

I. Order

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

2. This opinion falls within the attributions and powers of the CNPD, as the national authority for controlling 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.º 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 Convention is the elimination of 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 paragraph 1) of article 4 of the GDPR, the tax data subject to transfer constitute personal data and for that reason, before entering into a bilateral Convention with the Republic of Mozambique, the Portuguese authorities must ensure that that it 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 general or sectoral rules of law in force in the State in question, as well as the rules and security measures that are adopted in the Republic of Mozambique.

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PAR/2021/78

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6. It should be noted that in the field of legal instruments for the protection of personal data, the Republic of Mozambique has not adhered to the Council of Europe Convention No. 1081 (open to countries not belonging to it), having only data protection legislation for some sectors of activity, there is no general legal regime for the protection of personal data that applies to public entities.

7. In the absence of a legal framework that offers adequate guarantees for the transfer of personal data in the Republic of Mozambique, so that the level of protection offered by the European Union is not compromised, it is essential that the text of the Convention, as a legal instrument specific regulation of the exchange of personal data, contains the necessary safeguards for the international transfer of data, constituting itself as the guarantor of a level of data protection essentially equivalent to that existing in the EU, as required by the Court of Justice of European Union².

8. It should be noted that, in the Portuguese case, although the transfer of data does not expressly result from a legal provision, the basis for the lawfulness of this treatment is still brought back to the law, since article 81 of the Tax Code on Personal Income, on the elimination of international double taxation (as well as article 51 of the Corporate Income Tax Code, with regard to distributed profits and reserves, relating to legal persons, but with repercussions on natural persons) , has as a logical presupposition the exchange of information between the States concerned as an adequate means to guarantee the effectiveness of the rules it contains and that does so, in addition, to the benefit of the specific interests of the affected taxpayers.

9. Taking into account the above, the text of the Project is analyzed below in order to verify whether it offers sufficient guarantees for the protection of personal data that are transferred, for this purpose, to the territory of the Republic of

Mozambique, in respect for the general principle enshrined in Article 44 of the GDPR.

III. Analysis

10. The Draft Convention deals with the matter relating to the processing of personal data in Articles 26 and 27.

11. Under the heading "Exchange of information", article 26 regulates the exchange of information by the Parties, expressing *expressis verbis* article 26 of the OECD Model Convention on Double Taxation of

1 Convention for the Protection of Persons in relation to the Automated Processing of Personal Data approved on 28 January 1981, was approved for ratification by Resolution of the Assembly of the Republic No. 23/93, of 9 July 1993 and ratified by Decree of the President of the Republic No. 21/93, of the same date.

2 Cf. Judgment of July 16, 2020, Case C-311/18 (Schrems II).

PAR/2021/78

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National Data Protection Commission

Income and Capital, in the 2008 abridged version³, with two differences: a paragraph has been added to paragraph 2 providing 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 providing them authorize such use. A paragraph 5 was also added, establishing 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 Data⁴.

12. 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 data subjects.

i. Purposes of exchanging information

13. 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.

14. 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.

15. 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 principle of purpose, also jeopardizing the verification of the application of the remaining principles on the protection of personal data.

16. 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.

3 Available in

https://info.portaldasfinancas.gov.pt/ot/informacao_fiscal/convencoes_avoid_double_taxation/convencoes_doclib_tables/Documents/CDT_OECD_model.pdf

4 Available at <https://www.refworld.org/pdfid/3ddcafaac.pdf>

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PAR/2021/78

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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 Convention, under penalty of violating the principle enshrined in subparagraph b) of no.

1 of article 5 of the GDPR.

17. In turn, the last sentence of Article 26(2) allows 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 authorized by

the competent entity of the State providing the information. The purposes or the context of the reuse of the legally provided data must be duly defined here, to guarantee the normative predictability of the processing of personal data, required in any State of Law, under the terms of subparagraph b) of paragraph 1 of article 5 . of the GDPR.

ii. The principle of proportionality

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

19. Referring the determination of the personal data subject to communication and exchange between the two States for a prognostic judgment on which 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 and Customs Authority collects in light of the legislation in force in our legal system. The appeal to the prognosis judgment also makes it difficult to assess compliance with the principles of proportionality in relation to the data processed, according to the Convention as determined in subparagraph c) of paragraph 1 of article 5 of the RGPD, which requires that they can only be subject to exchange of adequate, relevant and not excessive information in relation to the purpose of the processing.

20. To that extent, it appears that a prediction of such content is contrary to the general principle! contained in Article 5 of Convention 108 of the Council of Europe and Article 5(1)(c) of the GDPR, not being consistent with the regime assumed to be indispensable for data transfers to third countries , Article 2 of the Additional Protocol to Convention 108 and Articles 44 and 46 of the GDPR.

21. It is therefore recommended that, at least in paragraph 1 of article 26, instead of "predictably relevant information" the expression "necessary information" is used, which appeals to the principle of proportionality .

PAR/2021/78

3

CNPD

National Data Protection Commission

22. It should be noted in this regard that in various conventions on the same subject⁵ the expression "necessary information" is used. Moreover, the official comments to the OECD Model Convention admit that any of these expressions is used, alternatively, with an equivalent meaning, so that, as the concept of necessity 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

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

24. In the weighing of legal interests or interests carried out in the OECD Model Convention, the public interest of the States Parties in the effective taxation of covered income was given precedence over the fundamental right of individuals to have their privacy protected, even if this sacrifice is accompanied by adequate guarantees regarding the confidentiality of the information transmitted.

25. 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.

iv. The rights of data subjects enshrined in article 27

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

27. 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 they presided.

⁵ See, by way of example, the Conventions concluded with the same purpose with Israel, Pakistan, Singapore, Chile, Algeria, Holland, approved by Resolutions of the Assembly of the Republic No. 2/2008, 66/2003, 85/2000, 28/2006, 22/2006 and 62/2000 respectively.

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PAR/2021/78

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to collection; 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 that they must be deleted at the end of that period.

28. 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.

29. First of all, the Convention must clearly explain which information (categories of personal data) will be specifically processed and transmitted. The omission of this information in the Draft does not allow the CNPD to assess whether the personal data being processed are adequate, relevant and not excessive in view of the purposes set out in paragraph 1 of article 26 of the Draft Convention and to assess whether it has been complied with. the principle of data minimization, set out in Article 5(1)(c) of the GDPR.

30. Although the Project 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.

31. Finally, Article 27(h) of the Draft provides that Contracting States will be required to take effective measures to protect the information provided against unauthorized access, alteration and disclosure, in compliance with the principle of completeness and confidentiality provided for in Article 5(1)(f) of the GDPR.

32. Article 27(1)(d) provides that data must not be kept longer than necessary for the purposes for which they were collected, and that they must be deleted after 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.

33. The text of the draft Convention should also expressly mention other rights, such as the right to erasure, and provide for mechanisms that ensure their applicability, ensuring that the data subject can

PAR/2021/78

4

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National Data Protection Commission

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 Project does not provide for the necessary and indispensable conditions for carrying out the transfer of personal data, as the article imposes

44 of the GDPR.

v. Transmission to other third states or international organizations

34. Article 27(3) of the Draft establishes that the transmission to third States or to international organizations of personal data received from the other Contracting Party under the Convention, takes place in accordance with the applicable laws.

35. The CNPD recognizes that, when in the State of destination there are guarantees of recognition of a set of rights of the holders of the transferred data and the exercise of these rights, an article with that content would be unnecessary. However, as mentioned above, insofar as it does not have a general law for the protection of personal data, applicable to public entities, the Republic of Mozambique does not guarantee an adequate level of data protection, so the necessary conditions are not guaranteed. carrying out the transfer of personal data as required by article 44 of the GDPR.

36. To that extent, as it stands, the Draft Convention does not comply with the GDPR, not guaranteeing compliance with the provisions of paragraph 1 of article 35 of the Constitution of the Portuguese Republic and article 8. of the Charter of Fundamental Rights of the European Union.

IV. Conclusion

37. In view of the observations made, the CNPD recommends revising the text of the draft Convention on bilateral cooperation between the Portuguese Republic and the Republic of Mozambique to Avoid Double Taxation and Prevent Tax Evasion in the field of Income Taxes, in compliance with the Portuguese and European legal framework for data protection, 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 the reuse of personal data in the final part of paragraph 2 of article 26;

ç. Introduce a precept that clearly explains which categories of personal data are specifically transmitted, as well as their retention period;

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PAR/2021/78

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d. Incorporate into the text of the Convention a provision that provides for mechanisms to ensure the exercise of rights by data subjects.

Approved at the meeting of July 13, 2021

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Filipa Calvão (President)