National Data Protection Commission

OPINION/2023/46

1. Order

1. The President of the Budget and Finance Committee of the Assembly of the Republic asked the National Data Protection Commission (CNPD) to pronounce on Proposal for Law No. 64/XV/1 a (GOV) which transposes into the national legal Directive (LJE) 2021/514, of the Council, of March 22, 2021, which amends Directive 2011/16/EU on administrative cooperation in the field of taxation. Proceeds with the amendment to the General Regime of Tax Infractions, approved as an annex to Law No. 15/2001, of June 5, in its current wording (RGIT), to the amendment to the Complementary Regime of the Tax and Customs Inspection Procedure, approved in Annex to Decree-Law No. 413/98, of December 31st, in its current wording and to the fourth amendment to Decree-Law No. 61 /2013, of May 10th, which transposes Council Directive 2011 /16/EU , of February 15, 2011, on administrative cooperation in the field of taxation.

2. The CNPD issues an opinion within the scope of its attributions and competences, as an independent administrative authority with authoritative powers to control the processing of personal data, conferred by paragraph c) of paragraph 1 of article 57, paragraph b ) of paragraph 3 of article 58 and paragraph 4 of article 36, all of Regulation (EU) 2016/679, of April 27, 2016 - General Regulation on Data Protection (hereinafter GDPR) , in conjunction with the provisions of article 3, paragraph 2 of article 4 and paragraph a) of paragraph 1 of article 6, all of Law no. 58/2019, of 8 of August, which implements the GDPR in the internal legal order.

read. Analysis

3. The bill aims to establish the regime for the automatic exchange of information communicated by reporting platform operators, transposing Directive (EU) 2021/514, of the Council, of March 22, 2021, to the national legal system, which amends the Directive 2011/16/EU on administrative cooperation in the field of taxation, and defining, at the same time, the discipline for the automatic exchange of information communicated by reporting platform operators, under international conventions, in line with the commitments assumed in the framework of the Organization for Economic Co-operation and Development (OECD).

4. The Project also provides for the exchange of information at an international level on income from intellectual or industrial

property! or experience gained in the industrial, commercial or scientific sectors, as well as carrying out joint audits for the purpose of administrative cooperation between Member States in the field of taxation.

Av. D. Carlos 1,134,10

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt



5. Under the terms of the preamble, «The establishment of a broader mutual administrative cooperation mechanism, either with other Member States of the European Union or with other participating jurisdictions with which Portugal must carry out the mandatory automatic exchange of information communicated by operators of reporting platforms, concluded under international conventions, in particular the Convention on Mutual Assistance in Tax Matters, as amended by the Protocol of Amendment to the Convention on Mutual Assistance in Tax Matters, constitutes the main aim of the discipline that is intended to be enshrined in the present law."

6. It is important, first of all, to point out that the present draft Decree-Law is not supported by an impact study on the protection of personal data - which is, remember, mandatory under the terms of paragraph 4 of article 18 of Law No. 43/2004, of August 18, amended by Law No. 58/2019, of August 8. The absence of the aforementioned impact study compromises a more complete assessment of the likely risks arising from the processing of personal data.

7. From the point of view of the right to the protection of personal data, the Bill raises some issues that need to be analyzed.

8. Thus, regarding the scope of application, article 2 provides that «The rules and procedures introduced by this law must be applied within the framework of assistance and administrative cooperation in tax matters with the other Member States of the European Union, as well as as, with the necessary adaptations, whenever administrative assistance and cooperation in tax matters with other jurisdictions result from international, bilateral or multilateral agreements or conventions, to which the Portuguese State is bound".

9. It appears, therefore, that this article extends the scope of application of Directive (EU) 2021/514, of the Council, of March 22, 2021, which amends Directive 2011/16/EU, which is intended to transpose , which only regulates the exchange of information between Member States, now encompassing international agreements or conventions entered into with third countries on tax matters. This includes agreements to avoid double taxation entered into between Portugal and third countries that have been the subject of an opinion by the CNPD.

10. This extension of the scope of application implies the application of chapter V of the RGPD on transfers of personal data to third countries or international organizations. However, the solution found by the Proposed Law clearly violates the legal regime established by the RGPD. Let's see:

11. Article 2(2) provides that «For the automatic exchange of information communicated by the reporting platform operators resulting from a convention or other international legal instrument, bilateral or multilateral, that is concluded with jurisdictions not belonging to the Union European Union must ensure that the jurisdictions receiving this information ensure an adequate level of protection of personal data».



12. No. 3 of this item provides that in cases where decisions on the adequacy of the level of data protection in jurisdictions outside the European Union have not been issued by the European Commission or by the National Commission for Data Protection, whether there is an adequate level of protection when the competent authorities of the recipient jurisdictions ensure sufficient mechanisms to guarantee the protection of privacy and the fundamental rights and freedoms of individuals, as well as their exercise, subject to verification by the National Data Protection Commission . The list of jurisdictions that meet the conditions set out in paragraphs 2 and 3 is contained in an order to be approved by the member of the Government responsible for finance (cf. paragraph 4).

13. First of all, it is important to underline that it is not up to the CNPD to issue decisions on the adequacy of the level of data protection of third countries, such competence being attributed exclusively to the European Commission, under the terms of article 45 of the RGPD (see recitals 103 to 107). It is therefore suggested that this item be reformulated, eliminating such provision, in compliance with the provisions of article 45 of the RGPD.

14. On the other hand, it is considered that there is an adequate level of protection when the competent authorities of the

recipient jurisdictions ensure sufficient mechanisms to guarantee the protection of privacy and the fundamental rights and freedoms of individuals, as well as their exercise. However, the competent authorities can never bind their State to the granting of rights that can be enforced against data subjects and to ensure independent remedies, lacking the legal capacity to do so, as it exceeds their legal competence.

15. Such level of connection will have to be made at the level of the State, through an international agreement, which contains adequate guarantees that ensure that the personal data transferred enjoy a level of protection essentially equivalent to that guaranteed in the Union.

16. In this regard, the Schrems II Judgment is revisited, in particular points 91 and 95. Here it is established that «With regard to the level of protection of fundamental freedoms and rights guaranteed within the Union, a regulation of that protection that implies an interference with the fundamental rights guaranteed by Articles 7 and 87 of the Charter must, according to the constant jurisprudence of the Tribuna! of Justice, establish clear and precise rules that regulate the scope and application of a measure and impose minimum requirements, so that the persons whose personal data are at stake have sufficient guarantees to effectively protect their data against the risks of abuse and against any access and any illicit use of such data. The need to have these guarantees is even more important when personal data are subject to automatic processing and there is a significant risk of illicit access to them (Digital Rights Ireland judgment and C-293/12 and C-594/12, EU:C:2014:238, paragraphs 54 and 55, as well as the case law referred therein).

Av. D. Carlos 1,134,1°

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt



17. And yet, in point 95 of the Judgment, «... a regulation that does not foresee any possibility for the individual to resort to legal means to gain access to personal data concerning him, or to obtain the rectification or deletion of such data, does not

respect the essential content of the fundamental right! to effective judicial protection, as enshrined in Article 47(0) of the Charter. Indeed, the first paragraph of Article 47 of the Caria requires that any person whose rights and freedoms guaranteed by Union law have been violated have the right to bring an action before a court under the terms provided for in that article. In that regard, the very existence of effective judicial review aimed at ensuring compliance with the provisions of EU law is inherent to the existence of a rule of law (see, to that effect, Les Verts v Parlamento, 294/83 EU :C:1986:165, no. 23; Johnston, 222/84, EU:C:1986:206, no. 18 and 19; Heylens et al., 222/86, EU:C:1987:442, No. 14; as well as UGT-Rioja and Others, C-428/06 to C-434/06, EU:C:2QQ8:488, No. 80)'.

18. It is therefore reaffirmed that, in the absence of an adequacy decision by the European Commission, data transfers can only take place if subject to adequate guarantees under the terms of the combined provisions of Article 44 and Article 46 of the GDPR, in order to ensure that the level of protection of natural persons guaranteed by the GDPR is not compromised. Among these guarantees, and without prejudice to compliance with other provisions of the RGPD, we highlight the requirement that data subjects enjoy enforceable rights and effective legal corrective measures.

19. This can be provided for by means of a legally binding and enforceable instrument between public authorities or bodies (Article 46(2)(a)). Since they are just administrative agreements between competent public authorities, these instruments do not enjoy enforceable force because their grantors do not have the legal capacity to bind their States, namely in guaranteeing the rights of data subjects and in establishing means of resource.

20. Only an international agreement between Portugal and the Third State, equivalent to a legislative measure, will enshrine such possibilities and remedy any flaws in the Third State's legislation. In addition, such international agreements entered into between States would always be limited to the specific case that is the object of the agreement in question, and within the scope of that agreement, and no consequence can be drawn from this regarding the level of adequacy of the recipient State in general.

21. The reference to the drawing up of lists of jurisdictions that have an adequate level of protection, referred to in paragraph 4 of article 2, is therefore strange. Also here, because such a provision violates the legal regime enshrined in Chapter V of the RGPD, its removal is recommended. It should be noted that the reference to such lists also appears in subparagraph i) of paragraph 1 of article 4 L, now added, which defines «Gutra jurisdiction subject to communication», as any

jurisdiction included in the list contained in the ordinance approved by the member of the Government responsible for the area of finance referred to in paragraph 4 of article 2.0.

22. With regard to the legislative changes introduced to the Gera! of Tax Infractions as well as the amendment introduced to the Complementary Regime of the Tax and Customs Inspection Procedure do not raise new questions of the right to the protection of personal data.

23. Regarding the amendments to Decree-Law No. 61/2013, of May 10, from the point of view of personal data protection, the new definition of data breach provided for in paragraph r) of no. 1 of Article 3. Without questioning the consecrated definition, it is suggested, for the sake of legal coherence, that the definition provided for in paragraph 12) of article 4 of the RGPD be used or, preferably, reference be made to that legal provision of the RGPD.

24. Article 5(1)(fj) introduces the obligation of automatic exchange between the competent national authority and that of another Member State of available information regarding income from intellectual or industrial property or the provision of provision of information relating to experience acquired in the industrial, commercial or scientific sector. Available information is understood as the information contained in the records and databases that can be obtained by AT's procedures for collecting and processing information.

25. In turn, paragraphs 19 to 24 of article 6 contain the elements contained in the information to be provided by the TA to the European Commission and the competent authorities of the Member States in which the sellers subject to notification are residents and cases sellers provide real estate services. Such information includes the name, the TIN, the individual identification number of the operator of the reposing platform, the main address, place of birth, the identifier of the financial account in which administrative payments made by the requested Member State are made or any consideration is credited, the name of the financial account holder.

26. With regard to Article 8, concerning the presence of officials of the Member States in administrative services, it now provides that the competent national authority may request the authority of another Member State that authorized officials may 'participate, through appeal to electronic means of communication, where appropriate, in proceedings".

27. As for article 12 of Decree-Law no. 61/2013, of May 10, numbers 5 and 6 provide for the use of information and documents received under this law for purposes other than those referred to in the previous numbers, in the situations provided for by national law, subject to authorization by the competent authority of the Member State which communicated them. When requested, the competent national authority authorizes the

Av. D. Carlos 1,134,1°

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt



competent authority of another Member State to use the information and documents sent for purposes other than those referred to in paragraphs 1 to 4, where they can be used for similar purposes under national law.

28. Also in accordance with Article 12, the competent national authority may communicate to the competent authorities of all the other Member States a list of purposes, other than those referred to in paragraphs 1 to 4, for which, in In accordance with national law, the information and documents may be used, The Proposal now includes criminal purposes in that list. For the purposes of paragraph 5, the national competent authority may use the information and documents received, without the need for the authorization referred therein, for any of the purposes included in the list communicated by the Member State sending the information and documents.

29. It should be noted that the possibility of using personal data for criminal purposes is not expressly provided for in the Directive being transposed, which only allows in Article 16(2) the use for other purposes not specified in that article, but which should be eonexualized in the context of administrative inquiries. In effect, the object of the Directive focuses solely on administrative cooperation between the Member States. Furthermore, even if the reuse of data for "criminal purposes" is admitted, the legislator must explain the crimes in question, which must always have a close relationship with fiscal and tax matters.

30. With particular relevance to the analysis carried out here, article 16 of the Decree-Law, on data protection, closely follows article 25 of Directive 2011/16/UE. Thus, it enshrines that all exchanges of information carried out under this decree-law are subject to the provisions of Law No. 58/2019, of August 8, and the RGPD, without prejudice to the limitation of the scope of obligations and rights provided for in Article 13, Article 14(7) and Article 15 of the said regulation, insofar as this proves necessary to safeguard the interests referred to in sub-paragraphs d) or e) Article 23(1) of the same regulation.

31. Now, the open wording, used in the Bill, is manifestly insufficient with regard to the possible restriction of the rights of data subjects and the obligations of those responsible for the treatment, and the norm must precisely establish the scope of such derogations.

32. The European Data Protection Board has already given its opinion in Guidelines 10/2020 on restrictions based on article 23 of the RGPD, adopted on 13 October 2021 ri

33. There it is noted that any measure taken by Member States must respect the general principles of law, the essence of fundamental rights and freedoms and controllers and processors

'Guidelines

available

in

PAR/2023/42

4

.... ®

National Data Protection Commission

must continue to comply with data protection rules. The relationship between the envisaged restrictions and the objective pursued must be clearly expressed in the legislative act.

34. It should be noted that the protection of the fundamental right to respect for privacy at Union level requires that the derogations to the protection of personal data and their limitations operate to the strict extent necessary (Digitai Rights lireand and the „ C- 293/12 and C-594/12, EU:C:2014:238, paragraph 52 and case law referred to therein).

35. Whenever a legislative measure permits restrictions on the rights of data subjects or the obligations of controllers and processors, it should be noted that the principle of accountability, provided for in paragraph 2 of article 5 of the RGPD, is still

applicable. This means that the person in charge will be able to demonstrate to data subjects their compliance with the EU data protection legal regime, including the principles related to the processing of their data.

36. The data subject must be informed without delay and be notified with the justifications contained in the decision of the person responsible for the treatment and with the date from which he will be able to exercise his rights again. Adequate safeguards must also be ensured to ensure that an independent Authority can verify the legality of the processing.

37. It is therefore recommended that article 16 be expanded in terms of the possibility of restricting the rights of information and access of data subjects, delimiting its scope in compliance with the principle of proportionality and enshrining adequate safeguard measures to ensure compliance with the principles of processing personal data.

38. It should be noted that the text of Directive2 only refers to subparagraph e) of paragraph 1 of article 23 of the GDPR, to which a reference to subparagraph d) of paragraph 1 of the same article is now added.

39. In turn, Article 16(2) of Decree-Law No. 61/2G13, of May 10th, provides that AT, reporting financial institutions, intermediaries and platform operators are responsible for data processing in the event that they determine the purposes and means of processing, in compliance with paragraph 7) of article 4 of the RGPD.

40. It also enshrines the right to information of data subjects, but now only the responsibility of reporting financial institutions, intermediaries and platform operators, excluding AT from this obligation. It should be noted that paragraph 4 of article 25 of the Directive which is intended to be transposed provides: 'Notwithstanding paragraph 1 each Member State

2 Cf. Article 25 - 'All exchanges of information under this Directive are subject to Regulation (EU) 2016/679 of the European Parliament and of the Council . However, for the purpose of correctly applying this Directive, Member States limit the scope of the obligations and rights provided for in Article 13, Article 14(1) and Article 15 of the Regulation ( EU) 2016/679 to the extent necessary to safeguard the interests referred to in Article 23(1)(e) of that Regulation."

Av. D. Carlos 1,134,1°

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

4v.

Member ensures that each reporting financial institution, intermediaries and platform operators, under its jurisdiction, ensure:», linking the right to information to the restriction of holders' rights provided for in articles 13, 14 and 15. of the GDPR.

41. In turn, point 6 of this item provides that the right of access of data subjects is exercised with the AT, under the conditions to be defined by the latter. However, under the terms of article 15 of the GDPR, the right of access is exercised with the person responsible for the treatment, so, in line with paragraph 2 of article 16 of the Proposal, the right of access may be exercised with of any entity mentioned therein, if considered responsible for the treatment. The same applies to the right to information enshrined in Articles 13 and 14 of the RGPD, provided for in point b) of paragraph 3 of this article.

42. Other obligations of those responsible are the responsibility of the AT, such as the adoption of security measures under the terms of article 32 of the RGPD and the communication of violation of personal data.

43. It should be noted that the definition of a retention period for the information transmitted and received under the terms of the Proposal by AT, which may only be kept for the period of time necessary to pursue the purposes for which it was collected or processed, not exceeding the period maximum of 12 years, suspending the counting of this period in the situations and terms provided for in article 46 of the General Tax Law, in compliance with the principle of limitation of conservation enshrined in paragraph ej cio n.° 1 of article 5 of the GDPR.

44. A note on Article 5(A), now added, concerning foreseeably relevant information. Recognizing that the national legislature is limited to reproducing article 5.A of the Directive, only adding in subparagraph b) of paragraph 2 "or for the application of the provisions of a Convention to avoid double taxation", the CNPD manifests, once more time, its concern, already expressed in opinion n.° 2020/123, approved on October 21, 20203 which is partially transcribed here: Refer the determination of personal data subject to communication and exchange between the two States to a judgment of prognosis about which are foreseeably relevant for tax purposes, there is a degree of legal uncertainty that, in itself, is unacceptable in the context of regulating 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 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 n.01 of article 5.0

of the RGPD, which imposes that they can only be subject to

3 Available at



exchange of adequate, pertinent and not excessive information regarding the purpose of the processing. n.º 1, letter c), of the RGPD, not being consistent with the regime assumed as essential by article 2. .

45. It should be noted in this regard 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 can be used, alternatively, with an equivalent meaning, so that, being the concept of necessity more precise and rigorous from the point of view of protection of personal data option for this expression would be desirable.

46. With regard to amendments to Decree-Law No. 61/2013, of May 10, Article 6 C, No. 8 is relevant. Here it is provided that the notified information relating to an excluded platform operator and the demonstration referred to in Article 4(1)(e)j, as well as any subsequent amendments, and the information communicated by reporting platform operators in accordance with Article 16(2). of Annex II must be included in a central register established by the European Commission, which is available to the competent national authority and the competent authorities of other Member States. However, nothing is said about this registration, who is responsible for processing the data resulting from it, nor what is the period of conservation of the data, so that the pronunciation of the CNPD is impaired.

47. Annex II sets out the due diligence procedures by reporting platform operators for the purpose of identifying vendors subject to reporting. Therefore, the latter must collect the following personal data for each seller who is a natural person and is not an excluded seller: first name and surname, main address, NIF, and if not, the seller's place of birth, date of birth. Under the terms of article 4, in case of doubt about the accuracy of the data, the platform operator must ask the seller to correct the information and provide a valid identification document issued by a State or a recent tax residence certificate.

48. Such data are adequate and necessary for the purpose in question in compliance with the principle of data minimization provided for in Article 5(1)(c) of the RGPD.

4 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.

Av. D. Carlos 1,134,1o

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt



49. In turn, article 12 establishes that each reporting platform operator must communicate the following information: name, address of registered office, individual identification number, business name, as well as the information contained in paragraphs 2 and 3 in relation to each seller subject to notification who has carried out a relevant activity that does not imply the leasing of immovable property and that involves the leasing of movable property.

50. Reporting platform operators must keep records of the measures taken and the information that served as a basis for the execution of due diligence procedures and reporting obligations for 10 years, counting from the end of the reporting period to which they relate. . We welcome the setting of the conservation period, in compliance with the principle of limitation of conservation enshrined in article 5(1)(e) of the RGPD.

51. Lastly, Article 16 regulates the single registration of reporting platform operators with the competent authority of the Member States when they start their activity as a platform operator.

III. Conclusion

52. Under the terms and grounds set out above, the CNPD recommends:

a) The reformulation of article 2 of the Proposal in order to remove the reference to the possibility for the CNPD to issue decisions on the adequacy of the level of data protection in jurisdictions outside the European Union, a provision that violates the legal regime enshrined in the RGPD ;

b) Elimination of the statement that there is adequate protection when the competent authorities of the recipient jurisdictions

ensure sufficient mechanisms to guarantee the protection of private life and the fundamental rights and freedoms of individuals, as well as their exercise with the grounds expressed in points 14 at 17;

c) The deletion of paragraph 4 of article 2 regarding the preparation of lists of jurisdictions that have an adequate level of protection, as this would also violate the legal regime of data protection;

d) The reformulation of article 12, explaining the crimes for which the reuse of data is allowed, which must always have a close relationship with fiscal and tax matters.



e) The expansion of paragraph 1 of article 16 with regard to derogations to the rights of data subjects, provided for in article 23 of the RGPD.

Lisbon, May 18, 2023

Maria Cândida Guedes de Oliveira (Rapporteur)

Av. D. Carlos 1,134,10

1200-651 Lisbon

T (+351) 213 928 400

F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt