside the territory of the Party that receives them, what was said above applies as regards the admissibility of consent, in the sense that it is established that the consent of the data subject can only justify this transfer when represents an unequivocal benefit for the same. The alternative provided for in paragraph 14 of, in the absence of consent, requiring the authorization of the Party that transmitted the data, meets the solution already recommended by the CNPD.

22. Therefore, a simplification of the regime enshrined in articles 5 to 7 is suggested, in the sense of:

The. to affirm that personal data may only be used for the purposes specified in this Convention and may under no circumstances be processed for a purpose incompatible with those purposes;

B. That the communication of data to third parties, whether to another body of the Party that receives them, or their transfer to a third country, must be conditioned to the prior written authorization of the Party that transmitted them or to the consent of the data subject when there is a obvious benefit to you.

ç. Any legal transmission obligations to other bodies of the Party receiving the data must be made explicit in the Convention, and the duty of communication between Parties of new transmission obligations that may be adopted by either Party must be established, for reassessment of the validity of the Convention.

23. It should be added that it must be established that all interactions between the Parties in the sense of use for different purposes, as well as for transmission to other entities, are duly documented, in order to enable the control of data transmissions.

24. Any legal requirements for transfer to a third party that Canadian law imposes should be enshrined in the Convention, identifying not only the situations, but the third party entities to which these transfers must be made.

25. In paragraph 8, it is established that the Parties use means to preserve confidentiality, suggesting that the adjective "adequate" be added with reference to the means to be used for this purpose.

26. In paragraph 12, certain rights of data subjects are detailed, namely the right to be informed when data are used for purposes other than those for which they were collected, as well as the legal basis that supports this deviation. Furthermore, the right of access and rectification of data is provided "in accordance with the law and regulations where such data or information is found". Such latitude is permissible because, having consulted the Québec legislation, there seem to be no derogations that jeopardize the exercise of the rights of holders. However, if the Quebec protection regime is modified to allow other derogations, this change must be communicated to Portugal to verify compliance with the personal data protection rules in force in Portugal.

V. Conclusion

27. On the grounds set out above, the CNPD recommends revising Article 18-A of the Draft Convention to be signed between the Portuguese Republic and Quebec, in order to safeguard the effective protection of personal data of the data subjects involved.

Approved at the meeting of February 16, 2022

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