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NATIONAL COMMISSION

DATA PROTECTION

OPINION/2020/123

I - Order

The Director-General of the Directorate-General for Foreign Policy of the Ministry of Foreign Affairs requests the opinion of the National Data Protection Commission on the draft Agreement to Avoid Double Taxation in the field of Income Taxes and to Prevent Fraud and Tax Evasion with the Islamic Republic of Iran.

The request made and the present opinion fall within the attributions and competences 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 n. 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 Article 4(2) and Article 6(1)(a), all of Law No. 58/2019, of 8 August (which aims to ensure the execution , in the domestic legal order, of the GDPR).

II - International contracting and transfer of personal data

Pursuant to Article 46 of the GDPR, the Portuguese Republic may only transfer personal data to a third country located outside the European Union, such as the Islamic Republic of Iran, if that country provides adequate guarantees and on condition that the holders of the data enjoy enforceable rights and effective corrective legal measures.

In light of Article 4(1) of the GDPR, the tax data subject to transfer constitute personal data and for this reason, before entering into a bilateral agreement with the Islamic Republic of Iran, the Portuguese authorities must ensure that this The State is in a position to ensure an adequate level of protection for tax data whose transfer is provided for in the text of the project.

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 processing, 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 Islamic Republic of Iran.

It should be noted that in the field of data protection legal instruments, the Islamic Republic of Iran has not acceded to Convention No. 108 of the Council of Europe1, open to non-Council of Europe countries. There is no data protection law in force in that country2 nor is there an authority with powers in this matter.

Against this background, it is not possible to say that the Islamic Republic of Iran has an adequate level of data protection regarding the matters that are now analyzed as required by the GDPR. For this reason, it is essential that the text of the Draft Agreement, as a specific legal instrument for regulating the exchange of personal data, contains the necessary safeguards for the international transfer of data.

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 Income Tax Code of Individuals, 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 corporate entities, but with repercussions on individuals), has as a logical assumption the exchange of information between the States concerned as an adequate means to guarantee the effectiveness of the rules it contains and that it does so, in addition, to the benefit of the specific interests of the affected taxpayers.

The text of the project is then analyzed to verify whether it offers sufficient guarantees of an adequate level of protection of personal data that are transferred, for this purpose, to the territory of the Islamic Republic of Iran, in compliance with the general principle enshrined in Article 44 of the GDPR.

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, and ratified by the Decree of the President of the Republic No. 21/93, of the same date.

2 The Islamic Republic of Iran does not have specific legislation on the protection of personal data. However, several laws contain provisions regarding data protection, such as: Draft of the Bill on Protection of Data and Privacy in the Cyber Space 2018;Charter of Citizen’s Rights 2016; Cyber Crime Act 2011;The Law Concerning Protection of Consumers Rights 2010;The Law on Publishing and Access to Data 2010; Stock Market Law 2006; Electronic Commerce Law (ECL 2004)

III - Appreciation

A - Article 24 of the Agreement

Article 24 of the draft Agreement, entitled “Exchange of information”, regulates the exchange of information by the Parties, reproducing expressly the article 26 of the OECD Model Convention on Double Taxation of Income and Capital, in the summarized version of 20 083, with the exception of the last subparagraph of 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 which provides them to authorize such use.

a) Purposes of exchanging information

Article 24(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 agreement.

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 of the 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.

However, the final part of Article 24(1), in determining that the exchange of information is not restricted by the provisions of Articles 1 and 2 of the same Agreement, calls into question the principle

3 Available in

https://info.portaldasfinancas.gov.pt/pt/informacao_fiscal/convencoes_evitar_dupla_tributacao/convencoesjabelas_doclib/Documents/CDT_Modelo_OCDE.pdf

of the purpose, also jeopardizing the verification of the application of the remaining principles regarding the protection of personal data.

In fact, such a provision opens up the processing of data for any purpose and for any subject (categories of data subjects), exceeding 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 .

In turn, the last subparagraph of Article 24(2) 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, which is why the introduction of a precept that extends the legally established regime into the Agreement is strange.

b) The principle of proportionality

The same paragraph 1 of the article in question 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.

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 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, 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 in relation to the purpose of the processing.

Although the Protocol annexed to the Agreement makes it clear in point V(c), in the addendum to Article 24, that the reference to "foreseeably relevant" information is intended to allow the widest possible exchange of information in tax matters and, at the same time, While stressing that Contracting States cannot request information that is not relevant to the tax affairs of a particular taxpayer or group of taxpayers, the need for such clarification only reinforces the concerns noted above.

In this sense, we are of the opinion that a provision with such content contravenes the general principle contained in Article 5 of Convention 108 of the Council of Europe and Article 5(1)(c) of the GDPR, and is not consistent with the regime assumed as indispensable 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.

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

In this regard, it should be noted that in various conventions on the same subject4 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.

c) Access to bank secrecy data

In a provision which, as mentioned above, reproduces Article 26(5) of the Model Convention, Article 24(5) of the Draft provides that a Contracting State cannot refuse to provide information solely because it is held by a credit institution, another financial institution, an agent or a person acting as an agent

4 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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or fiduciary, or because such information is connected with a person's proprietary rights.

This precept makes it clear that, in the weighting 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 priority over the fundamental right of individuals to have their privacy protected. , even though this sacrifice is accompanied by adequate guarantees regarding the confidentiality of the information transmitted.

In this regard, the CNPD notes that Article 26(5) 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 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.

d) The rights of data subjects

It is noted that the draft Agreement does not include any provision on data protection principles and the rights of data subjects, namely the right of access and the right of rectification. It is also not foreseen - and therefore not regulated in accordance with our legal system - the transmission to third states or international bodies of personal data received from the other Contracting Party under the Agreement.

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, the Islamic Republic of Iran, in not having a data protection law, nor an independent administrative entity that has supervisory and correction powers to ensure the respect and exercise of rights, does not guarantee the necessary conditions indispensable for carrying out the transfer of personal data as required by article 44 of the GDPR.

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To that extent, the draft Agreement as presented does not comply with the GDPR, nor does it guarantee the provisions of Article 35(1) of the Constitution of the Portuguese Republic and Article 8 of the Charter of Fundamental Rights. of the European Union.

Thus, it is recommended to introduce a new item that expressly enshrines the rights of data subjects, and that includes the specific commitment of the Contracting Parties, in order to facilitate the effective exercise of these rights, providing mechanisms to ensure their applicability.

This section should contain provisions regarding the transparency of information and the rules for exercising the rights of data subjects. Therefore, in view of the above considerations on the purposes of the exchange of information, it is recommended that the following mentions be introduced in the text of the Agreement:

a) In the event of an exchange of information for the purpose of applying domestic laws or the Agreement, with regard to income taxation, exemptions and other mechanisms for the elimination of international double taxation, the competent authority must notify the affected taxpayers by informing - them about the communication that will be made, its recipients, its purpose and the way in which they can exercise the rights of access and rectification of data;

b) In the case of exchanges of information aimed at preventing or combating tax evasion and fraud, as well as investigating and prosecuting tax crimes and infractions connected with the international operations of taxpayers, it is accepted that respect for the right to information of data subjects may harm the pursuit of this public interest in the investigation, so the possibility of their removal is recognized.

However, States Parties must ensure that the data subject can exercise his right of access to personal data (and perhaps the right of rectification) through independent authorities (administrative or judicial) to whom domestic law attributes respect for such data. 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.

B - Protocol in Annex

Finally, it should be noted that the draft Agreement comprises, in an annex, a protocol in addition to some of its provisions.

With regard to article 24, and with regard to the protection of personal data, number VI contains some provisions with a view to ensuring compliance with the principles relating to the processing of personal data. Thus, subparagraph b) provides that the tax authorities of the Requesting State shall provide the tax authorities of the Requested State with the following information when a request for information is made under Article 26 (?): the identity, if available, including the name of the person under

investigation, the address, the tax identification number and any other data that facilitate the identification of that person, and also, where possible, the name, address and other particularities mentioned above of any person who is in possession of the requested information .

The personal data listed are adequate, relevant and not excessive, in view of the purposes enshrined in paragraph 1 of article 24 of the draft Agreement, so the principle of data minimization, set out in paragraph c) of paragraph Article 5(1) of the GDPR.

It must also indicate the period of time for which the information is required, in compliance with the principle of limitation of retention (item e)6, paragraph 1 of article 5 of the GDPR) and the purpose for which the information is requested.

The State from 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. If it is found that inaccurate data have been communicated or that they should not have been provided, the State that requested them must be informed of this 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) GDPR.

Finally, it is stipulated in subparagraph h) that the Contracting States shall be obliged to take effective measures to protect the information provided against unauthorized access, alteration and disclosure in compliance with the principle of completeness and confidentiality set out in subparagraph f) of paragraph 1. of Article 5 GDPR.

The CNPD marks as positive the express reference to these personal data processing principles. However, it underlines that any legally binding instrument relating to transfers of personal data must address data protection principles and the rights of data subjects, as required by the GDPR. So recommend

that these data protection clauses are expressly included in the text of the Agreement, or if this is not understood, that at least one general clause is incorporated that sets out the data protection principles directly in the text of the Agreement and inserts the more detailed provisions and safeguards in the attached protocol.5

IV - Conclusion

In view of the observations made, the CNPD recommends revising the text of the draft bilateral cooperation agreement between the Portuguese Republic and the Islamic Republic of Iran to Avoid Double Taxation and Prevent Tax Evasion in the

field of Income Taxes, in compliance with of the Portuguese and European legal framework for data protection, in order to introduce the following changes:

a) Replace, in paragraph 1 of article 24, the expression "information that is foreseeably relevant by information that is necessary,

b) Delete the final part of paragraph 1 of article 24, as well as the last paragraph of paragraph 2 of article 24;

c) Introduce a precept that guarantees respect for the rights of data subjects; and,

d) Incorporate in the text of the Agreement a clause that establishes the principles of data protection, notwithstanding that the Annex contains more detailed provisions.

Approved at the meeting of October 21, 2020

Filipa Calvão (President)

5 According to Guidelines 2/2020 on articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of persona!data between EEA andnon-EEA pubiic authorities and bodies, available at https :iVedpb.europa.eu/our-work-tools/public-consultations-art--704/2020/guidelines-22020-articles-46-2-and-46-3-b_nl