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CNPD

National Data Protection Commission

OPINION/2022/13

#### I. Order

1. The Directorate-General for Social Security (DGSS) submitted to the National Data Protection Commission (CNPD), for an opinion, the proposal for a Convention on Social Security (hereinafter referred to as the Convention) to be concluded between the Portuguese Republic and Canada ( parties).

2. The order is also accompanied by two documents.

#### 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 and subparagraph b)) of paragraph 3 of article 58 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, in paragraph 2 of article 4 and in subparagraph a) of paragraph 1 of article 6, all of Law no. ensure the implementation, in the domestic legal order, of the GDPR).

#### III. Analysis of the Convention

4. With this proposal for a Convention, the Parties wish to develop reciprocal relations in the field of social security, enshrining principles and rules that guarantee equality with regard to acquired rights and rights to be acquired under national legislation that is applicable in every moment.

5. The Convention is intended to cover all persons who are or have been subject to the legislation of Canada or the Portuguese Republic, or both Parties, as well as persons whose rights derive from those persons, with respect to matters that are discriminated in the Article 2.

6. The CNPD had the opportunity to comment on an earlier version of the text of this Convention, through Opinion 2019/12.

According to information from the DGSS (doc.1), in this sequence, the Portuguese Party prepared a new proposal for the wording of article 22, which provides for the personal data protection regime, which was the subject of Canada's comments included in the accompanying document. the request (doc. 2 a)).

7. This Convention presupposes the transfer of personal data between the competent entities of the two parties, as expressly follows from article 22 of the project, and the CNPD's analysis focuses on the

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version of article 22 contained in the Framework note accompanying the request<sup>1</sup> (doc.1) and which substantiates the Canadian Party's counter-proposal to the version presented by the DGSS following the issuance of that opinion. The Framework Note also includes comments from the DGSS in this regard.

8. Pursuant to Article 4 of the GDPR, the data necessary for the implementation of this Convention are personal data - in some cases including special categories of data, as defined in Article 9(1) of the same instrument - therefore, pursuant to article 46 of the GDPR, the Portuguese Republic can only transfer personal data to a third country located outside the European Union, such as Canada, if that country presents adequate guarantees and on condition that the data subject is assured of means of exercise their rights and to oppose undue treatment.

9. However, it appears that the regulatory framework that supported the CNPD's OPINION/2019/12 remains unchanged, since there is still no Adequacy Decision in relation to the Privacy Act, which is the legislation applicable to the sector and, therefore, to the Convention under analysis<sup>2</sup>, and that, although in some areas of activities the data protection regime is satisfactory, it does not guarantee an adequate level of data protection in all areas of application of this draft Convention.

10. The Canadian Party considers that the lack of an adequacy decision should not be considered relevant, invoking Article

26(1) of Directive 95/46/EC in favor of its position, insofar as it provides that the transfer of personal data to a third State that does not ensure an adequate level of protection can take place when "the transfer is necessary or legally required for the protection of an important public interest or for the declaration, exercise or defense of a right in a judicial process" (paragraph d)), which, in his understanding, would be the case.

11. Since that Directive was revoked by the RGPD, it is in the light of this instrument that that claim must be analyzed. In fact, the RGPD also enshrines, in article 49, derogations for specific situations regarding the requirement of adequate guarantees, however, these derogations are exceptional in nature and can only be considered when the transfers are punctual, and cannot be invoked when cross-border flows on a regular basis, such as those transmitted under the Convention.

1 This wording coincides with the text of the Convention, but with sequential numbering. In the Convention, numbers 4, 5 and 7 of article 22 are not accompanied by any text, as they refer to rules proposed by the Portuguese Party that were not accepted by Canada or were incorporated in other numbers or paragraphs of the same article. Therefore, any reference to Article 22 must take into account the text of the Framework Note.

2 European Commission Decision 2002/EC only recognizes the adequacy of Canadian legislation regarding transfers of data from the Union to Canada in the private sector.

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12. Thus, in order to guarantee the protection of personal data, the essential rules in this matter must be enshrined in the Convention.

13. It appears that several of the omissions identified by the CNPD in Opinion 2019/12, regarding data protection, have not yet been addressed.

14. Therefore, for the reasons already explained in that opinion, the need to include specific rules aimed at guaranteeing respect for the European data protection regime with regard to the following aspects is reiterated:

The. That personal data are only used for the purposes set out in this Convention and may under no circumstances be processed for a purpose incompatible with those purposes.

B. That the data being processed are adequate, relevant and not excessive in relation to the purposes for which they are collected and, in general, processed.

ç. Which are kept in a way that allows the identification of people only for the period necessary for the pursuit of the purposes for which they were collected.

15. In that same opinion, the CNPD explained that a rule should be included that determines that "[t]he transmission of data by the receiving State to third parties always depends on the authorization of the State Party that transmitted them".

16. Transmission to third parties is regulated (Article 22(3)), providing that the Parties may not transmit to another person or body the personal data they receive from each other pursuant to this Convention and its agreements. administrative procedures except as follows: "a) the disclosure is for the sole purpose of implementing this Agreement and the legislation and is in accordance with the Parties' domestic laws; b) the disclosure is authorized under the Party's domestic law or c) the person to whom the personal data reports have provided a valid written consent for the disclosure".

17. This precept must be amended. In fact, with the exception of the exception based on consent, the others cannot be accepted insofar as they allow the transfer of personal data to a third party to be based on the national legislation of the Parties. Now, taking into account that Canada does not guarantee, from a European perspective, an adequate level of protection of personal data when processed by public sector entities, this provision is not sufficient to ensure the protection of personal data transmitted to entities. administrative authorities of that Party, nor for other entities.

18. Therefore, another must be inserted that provides that the transferred personal data cannot be shared with third parties in the territory of the State of the States Parties, without at least one

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prior authorization from the transferring State, except when it is necessary for the implementation of the Convention and to the extent strictly necessary.

19. In addition, there must be an express provision that data transferred to the other Party are not subsequently transferred to third countries or international organisations.

20. For the same reason, the reference to the national law of the States as the basis for the application of this Convention should be deleted in Article 22(2).

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21. A specific provision should also be inserted which provides that in the event of suspension, termination or revocation of the Convention, the personal data transferred under it will continue to be processed under the conditions established therein.

22. Indeed, it is suggested that a specific provision be added that provides that non-compliance with the articles on data protection is grounds for denunciation of the Convention.

23. With regard to the terminological issue, the Canadian Party suggests the replacement of two words, and with regard to the proposed replacement of "transmission" by "disclosure", the CNPD is not opposed.

24. The Canadian Party proposes that the following wording be fixed for Article 22(2)(e) "[f]or the implementation of this Agreement, the administrative arrangements referred in Article 20 and the legislation, the Parties shall , in accordance with their domestic laws: [...] e) protect the personal data received from each other from events such as unauthorized access, disclosure and disposal", using the latter term instead of "destruction" in the Portuguese proposal.

25. In support of its claim, the Canadian Party argues that "destruction" is one of the types of "disposal", another method being transfer for deposit. This understanding is not followed or understood, since the guarantee is aimed precisely at the protection of personal data against erasure, which is why it is argued that "destruction" must be used expressly.

26. Finally, it is understood that the Convention has chosen to refer part of the Convention's implementation regime to administrative agreements, however, it is emphasized that all rules relating to data protection must be inscribed in the text of the Convention and not in administrative agreements, due to their non-binding nature for the Parties.

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#### IV. Conclusion

27. On the grounds set out above, the CNPD recommends reviewing Article 22 of the Draft Convention to be signed between the Portuguese Republic and Canada, through the insertion of specific provisions that safeguard the effective protection of the personal data of the people involved.

Approved at the meeting of February 16, 2022

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