NATIONAL DATA PROTECTION COMMISSION

OPINION/2020/1

I. Order

The Secretary of State for Tax Affairs asked the National Data Protection Commission (CNPD) to issue an opinion on the "draft law proposal that transposes Directive (EU) 2018/822, of the Council, of May 25, 2018 (DAC 6)».

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. appreciation

The draft law under consideration (hereinafter, Project) transposes Directive (EU) 2018/822 into the Portuguese legal system, which amends Directive 2011/16/EU, essentially reproducing the rules provided for therein regarding communication obligations to the tax authority and automatic exchange of information regarding cross-border mechanisms that indicate 'a potential risk of tax evasion'.

But the purpose of the Project goes beyond the scope of the Directive, also regulating communication obligations to the Tax and Customs Authority (AT) of internal mechanisms, i.e., mechanisms that indicate a potential risk of tax evasion capable of being applied or having effects in the national territory. and that do not correspond to cross-border mechanisms (cf. Article 1(a) of the Project and Article 2(1)(h) of the Project)1.

1 The Project therefore distinguishes between internal mechanisms and cross-border mechanisms, the latter corresponding to mechanisms that concern more than one Member State of the European Union or a Member State and a third country (cf. point j) of n. 1 of article 2 of the Project).

In this part, the Project regulates, in terms that do not fully coincide with those so far provided for in Decree-Law no. adopted with the sole or predominant purpose of obtaining tax advantages, in order to combat abusive tax planning.

It is on these innovations, which are not limited to reproducing the rules of the Directive that are intended to be transposed, that the analysis of the CNPD will begin, and only then will other aspects of the regime arising from the Directive be considered.

1. The obligation to communicate personal data of third parties by intermediaries subject to the duty of professional secrecy

In fact, this Project introduces some impactful novelties in the context of the processing of personal data provided for in Decree-Law no.

The main novelty lies in the fact that the obligation to communicate schemes with the sole or predominant purpose of obtaining tax advantages, which falls on the now called intermediaries (who, in that Decree-Law assumed the designation of "promoters") encompass the identification of the relevant taxpayer - cf. Article 15(1)(a) of the Project and Article 8(2) of Decree-Law No. 29/2008.

Considering that the relevant taxpayer can be a natural person and the information to be communicated is related to him, the Project is, therefore, innovatively providing for two processing of personal data: the first, to be carried out by the intermediary, and which translates into the communication of data personal data of third parties to AT; the second, which is revealed in the subsequent operations of collection, conservation and analysis of personal data by AT, for the purposes listed in article 17 of the Project.

However, it is precisely the innovation of imposing on intermediaries an obligation to notify AT of the identity of their customers or, more generally, of those to whom they provide services, associated with information on the mechanisms, which gives rise to reservations to the CNPD. In particular, because in many of these service delivery relationships

services there are statutory duties of secrecy, and that the Project, in its article 11, terminates before the AT.

In this regard, it is important to remember that the duties of secrecy within the scope of regulated professional activities, such

as those of a lawyer, solicitor, accountant or statutory auditor, expressly imposed by law, are essential to the pursuit of the public interest purposes envisaged by public regulation. of such professions.

This is the duty that supports the relationship of trust between the professional and the client and which, to that extent, ensures that all members of our community have access to advice or defense of their interests within the scope of each of the activities in question. It is, in fact, essential to protect the client's interests, that the provision of professional services such as those listed above is aimed at transmitting to the professional information regarding his private life, which may have patrimonial or financial relevance; and to that extent, the duty of professional secrecy contributes to the protection of the fundamental right to respect for private life and the strengthening of the fundamental right to the protection of personal data. The annihilation or removal of the duty of professional secrecy and, with that, the relationship of trust between a professional and his client, puts in crisis the public interests that the regulation of those professional activities aims to safeguard, and significantly affects the fundamental rights provided for in n. Article 26(1) and Article 35 of the Constitution of the Portuguese Republic (CRP).

Without forgetting the elimination of the duty of professional secrecy to which financial institutions are bound, under the contractual terms, which the national legislator has already chosen to exclude in relation to the AT.

It is for this reason that the CNPD understands that the processing of personal data now introduced by the Project, which is embodied in the communication of personal data of a third party (when this is a natural person), as it implies the restriction of the fundamental right to the protection of personal data and of the fundamental right to respect for private life, must be specially considered and justified, by demonstrating not only the suitability of such a measure to achieve the intended purpose of combating tax evasion or avoidance or abusive tax planning, but above all the need of such a measure - as required by Article 18(2) of the CRP, in conjunction with Articles 26 and 35 of the CRP.

And it is this need that, from the perspective of the CNPD, is neither alleged nor demonstrated in the Project.

The invocation, in the Explanatory Memorandum of the Project, of the «strongly negative view of tax evasion / tax avoidance>> or that «there is a consensus in democratic societies with a certain repulsion towards tax evasion, associated with a seriously derogatory charge, not only in moral terms, but also in legal-social terms», it may perhaps serve as a basis for demonstrating

the adequacy of such a restrictive measure of a right, freedom and guarantee, but it is not sufficient, per se, to affirm the need for same.

The judgment of the necessity of this restrictive measure involves the demonstration that there are no other suitable measures to achieve the same end and that do not imply such a significant restriction of the fundamental rights of citizens.

However, the Directive precisely allows for the removal of the duty to communicate information on a cross-border mechanism if compliance with it entails the breach of a duty of professional secrecy legally protected under the national law of the Member State. And it outlines as an appropriate and necessary measure the requirement that intermediaries notify any other intermediary not subject to a duty of secrecy or, if this does not exist, the relevant taxpayer that he has the obligation to communicate to the tax authority (cf. no. 5 of Article 8-AB inserted by Directive 2018/822 into Directive 2011/16/EU; also recital 8). Since the Directive has accepted as adequate and necessary to combat aggressive tax planning a solution that safeguards the duties of professional secrecy provided for by the national law of the Member States, and which, therefore, does not involve the communication of customer data by intermediaries subject to such duty, it is difficult to accept as sufficient the reasoning given in the Explanatory Memorandum of the Project to justify the option of the national legislator for a more restrictive measure of the fundamental right to the protection of personal data and respect for the private life of taxpayers, when they are natural persons , and the public interests underlying the provision of the duty of professional secrecy.

Indeed, the statement in the aforementioned Explanatory Memorandum, subsequent to the list of public interest purposes in the tax field, that "It is understandable, therefore, that the obligation to disclose practices that objectively indicate a

potential risk of tax evasion must prevail over the duty of secrecy that, legally or contractually, incumbent upon the subjects of that obligation», does not clarify why a different path was not followed, in fact, proposed in the Directive, and which is still suitable for the pursuit of such purposes. Nor is it invoked, as stated in the same Explanatory Memorandum, that this prevalence comes “in line with Decree-Law no. provided for in this legal diploma did not imply a violation, at least directly, of the duty of secrecy, as it did not involve the identification of the persons to whom the information to be communicated pertained. In fact, the lesser rigor of what is stated in the Explanatory Memorandum may lead a less attentive reader to conclude that this option expressed in the Project's articles does not reflect any innovation in our legal system or that it is

limited to transposing the aforementioned Directive, when it is certain that any of the conclusions does not correspond to reality.

For the rest, the solution found in paragraph 2 of article 10 and in article 13 of the Project of placing the duty of communication on the relevant taxpayer in the first line, providing for the duty of the intermediary to notify the taxpayer so that the latter fulfills this duty, and only in the alternative, i.e., in case of non-compliance by the taxpayer, imposing such a duty of communication on the intermediary subject to the duty of secrecy, does not fail to translate the option of prevailing the duty to communicate personal data of third party on the duty of professional secrecy, in terms that, as explained, do not demonstrate the need for this restrictive measure.

Thus, since the Explanatory Memorandum does not claim or demonstrate the need for such a measure, the CNPD recommends that the option be considered, as reflected in paragraph 4 of article 13 and paragraph 1 of article 14. ° of the Project, to make the duty to communicate to the AT of the personal data of third parties prevail over the duty of secrecy, in the light of the principle of proportionality of the restriction of fundamental rights to respect for private life and the protection of personal data - strengthened in the context of service provision relationships in which, due to the nature of the activity of the professionals who provide them, the holders expose aspects of their private life.

2. The purposes of the processing of personal data by AT and the rights of data subjects

Article 15(3) of the Project determines that the information communicated to AT "is, in compliance with the legal requirements applicable to the protection of the data contained therein, in a national database of AT, accessible by the bodies and services of this for the pursuit of their respective powers', defining in Articles 16 and 17 of the Project, the purposes of processing the information communicated. If there is nothing to observe regarding information relating to cross-border mechanisms, since the purpose is precisely defined, the provision of the 'internal purposes of the information communicated' to the AT, in Article 17, needs to be revised.

In fact, in paragraph 1 of article 17 it is determined that '.In possession of the information referred to in article 15.0 that has been communicated to it, the AT, in addition to the provisions of the previous article, proceeds, namely: /.. .>, which is followed by an exemplary list of purposes that can be pursued by the AT.

The CNPD does not question the suitability and necessity of the information for the pursuit of any of the purposes listed. However, the processing by AT of information relating to cross-border mechanisms and internal mechanisms (as this is the scope of the provisions of article 17), when referring to natural persons, cannot serve any purpose, even if in the public interest, to be specifically determined by the AT or by any of its bodies or services (and this, even if the purpose falls within the scope of the attribution that the AT is responsible for pursuing). It is not just an imposition of the principle of legality of the Public Administration, which, in the context of the processing of personal data, because rights, freedoms and guarantees are at stake, requires a greater density of the legislative norms that provide for restrictions or conditioning of rights. . It is also an imposition of European Union law, in particular the purpose principle enshrined in Article 5(1)(b) of the GDPR: the processing of personal data has one or more predetermined purposes, even if , under certain conditions, the reuse of data for new and different purposes can be accepted.

But, as stated in the RGPD, when this diploma of Union law allows Member States to provide, through legislation, restrictions on rights or the reuse of personal data for purposes other than the one that justifies the collection of the

data, requires that such a legislative provision constitutes a necessary and proportionate measure in a democratic society to ensure, among other purposes, the public interest in the tax field (cf. Article 6(4) and paragraph 1(e)). of article 23 of the GDPR). However, the legislative measure can only be and be considered necessary and proportionate to ensure purposes of public interest, if those purposes are previously determined. For this reason, in subparagraph a) of paragraph 2 of article 23 of the RGPD, the purpose or purposes pursued with the treatment is indicated as an element that must be defined in the intended rule, in terms, therefore, that allow this judgment of necessity and proportionality of treatment.

In other words, article 17 must define an exhaustive list of purposes for the processing of personal data related to cross-border and internal mechanisms, otherwise it violates the provisions of paragraph 4 of article 6 and article 23. RGPD, as well as the principle of the purpose of processing personal data, enshrined in Article 5(1)(b) of the GDPR.

In view of the above, the CNPD recommends the elimination of paragraph 1 of article 17 of the adverb “namely”, also considering it useful to add at the end of paragraph 3 of article 15 “for the purposes set out in articles 16 .° and 17.°'.

Also with regard to the database referred to in paragraph 3 of article 15 of the Project, the CNPD recommends that the period for the conservation of personal data is foreseen, depending on the need for the information in question for the purposes envisaged. , pursuant to Article 23(2) of the GDPR and in compliance with Article 5(1)(e) of the GDPR.

It is also recommended to explicitly provide for the rights of access and rectification, as set out in Articles 15 and 16 of the GDPR.

III. conclusions

From the perspective of the CNPD, the Draft Law does not reveal - as it is not demonstrated, nor alleged in the Explanatory Memorandum - the need and proportionality of the innovative provision to ensure that the duty of communication to the AT of the personal data of third parties prevails over the duty of secrecy. Consequently, the

restriction, resulting from such provision, of the fundamental rights to respect for privacy and the protection of personal data - especially strengthened in the context of service provision relationships in which, due to the nature of the activity of the professionals who provide them, the holders expose aspects of his private life (e.g., law, accounting, statutory audit) - does not seem to comply with the principle of proportionality enshrined in paragraph 2 of article 18 of the CRP, especially when the Directive intended to be transposed outlines alternative path less harmful to such rights.

Thus, on the grounds set out above, the CNPD recommends:

a) The weighting of the option, expressed in paragraph 4 of article 13 and in paragraph 1 of article 14 of the Project, to give priority to the duty to communicate to AT of the personal data of third parties over the duty to secrecy;

b) The elimination of paragraph 1 of article 17 of the adverb “in particular” and the specification at the end of paragraph 3 of article 15 of the reference to the purposes foreseen in articles 16 and 17, under penalty for violating the principle of the purpose of data processing and paragraph 4 of article 6 and article 23 of the GDPR;

c) The provision in the Articles of the Project of the period of conservation of personal data and the rights of access and rectification, in accordance with the legal regime for the protection of personal data.

Approved at the plenary meeting of January 7, 2020.

Filipa Calvão (President)