National Data Protection Commission

OPINION/2022/96

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 in Income Taxes and to Prevent Fraud and Tax Evasion to celebrate with the Republic of Korea.

2. This opinion falls within the attributions and powers of the CNPD, as the national authority for controlling the processing of personal data, under the terms of paragraph 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 April 27, 2016 (General Data Protection Regulation - RGPD), in conjunction with the provisions of Article 3, no. no. 2 of article 4 and subparagraph a) of no. 1 of article 6, all of Law no. 58/2019, of August 8 (which aims to ensure the execution, in the internal legal order, GDPR).

II. Data transfer to third country

3. The purpose of this Agreement is to eliminate double taxation in terms of income taxes, while ensuring that opportunities for non-taxation or reduced taxation are not created through fraud or tax evasion.

4. As is clear from article 25 of the text under analysis, the implementation of this Convention presupposes the transfer of tax data from one State Party to another through the competent authorities of the Republic of Korea and Portuguese, that is, by the Party Portuguese, the Minister of Finance, the Director General of the Tax and Customs Authority or his authorized representative and, on the side of the Republic of Korea, the Minister of Economy and Finance or an authorized representative of (article 3 j) .

5. In the light of paragraph 1) of article 4 of the RGPD, the tax data subject to transfer constitute personal data and, for that reason, before entering into a bilateral agreement with another State, the Portuguese authorities must make sure that the Agreement to be signed ensures an adequate level of protection for the tax data whose transfer is foreseen in the text of the project.

6. The adequacy of the level of data protection must be assessed in the light of all the circumstances surrounding the transfer

or set of transfers, taking into account, namely, 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 that Country.

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7. Now, under the terms of article 46 of the RGPD, the Portuguese Republic can only transfer personal data to a third country located outside the European Union, such as the Republic of Korea, if that country presents adequate guarantees and under the condition that data subjects enjoy enforceable rights and effective legal remedies.

8. It is therefore important first of all to consider whether the Republic of Korea ensures an adequate level of protection.

9. In this specific case, it appears that the Republic of Korea has specific legislation on the protection of personal data1 and that a national authority has been established with regulatory and supervisory powers in terms of the protection of personal data2.

10. Furthermore, it appears that the Republic of Korea has not adhered to Convention No. 108 of the Council of Europe, open to third countries, but which benefits from an adequacy decision by the European Commission, of December 17, 20213, through which the Commission certifies that this country ensures an adequate level of protection.

11. The aforementioned Adequacy Decision only excludes from its scope the processing of personal data for missionary activities carried out by religious organizations and for the nomination of candidates by political parties, or the processing of personal credit information, in accordance with the Information Law by controllers who are subject to oversight by the Financial Services Commission, which is not the case.

12. Under the heading "Exchange of information", article 25 of the draft Convention under analysis regulates the exchange of information by the States Parties, expressly reproducing article 26 of the OECD Model Convention on Double Taxation of Income and Capital, in the abridged version of 20084, with the only difference that a paragraph has been added in paragraph 2 providing that information received by a Contracting State may be used for other purposes when such use is permitted to the

under the laws of both States and the competent authority of the State that provides them to authorize such use, a solution that is welcomed.

1 Personal Information Protection Act, passed by Law No. 10465, of March 29, last amended by Law No. 16930, of February 4, 2020; Personal Information Safeguard and Security Standard, enshrined in Communication No. 2011-43 of the Ministry of Security and Public Administration, of September 29, 2011, amended by Communication No. 2014-7, of December 30, of the Ministry of the Interior and security; Enforcement Rule of Personal Information Protection Act approved by Regulation No. 241, of September 29, of the Ministry of Security and Public Administration and amended by Regulations No. 1, of March 23, 2013 of the same Ministry and No. 1 , dated November 19, 2014, from the Ministry of Interior and Security.

2 https://www.pipc.oo.kr/cmt/main/enalish.do

3 Available https://ec.europa.eu/info/sites/default/files/1 1 180366 dec ade kor new en.pdf

4 Available at

https://info.portaldasfinancas.aov.pt/pt/fiscal information/conventions to avoid double taxation/conventions doclib tables/Documents/CDT Model 0CDE.pdf

i. Purposes of exchanging information

13. Article 26(1) attributes two purposes to the exchange of information: a) the application of the Convention, therefore the elimination of double taxation in matters of income taxes and the prevention of fraud and tax evasion; b) the administration or enforcement of domestic tax laws, in so far 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 pursue specific, explicit and legitimate purposes, and cannot be subsequently processed in a way that is incompatible with those purposes (cf. subparagraph b) of paragraph 1 of article 5. ° of the GDPR). As will be better explained 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, from the outset in order to be able to assess the adequacy and necessity of the processing of data for its pursuit.

15. However, the final part of paragraph 1 of article 26, 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 finality, harming also the verification of the application of the remaining principles on the protection of personal data.

16. In fact, such a provision opens up the processing of data for any purpose and for any subject (categories of data subjects), going beyond the limits arising from the object (and objective) of the Convention. If it is intended to extend this legal regime 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 paragraph b) of paragraph 1 of article 5 of the RGPD .

17. In turn, the last sentence of paragraph 2 of article 26 introduces an unjustified crack in the data protection regime by allowing the processing of data for purposes other than those for which the data were collected, provided that such provided for in the legislation of both Contracting States and provided that it is authorized by the competent authority of the State providing the information.

18. In this regard, it is important to remember that the RGPD establishes the conditions under which personal data may be processed for a purpose other than that which justified the original collection or transfer, highlighting the conditions defined in paragraph 4 of article 6 read in conjunction with Article 23(1), both of the GDPR.

19. Indeed, it follows from Article 6(4) of the GDPR that there may be provisions of national law or of the European Union providing for such reuse of data, but only "[...] if they constitute a necessary and provided in a democratic society to safeguard the objectives referred to in Article 23(1) of the GDPR [...]'.

20. Under the terms of paragraph 1 of the aforementioned article 23 of the RGPD, it is essential that the legal rule that provides for the possibility of reusing personal data for another purpose indicates the specific purpose or purposes of reuse, under pity that it does not correspond to a necessary and proportionate measure in a democratic society to safeguard that purpose.

21. For this reason, in fact, paragraph 1 of article 23 of Law no. 58/2019, of August 8, which intends to generically legitimize the reuse of data by public entities, does not comply with the provisions of the first part of paragraph 4 of article 6 of the RGPD,

by not specifying the purposes of public interest that may justify such reuse, rather extending this possibility to pursue any public interest. Consequently, it also fails to prove to be a necessary and proportionate measure, as this implies an analysis and weighing for each new purpose specifically provided for in the legal plan (cf. recital 50.3.° of the RGPD).

22. In these terms, it is recommended to revise article 26, to eliminate the final part of paragraph 1, and to delimit the scope of the prediction of reuse of personal data in the final part of paragraph 2 of article 26 .°, in the sense set out above.

ii. The principle of proportionality

23. Paragraph 1 of Article 26 under review provides that the competent authorities of the Contracting States shall exchange "information that is foreseeably relevant" to the application of the Convention or for the administration or enforcement of domestic laws.

24. Now, referring the determination of personal data subject to communication and exchange between the two States to a judgment of prognosis about which are foreseeably relevant to combating double taxation and tax evasion, implies a degree of legal uncertainty that, only for itself, is not to be accepted in the context of regulating fundamental rights such as the protection of personal data and the reservation of the privacy of private and family life - here, in tax matters, also at stake given the extent of the personal information that the tax authority collects in the light of current legislation in our legal system. The appeal to the judgment of prognosis makes it even more difficult to assess compliance with the principles of proportionality with regard to the data processed, in accordance with what is determined in paragraph c) of paragraph 1 of article 5 of the RGPD, which requires that they can only be subject to exchange adequate, relevant and not excessive information regarding the purpose of the treatment.

25. In this sense, a provision of similar content is contrary to the general principle set out in Article 5 of Convention 108 of the Council of Europe and Article 5(1)(c) of the GDPR, not being consistent with O

regime assumed as indispensable by article 2 of the Additional Protocol to Convention 108 and by articles 44 and 46 of the

RGPD for data transfers to third countries.

26. It is recommended, therefore, that at least in paragraph 1 of article 25, instead of "predictably relevant information", the expression "necessary information" be used, which appeals to the principle of proportionality .

27. It should be noted in this regard that in several 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 can be used, alternatively, with an equivalent meaning, so, as the concept of need is more precise and rigorous from the point of view of protection of personal data, there seems to be no reason not to introduce it into the text of the Project.

iii. Access to data under bank secrecy

28. In a precept that, as mentioned above, is reproduced in article 26, paragraph 5, of the Model Convention, paragraph 5 of article 26 of the Project determines that a Contracting State cannot refuse to provide information solely because it is possessed by a credit institution, other financial institution, a nominee, or a person acting in an agent or fiduciary capacity, or because such information is in connection with a person's proprietary rights.

29. This precept makes it clear that, in weighing the legal interests or interests carried out in the OECD Model Convention, the public interest of the Member States in the effective taxation of covered income prevails over the fundamental right of individuals to see the reserve of their private life, even if this sacrifice is accompanied by adequate guarantees regarding the confidentiality of the transmitted information.

30. In this regard, the CNPD notes that paragraph 5 of article 26 of the Model Convention must 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 exclude the application of that provision, that is, that access to bank information cannot contravene the conditions established in the internal law for the withdrawal

5 See, for merely illustrative purposes, the Conventions celebrated with the same purpose with Israel, Pakistan, Singapore, Chile, Algeria, Holland, approved by Resolutions of the Assembly of the Republic n.° 2/2008, 66/2003, 85/2000, 28/2006, 22/2006 and 62/2000 respectively.

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of bank secrecy. This is, moreover, the interpretation suggested by the official comments on Article 26(5) of the OECD Model Convention.

31. Considering that the legislation in force in both States offers an adequate level of protection and also applies to this Convention, there is no need for it to contain an extended precept on data protection.

III. Conclusion

32. Considering that the Republic of Korea benefits from an Adequacy Decision of the European Commission, which has specific legislation on data protection and that a data protection authority has been established in that State, the CNPD understands that all the necessary guarantees for the transfer of data, provided that the text of the Convention is revised to ensure respect for the Portuguese and European legal framework for data protection, under the terms recommended here:

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

B. Eliminate the final part of paragraph 1 of article 26, as well as delimit the scope of the prediction of reuse of personal data in the final part of paragraph 2 of article 26.

Approved at the meeting of October 25, 2022

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