

' NATIONAL COMMISSION

„ DATA PROTECTION

OPINION/2019/35

i - The 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 Convention to Avoid Double Taxation and Prevent Tax Evasion in the field of Income Taxes between the Portuguese Republic and the Kingdom of Eswatini.

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as an independent administrative entity with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and by the paragraph 4 of article 36 of Regulation (EU) 2016/679, of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of paragraph 1 of article 21, ° and no. 1 of article 22, both of Law no. 67/98, of 26 October, amended by Law no. 103/2015, of 24 August (Personal Data Protection Law) .

II - International contracting and transfer of personal data

Pursuant to Article 46 of the GDPR, the Portuguese Republic can only transfer personal data to a third country located outside the European Union, such as the Kingdom of Eswatini, if that country has adequate guarantees and on condition that the data subjects 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 that reason, before concluding a bilateral agreement with the Kingdom of Eswatini, 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 Eswatini.

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It should be noted that in the field of data protection legal instruments, the Kingdom of Eswatini has not acceded to Convention No. 108 of the Council of Europe¹, open to countries not belonging to the Council of Europe. There is no data protection law in force in that country and there is no authority with powers in this matter. For this reason, it is essential that the text of the Draft Convention, as a specific legal instrument to regulate 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 lawfulness of this treatment is still subject to the law, since article 81 of the Personal Income Tax Code, 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 of guaranteeing 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 Kingdom of Eswatini, in compliance with the principle enshrined in article 44 of the GDPR.

III - Appreciation

Article 26 of the draft Convention, entitled “Exchange of information”, 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 summarized version 2008, with the exception of paragraph 6, which refers to the application of regulatory directives

¹ Convention for the Protection of Persons with regard to the Automated Processing of Personal Data, approved on January 28, 1981, was approved for ratification by the Assembly of the Republic Resolution No. 23/93, of July 9, and ratified by the Decree of the President of the Republic No. 21/93, of the same date.

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of computer files containing personal data approved by the United Nations General Assembly.

a) Purposes of exchanging information

Article 26(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 paragraph 1 of article 26, in 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, undermining also the verification of the application of the remaining principles in terms of 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 Convention, under penalty of violating the principle enshrined in Article 5(1)(b) of the GDPR .

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.

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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 principle 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. 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 paragraph 1 of article 26, 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 subject² 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.

² 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 n.º 2/2008, 66/2003, 85/2000, 28 /2006, 22/2006 and 62/2000 respectively.

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c) Access to bank secrecy data

In a provision that, as mentioned above, reproduces Article 26(5) of the Model Convention, Article 26(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 or trustee, or because such information is in connection 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 Parties to this agreement have chosen to include an article entitled “Use and transfer of personal data” - article 27 - on the rights of data subjects.

However, the final part of Article 27(2) returns to the national legislation of each Party the guarantee of the rights of access and rectification, which, since there is no recognition of adequate protection of personal data in the United Kingdom of Eswatini, is liable to imply the denial of those rights to citizens whose personal data are transferred to that State, in violation of paragraph 1 of article 35 of the Portuguese Constitution, of article 8 of the Charter of Fundamental Rights of European Union and Articles 15 and 16 of the GDPR. On the other hand, given the above considerations on the purposes of exchanges of

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information, it is important to add a new paragraph to article 27 where these purposes are coordinated, and respect for the rights of data subjects is guaranteed. Therefore, it is recommended that amendments be made to Article 27, in compliance with the following general guidelines:

a) In the event of an exchange of information for the purpose of applying domestic laws or the Convention, 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 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, otherwise it will be understood that the text of the Convention 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.

IV - Conclusion

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 Kingdom of Eswatini to Avoid Double Taxation and Prevent Tax Evasion in the field of Income Taxes, which needs some reformulations , in compliance with the Portuguese and European legal framework for data protection, in order to introduce the following changes:

a) Delete the final part of paragraph 1 of article 26;

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b) Replace, in paragraph 1 of article 26, the expression "information that is foreseeably relevant" by information that is necessary,

c) Change the wording of paragraph 2 of article 27, and perhaps introducing a new paragraph, which guarantees respect for the rights of data subjects.

Lisbon, June 25, 2019

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