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National Data Protection Commission

OPINION/2022/33

I. Order

1. The Directorate-General for Foreign Policy of the Ministry of Foreign Affairs requests the opinion of the National Data Protection Commission on the draft Convention to Avoid Double Taxation to be concluded with Australia.

2. The present opinion falls within the attributions and powers of the CNPD, 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 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, in paragraph 2 of article 4 and paragraph a) of paragraph 1 of article 6, all of Law n.° 58/2019, of 8 August (which aims to ensure the execution, in the internal legal order, of the GDPR).

II. Transferring data to a third country

3. The objective of this Agreement is to eliminate double taxation in the field of income taxes without creating opportunities for non-taxation or reduced taxation through fraud or tax evasion. Article 2(1) clearly states that the Convention applies to income taxes levied for the benefit of a Contracting State or its political, administrative or local authority subdivisions, whatever the system. used for your billing.

4. In light of Article 4(1) of the GDPR, the tax data transferred are personal data and for that reason, before entering into a bilateral agreement with Australia, the Portuguese authorities must ensure that the it even ensures an adequate level of protection for tax data whose transfer is planned.

5. The adequacy of the level of data protection must be assessed in terms of all the circumstances surrounding the transfer or set of transfers, 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 law, general or sectoral, in force in the State in question, as well as the rules and security measures that are adopted in Australia.

6. It should be noted that in the field of data protection legal instruments, Australia has not acceded to Convention No. 108, of

the Council of Europe, open to countries not belonging to the Council of Europe

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A data protection law has been in force since 1989, which establishes the main guidelines in terms of data protection, as we will see below.

7. Australia is a party to the International Covenant on Civil and Political Rights (ICCPR), Article 17 of which refers to privacy rights, and is a member of the Organization for Economic Co-operation and Development (OECD), having made a public commitment to the 1980 OECD Guidelines on the protection and cross-border transfer of personal data. The content of Article 17 of the ICCPR and the OECD Guidelines were adopted internally through the Privacy Act of 1988. The preamble of this law specifically refers to these instruments as containing the values to be respected in the national legal system.

8. The Privacy Act 1988 is a law passed by the Australian Federal Parliament that sets out rules in relation to the collection, retention, access, correction, use and disclosure of personal information about citizens. The law, applied since January 1, 1989, has been revised in order to cover all areas of society, namely the private sector, which, in an initial version, was not covered.

9. The Privacy Act of 1988 created the Office of the Privacy Commissioner, whose functions include investigating the acts or practices of agencies that may violate privacy principles and the acts or practices of private organizations that may interfere with the privacy of individuals, and attempt to resolve, through conciliation, the issues that gave rise to this investigation.

10. Among the various diplomas that consolidated the personal data protection regime in Australia, the Privacy Amendment Act 2000 and the Privacy Amendment Act 2012 stand out, which reinforced the independence, exemption and sanctioning powers of the Office of the Privacy Commissioner, clarifying the its attributions in the existing framework, the regime being

applicable to the public and private sector.

11. In addition to this Act, Australian legislation contains a number of provisions governing the use and disclosure of certain types of sensitive official information, such as the Telecommunications (Interception) Act 1979, relating to the handling of intercepted communications, as well as the Financial Transaction Reports Act 1988 (Financial Transaction Reports Act 1988).

12. However, since the European Commission has not issued an adequacy decision on the level of data protection in Australia, it is important to ensure that the draft Convention offers sufficient guarantees for the protection of the personal data transferred, in compliance with the general principle enshrined in article 44 and the provisions of article 46, both of the GDPR.

III. Analysis

13. The draft Convention regulates the processing of personal data in Articles 26 and 27.

14. Under the heading “Exchange of information”, article 26 regulates the exchange of information by the Parties, reproducing expressis verbis article 26 of the OECD Model Convention on Double Taxation of Income and Capital, in the abridged version of 20081, with two differences: a paragraph has been added to paragraph 2 which provides that information received by a Contracting State may be used for other purposes where such use is permitted under the laws of both States and the competent authority of the State 6, which establishes the duty of Contracting States to comply with United Nations General Assembly Resolution A/RES/45/95, which establishes the Guidelines for the Regulation of Computerized Files of Personal Data2

15. In turn, Article 27, under the heading "Use and Transfer of Personal Data", sets out the principles to which the processing of data in this context must comply, as well as the guarantees of access and rectification of the data by the respective holders.

i. Purposes of exchanging information

16. Article 26(1) assigns two purposes to the exchange of information: a) the application of the Convention, that is, the elimination of double taxation in the field of income taxes and the prevention of fraud and tax evasion; b) the administration or enforcement of domestic laws on taxes, insofar as the taxation provided for therein is not contrary to the Convention.

17. In this regard, it should be noted that the personal data collected must aim at specific, explicit and legitimate purposes, and

cannot be further processed in a way that is incompatible with those purposes (cf. point b) of paragraph 1 of article 5. ° GDPR). As will be explained further below, the clear specification of the purposes of the processing of personal data is relevant with regard to the protection of the rights of the holders of personal data, first of all to be able to assess the suitability and necessity of the processing of the data for its pursuit.

1 Available in

https://info.portaldasfinancas.oov.Dt/en/tax information/conventions avoid double taxation/conventions doclib tables/Documents/CDT OECD model.pdf

2 Available at https://www.refworld.orn/pdfid/3ddcafaac.pdf

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18. However, the final part of Article 26(1), by determining that the exchange of information is not restricted by the provisions of Articles 1 and 2 of the same Convention, calls into question the purpose principle , also jeopardizing the verification of the application of the remaining principles on the protection of personal data.

19. In fact, such a provision opens the processing of data to any purpose and for any subject (categories of data subjects), going beyond the limits arising from the object (and objective) of the Convention. If this legal regime is intended to be extended to other subjects or for other purposes, it is imperative that they be specified in the text of the Agreement, under penalty of violating the principle enshrined in Article 5(1)(b) of the GDPR .

20. Still on the subject of article 26, it should be noted that the reference in paragraph 2 to the processing of data for purposes other than those for which the data were collected, provided that this is provided for in the legislation of both Contracting States and provided that it is authorized by the competent authority of the State that provides the information, it must be interpreted in

the sense that the national legal provision for reuse for different purposes meets the requirement of compatibility between the purposes, contained in paragraph 4 of article 6 of the GDPR

ii. The principle of proportionality

21. Article 26(1) under consideration provides that the competent authorities of the Contracting States will exchange among themselves "foreseeable relevant information" for the application of the Convention or for the administration or enforcement of domestic laws.

22. Referring the determination of the personal data subject to communication and exchange between the two States for a prognostic judgment on which data are foreseeably relevant to combat double taxation and tax evasion, entails a degree of legal uncertainty that, in itself , is inadmissible in the context of the regulation of fundamental rights such as the protection of personal data and the privacy of private and family life - here, in tax matters, also at issue given the extent of personal information that the tax authority collects in light of the legislation in force in our legal system. The appeal to the judgment of prognosis also makes it difficult to assess compliance with the principles of proportionality and data minimization, in accordance with what is determined in subparagraph c) of paragraph 1 of article 5 of the GDPR, which requires that they can only be exchanged information that is adequate, relevant and not excessive in relation to the purpose of the processing.

23. In this sense, it appears that a provision with such content is contrary to the general principle contained in Article 5 of Convention 108 of the Council of Europe and in Article 5(1)(c) of the GDPR, not being

consistent with the regime assumed to be indispensable, for data transfers to third countries, by Article 2 of the Additional Protocol to Convention 108 and by Articles 44 and 46 of the GDPR.

24. It is therefore recommended that, at least in Article 26(1), instead of "foreseeably relevant information", the expression "necessary information", which appeals to the principle of proportionality, is used.

25. It should be noted in this regard that in various conventions on the same subject3 the expression “necessary information” is

used. an equivalent meaning, so, as the concept of need is more precise and rigorous from the point of view of personal data protection, there seems to be no reason not to introduce it in the text of the Project.

iii. Access to bank secrecy data

26. Article 26(5) of the Draft, which, as noted above, reproduces Article 26(5) of the OECD Model Convention, provides that a Contracting State cannot refuse to whether to provide information solely because it is owned by a credit institution, another financial institution, an agent or a person acting as an agent or trustee, or because such information is connected with a person's proprietary rights.

27. In weighing the legal interests or interests underlying the OECD Model Convention, the public interest of the States Parties in the effective taxation of income covered over the fundamental right to reserve their private life was given priority, even if this sacrifice is accompanied by guarantees adequate information regarding the confidentiality of the information transmitted.

28. In this regard, the CNPD notes that Article 26(5) of the Model Convention must, however, be interpreted in its proper context. Thus, despite the literal terms of the first part of paragraph 3 of Article 26, it must be understood that the application of paragraph 5 does not preclude the application of that provision, that is, that access to information held by credit and financial institutions cannot contravene the conditions established in domestic law for lifting bank secrecy. This, moreover, is the interpretation suggested by the official comments on Article 26(5) of the OECD Model Convention.

3 See, by way of example, the Conventions concluded with the same purpose with Israel, Pakistan, Singapore, Chile and Algeria, approved by Resolutions of the Assembly of the Republic No. 2/2008, 66/2003, 85/2000, 28/ 2006 and 22/2006, respectively.

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iv. The rights of data subjects enshrined in article 27

29. Article 27(1) of the draft enshrines, in its various subparagraphs, principles to which data processing carried out under the Convention must comply.

30. Thus, subparagraph a) provides that the processing carried out under the Convention must comply with specific purposes, and the data must not be used for purposes incompatible with those for which the collection was carried out; in subparagraphs b) and c) establishes that the data processed must be precise, relevant and not excessive, accurate and, whenever necessary, updated, and every effort must be made to eliminate or correct inaccurate or incomplete data and, in subparagraph d), that the data must not be kept longer than necessary for the purposes for which they were collected, and must be deleted beyond that period.

31. The CNPD notes the express reference to these principles of processing of personal data as positive, since, as required by the RGPD, any legally binding instrument relating to transfers of personal data must contemplate the principles of data protection and the rights of data holders. Even so, it recommends that the Convention enshrine provisions and safeguards in a more dense way.

32. First of all, the Agreement must clearly explain which information (categories of personal data) will be specifically processed and transmitted. The omission of this information in the Project does not allow the CNPD to assess whether the personal data being processed are adequate, relevant and not excessive in relation to the purposes enshrined in paragraph 1 of article 26 of the draft Convention, nor if it is complied with. the principle of data minimization, set out in Article 5(1)(c) of the GDPR.

33. Although the Agreement establishes that the State to which information is requested must ensure that the data to be provided are accurate, necessary and proportionate to the purpose for which they were provided, it does not establish mechanisms for action when it is found that inaccurate data have been communicated or that should not have been provided. Therefore, it is proposed that it be established that the State that requested them must be informed thereof without delay. That State shall correct or delete such data without delay, in compliance with the principle of accuracy enshrined in Article 5(1)(d) of the GDPR.

34. Article 27(1)(d) provides that data must not be kept longer than necessary for the purposes for which they were collected, and must be deleted beyond that period. However, in compliance with the principle of limitation of retention (paragraph e) of

paragraph 1 of article 5 of the GDPR) the period of time for which the information is kept must be expressly indicated, even if only by reference to the national legal regime of each State.

35. The draft Convention should also expressly refer to other rights, such as the right to erasure, and provide for mechanisms to ensure their applicability, ensuring that the data subject can exercise their rights through independent authorities (administrative or judicial) to whom domestic law grants respect for such rights, under penalty of understanding that the text of the Agreement does not provide for the necessary and indispensable conditions for carrying out the transfer of personal data, as required by article 44 of the RGPD.

v. Transmission to other third states or international organizations

36. Article 27(3) provides that the transmission to third States or to international organizations of personal data received from the other Contracting Party under the Convention shall be carried out in accordance with the applicable laws.

37. The CNPD recognizes that, when in the destination State there are guarantees of recognition of a set of rights of the transferred data subjects and the exercise of these rights, an article with that content would be unnecessary, which is the case of Australia, as it provides specific legislation on data protection and a national authority with supervisory and corrective powers to ensure the respect and exercise of rights.

38. To that extent, with regard to transmission to other third States or international organizations, the draft Convention is in compliance with the GDPR, guarantees the provisions of paragraph 1 of article 35 of the Constitution of the Portuguese Republic and of Article 8 of the Charter of Fundamental Rights of the European Union.

IV. Conclusion

39. In light of the observations made, the CNPD recommends reviewing the draft Convention on bilateral cooperation between the Portuguese Republic and Australia to prevent tax evasion in terms of Income Taxes, in compliance with the Portuguese and European legal protection framework data, in order to introduce the following changes:

The. Replace, in Article 26(1), the expression “information that is foreseeably relevant” by information that is necessary;

B. Delete the final part of paragraph 1 of article 26, as well as delimit the scope of the provision for re-use of personal data in the final part of paragraph 2 of article 26;

ç. Introduce a precept that clearly explains which information will be specifically processed and transmitted, as well as the respective retention period.

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