

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 the Republic of Turkmenistan.

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 purpose of this Agreement is technical cooperation and exchange in matters of internal security (cf. Article 1). Article 2(1) identifies the following areas of cooperation: management of migratory flows and border control; proximity policing; management of major sporting events; road safety and prevention; civil defense; criminal investigation of tactical police incidents; airport security. The purpose of this Agreement is technical cooperation and exchange in matters of internal security (cf. Article 1). Article 2(1) identifies the following areas of cooperation: management of migratory flows.

4. In light of Article 4(1) of the GDPR, the tax data subject to transfer constitute and for that reason, before concluding a bilateral agreement with the Republic of Turkmenistan, the Portuguese authorities must ensure that the Agreement to be concluded ensures an adequate level of protection for tax data whose transfer is provided for in the text of the project.

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 concerned, as

well as the rules and security measures that are adopted in the Republic of Turkmenistan.

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6. It should be noted that in the field of data protection legal instruments, the Republic of Turkmenistan has not acceded to Convention No. 108 of the Council of Europe¹, open to non-Council of Europe countries and that there is no specific data protection legislation in force .

7. In the absence of a legal framework that offers adequate guarantees for the transfer of personal data in the Republic of Turkmenistan, so that the level of protection offered by the European Union is not compromised, it is essential that the text of the Draft Convention, while specific legal instrument to regulate 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 the 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 of lawfulness of this treatment is still brought back to the law, since the article

81 0 of the Personal Income Tax Code, on the elimination of double taxation

international law (as well as article 51 0 of the Corporate Income Tax Code,

with regard to distributed profits and reserves, relating to legal persons, but with an impact 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 which does so, moreover, for the benefit of the specific interests of affected taxpayers.

9. Taking into account the above, the text of the draft is then analyzed 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 Turkmenistan, in respect for the general principle enshrined in the Article 44 of the GDPR.

1 Convention for the Protection of Persons in relation to the Automated Processing of Personal Data approved on January 28, 1981 and entered into force in the international legal order on October 1, 1985. It was approved for ratification by Resolution of the Assembly of the Republic no. 23/93, of 9 July, and ratified by Decree of the President of the Republic No. 21/93, of the same date.

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

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III. Analysis

10. The project 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, expressly reproducing Article 26 of the OECD Model Convention on Double Taxation of Income and Capital, in the abridged version of 20083, 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 when such use is permitted under the laws of both States and the competent authority of the State which provides to authorize such use. A number 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, therefore 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.

3 Available in

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

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

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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 purpose, further 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. 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 .

17. In turn, the last sentence of paragraph 2 of article 26 introduces an unjustified opening to the data protection regime by allowing the processing of data for different purposes 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 providing the information. In fact, paragraph 4 of article 6 of the RGPD sets out the conditions under which such processing may take place, namely, it establishes that this information can only be used for purposes compatible with that of collection and transmission, so that strange the introduction in the Agreement of a precept that extends the legally established regime.

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 authority collects from the 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, 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 subject to exchange of adequate, relevant and not excessive information regarding the purpose of the processing.

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20. In this regard, we are of the opinion that a provision with such a 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 as essential by Article 2 of the Additional Protocol to Convention 108 and by Articles 44 and 46 of the GDPR for data transfers to third countries.

21. It is therefore recommended that, at least in paragraph 1 of article 26, instead of "foreseeably relevant information" the

expression "necessary information" is used, which appeals to the principle of proportionality.

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. In a precept that, as mentioned above, reproduces article 26, paragraph 5, of the Model Convention, paragraph 5 of the Article 26 of the Draft provides that a Contracting State may not refuse to provide information solely because it is held by a credit institution, another financial institution, an agent or by a person acting as an agent or trustee, or because such information is related with a person's property rights.

24. This precept makes it clear that, 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 the covered income was given precedence over the fundamental right of individuals to have their reservation safeguarded. privacy, 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 the

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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access to bank information 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. Paragraph 1 of art. 27 of the project enshrines, in its various paragraphs, principles to which the processing of data carried out under the Convention must comply.

27. Thus, point a) provides that the processing carried out under the agreement 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.

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 Agreement must clearly explain which information 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 and to assess whether the principle data minimization, provided for in Article 5(1)(c) of the GDPR.

30. 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. Finally, subparagraph h) provides that Contracting States will be obliged to take effective measures to protect the information provided against

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unauthorized access, alteration and disclosure in compliance with the principle of completeness and confidentiality set out in Article 5(1)(f) of the GDPR.

31. 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.

32. The text of the draft Convention should also expressly refer to other rights, such as the right to erasure, and provide for mechanisms that ensure their applicability, ensuring that the data subject can exercise their rights through independent authorities (administrative or courts) 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 GDPR.

v. Transmission to other third states or international organizations

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

34. The CNPD recognizes that when in the destination State 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, Turkmenistan, as it does not have specific legislation on data protection, nor a national authority with supervisory and correction powers to ensure the respect and exercise of rights, does not ensure the necessary conditions. essential for carrying out the transfer of personal data as required by article 44 of the GDPR.

35. To that extent, as the draft Convention is presented, it does not comply with the GDPR, does not guarantee the provisions

of Article 35(1) of the Constitution of the Portuguese Republic or Article 8 of the Charter. of Fundamental Rights of the European Union.

IV. Conclusion

36. 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 Turkmenistan to Avoid Double

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Taxation and Preventing 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 paragraph 1 of article 26, 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 the last paragraph 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 period of conservation thereof;

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

Approved at the meeting of January 19, 2021

Filipa Calvão (President)