/ NATIONAL COMMISSION JÊ*. DATA PROTECTION

OPINION/2020/67

I. Order

The Secretary of State for Tax Affairs asked the National Data Protection Commission (CNPD) to issue an opinion on the Draft Decree-Law which "defines, for the purposes of paragraph 7 of article 2 and article 10. °-A of Decree-Law No. 8/2007, of 17 January, in its current wording, the data fields of the SAF-T (PT) file relating to accounting, as well as the respective procedures to be adopted».

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as the national authority for controlling the processing of personal data, conferred by 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, no. Article 4(2) and Article 6(1)(a), all from Law No. 58/2019, of 8 August.

The request is instructed, not only with the relevant legislation and regulations, but also with an impact assessment on data protection - entitled Privacy Impact Analysis (PIA) Project: SAF-T/IES fact that is marked as very positive, especially as it is the first draft of a legislative diploma instructed in compliance with the provisions of paragraph 4 of article 18 of Law no. /2019, of August 8th.

The assessment of the CNPD is limited to the rules that provide for or regulate the processing of personal data.

II. appreciation

The Draft Decree-Law under consideration to regulate the regime introduced by Law No. 119/2019, of 18 September, in Decree-Law No. 8/2007, of 17 January. In fact, after Decree-Law No. 87/2018, of 31 October, amended Decree-Law No. 8/2007, making the fulfillment of aggregate obligations dependent on the presentation of the Simplified Business Information (IES) prior submission, to the Tax and Customs Authority (AT), of the standardized tax audit file, designated SAF-T (PT),

regarding accounting, that Law established rules that ensured that the AT did not access unnecessary or excessive

information in relation to the purposes envisaged with that submission.

Thus, it introduced in article 2 of Decree-Law no. 8/2007, the duty to exclude, prior to submission, "the data fields of the standardized tax audit file, known as SAF-T (PT), concerning accounting, which are of lesser relevance or disproportionate in relation to the scope of the object of this statute, namely data that may jeopardize confidentiality duties to which, legally or contractually, taxable persons are obliged.» It referred to the decree-law the definition of the data fields of that file and the procedures to be adopted.

It is, therefore, under this amendment to Decree-Law No. 8/2007, provided for in Law No. 119/2019, that this Project regulates the data fields and procedures to be adopted in this file submission process SAF-T (PT) on accounting1. Given that the information contained in the aforementioned file, when referring to natural persons, because they are identified directly or indirectly, corresponds to the concept of personal data under the terms of paragraph 1) of article 4 of the GDPR, access by the AT to the aforementioned file constitutes a processing of personal data that must comply with the principles enshrined in article 5 of the GDPR, in particular the principle of minimization of personal data (cf. subparagraph c) of paragraph 1 of that article).

It should be added that the file in question brings together personal information, especially that relating to customers who are natural persons, revealing important dimensions of private life, and may even involve particularly sensitive data, such as those relating to health contained in invoices relating to the provision of consultations, medical care or carrying out diagnostic tests (cf. Article 9(1) of the GDPR). If the need for AT access to personal data contained in invoices in the context of inspection activities is not discussed, already in the exercise of tax settlement functions and with the objective of simplifying the fulfillment of tax obligations, this access is not essential and is manifestly excessive.

As explained in an information note accompanying the request for an opinion, "[unlike another file known as the SAF-T for invoicing, which is sent monthly to the AT, this file will only be sent by the taxpayer when requested by the AT for the purposes of carrying out inspection procedures. It is a more elaborate file than the invoicing SAF-T, containing another type of information».

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Without questioning the goodness of the objectives pursued by the law that this draft law aims to regulate, from the perspective of protecting the fundamental rights to respect for private life and the protection of personal data, those can only be pursued if and to the extent that do not imply unnecessary or excessive access to personal data relating to the privacy of those with whom the taxable person, in the context of his economic or professional activity, interacts. This is what follows from the principle of proportionality enshrined in Article 18(2) of the Constitution of the Portuguese Republic.

Let's see in what terms the Project seeks to ensure the balance between the rights, freedoms and guarantees of data subjects and the fiscal public interest, in the light of this principle.

1. Starting with the analysis of the data fields, listed in the annex provided for in the article

2 of the Project, it is noted that the concepts contained in paragraph 6 of article 2 of Decree-Law no. [...] of lesser relevance or disproportionality in relation to the scope of the object of the present diploma».

In any case, it is important to emphasize that the mechanism for de-characterizing the data fields "of lesser relevance or disproportionality" provided for and regulated in the Project, as a mechanism for the pseudonymization of personal data, appears to be adequate for the intended purpose of ensuring that the submission of the SAF-T (PT) file, concerning accounting, does not result in an unnecessary and excessive processing of data by the AT in people's private lives.

In fact, under the terms of the annex, there is information regarding customers and suppliers, which, when these are natural persons, corresponds to pseudonymized personal data, since they are not directly identified (a code is assigned to them), but they are identifiable using additional information (cf. Article 4(5) of the GDPR). The information listed in the annex is, from that perspective, adequate to the objectives pursued by the legal instrument.

2. With regard to the procedural solution found in this Project to ensure that the AT does not access more data than is strictly necessary for verification

of the obligations encompassed by the IES, it corresponds to a right granted to the taxable person to hide non-relevant or excessive data, through a mechanism of "de-characterization of the fields related to descriptions and personal data"

(encryption) in charge of a third entity - National Press-Casa da Moeda, S.A. (INCM).

This solution is, from the outset, in contradiction with the provisions of Decree-Law No. 8/2007, in Article 2(6), introduced by Law No. 119/2019. In fact, that law imposes a duty to exclude data «of lesser relevance or disproportionate in relation to the scope of the object of the present diploma», while the present Project makes the decision to exclude them or not depend on the will of the taxable person, which it is especially surprising when personal data mainly concern third parties (e.g. suppliers and customers). It is not, therefore, a matter of referring to the will or consent of the holder of the personal data the legitimation of access to data by AT, but of leaving to the discretion of a legal subject (the taxpayer) the decision on whether the personal data of third parties are communicated to AT.

Furthermore, the option left to the taxable person is not, strictly speaking, neutral for him, since the process of decharacterizing the data fields in the file implies contracting an INCM service, which will have a cost that, as follows from the Project, must be borne by the taxable person. Although the CNPD is not aware of the cost of this operation, it admits that it may influence the decision to effectively protect personal data, a factor that is especially relevant when it comes to, as mentioned, the provision of information about third parties.

In these terms, the solution provided for in article 2 and in paragraph 3 of article 5 of the Project, contradicts the provisions of paragraph 6 of article 2 of Decree-Law No. 8/2007, in wording given by Law No. 119/2019, by recognizing as optional the operation of encryption or de-characterization of data fields that are not necessary or are excessive - or, to use the legal concepts, are considered "less relevant or disproportional » -, when the legal diploma that the Project intends to regulate imposes the duty to exclude such data.

Furthermore, the Project's solution violates the RGPD, by allowing the communication to the AT (and subsequent access) of more personal data than necessary to fulfill the purpose envisaged by this law.

3. In fact, whenever this de-characterization of the personal data of third parties (suppliers and customers) does not occur, at the option of the taxable person, AT objectively accesses more personal data than necessary, in violation of the principle of minimization of personal data (cf. point c) to paragraph 1 of article 5 of the GDPR).

It is important to reiterate here the sensitive nature of some of the information in question (as the AT itself recognizes in the

impact assessment it carried out), especially when relating to customers, which in addition to covering data relating to privacy, may also be subject to a special protection regime (cf. Article 9(1) of the GDPR) and the special protection of legal duties of secrecy, as is the case with health information contained in invoices relating to the provision of consultations, medical care or performing diagnostic tests.

At the same time, the obligation to ensure data protection by default, imposed by Article 25 of the GDPR, is not being respected. On the contrary: by default (in the event of inertia of the taxable person), the AT receives all the data contained in the submitted file, which is much more than what it needs for the intended purposes and, therefore, much more than what it can to meet.

To mitigate this impact on privacy, the Project provides (in paragraphs 1 and 2 of article 5) the AT's duty to eliminate from its databases the "detailed information" received after the its validation and subsequent aggregation by taxonomy, specifying that the AT cannot use it to issue alerts, divergences, notices or selection of taxpayers for inspection.

Although the concept of detail information is not defined in the draft diploma, it seems to encompass the “extra” information that is communicated when submitting the SAF-T file without mischaracterization (“extra” by reporting the information that must be given to be known to AT, as shown in the annex to this Project). Which means that AT effectively receives and accesses personal data and other information that it does not need for the intended purpose, in clear contradiction with the objective underlying the legal imposition of deletion of such data prior to the submission of the file. Therefore, those measures are not capable of complying with the provisions of paragraph 6 of article 2 of Decree-Law no. 8/2007.

Thus, if the law intends to grant the taxable person the option of choosing to submit the file without de-characterization, then AT, as the person responsible for the treatment that translates access to the personal data communicated, has the obligation to

guarantee data protection by default and from the very beginning to ensure that you do not access more data than you need to know. To that extent, for situations in which the file is submitted without mischaracterization, and under penalty of violation of subparagraph c) of paragraph 1 of article 5 and article 25 of the RGPD, a mechanism in the AT that excludes, as required by law, data considered to be of lesser relevance or disproportionality in relation to the scope of the object of the legal diploma,

according to the annex to this Project.

4. The SAF-T files relating to accounting are kept for a period of 15 years, the availability of their content in the AT database being limited to the inspection procedure and after notification of the beginning of the same (cf. no. 1 of Article 5 and Article 7 of the Project). And this regardless of whether or not they are uncharacterized.

In the event that the de-characterization mechanism has been applied, within the scope of the inspection procedure, the AT may request the access key from the INCM, to reverse this process, which does not raise reservations from a data protection point of view, considering the purpose of the inspection procedure. In the event that the taxable person has not opted for the de-characterization mechanism, the AT has the obligation to demonstrate that the use of the data is restricted to inspection procedures.

It should be noted, however, that the conservation period defined in the Project is not supported by any of the documents that accompany it in this consultation procedure. In particular, in the impact assessment presented, this period is only stated, without demonstrating, in that which is its own headquarters, the suitability and necessity of the fixed period. The purpose of the impact assessment is precisely to demonstrate, as regards the conservation period, compliance with the principle of limiting conservation to the period necessary for the purposes covered, established in subparagraph e) of paragraph 1 of article 5 of the GDPR Considering the statute of limitations, the solution found remains to be explained, so it cannot be concluded that the principle of limitation of conservation is respected.

III. Conclusion

Considering that, in compliance with the principle of proportionality, the law can only legitimize access by AT to personal data contained in the SAF-T (PT) file relating to the

accounting, necessary for the pursuit of the purposes envisaged with the presentation of the Simplified Business Information, and that the aforementioned file contains a large amount of personal information, revealing important dimensions of private life (which may even involve especially sensitive data and subject to a legal duty of secrecy , such as those relating to the health of customers contained in invoices relating to the provision of consultations or diagnostic tests), the CNPD understands that:

(PT) concerning accounting does not result in an unnecessary and excessive impact on people's private lives;

2. However, the solution provided in article 5, no. 3, of the Draft Decree-Law, contradicts the provisions of paragraph 6 of article 2 of Decree-Law no. 8/2007, to the recognize as optional the de-characterization of data fields that are not necessary or are excessive, when the legal diploma that the Project intends to regulate imposes the duty to exclude such data;

3. This possibility of, at the will of a taxable person, AT accessing personal data of other people (suppliers and customers), when they are not necessary for the purposes envisaged with the submission of the file:

i. It does not guarantee the protection of fundamental rights to respect for private life and protection of personal data;

ii. It violates the principle of minimization of personal data (cf. point c) of paragraph 1 of article 5 of the GDPR); and

iii. It contradicts the personal data protection obligation by default, imposed by Article 25 of the GDPR.

4. To that extent, and under penalty of violation of subparagraph c) of paragraph 1 of article 5 and article 25 of the RGPD, a mechanism must be foreseen and implemented in the AT that excludes, as required by law , data considered of lesser relevance or

disproportionate/age in relation to the scope of the object of this diploma, according to the annex to this Project.

Lisbon, June 15, 2020

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Filipa Calvão (President, who reported)