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DATA PROTECTION

OPINION No. 11/2018

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 revision of the current Convention to Avoid Double Taxation and Prevent Tax Evasion in the field of Taxes on the Yield between the Portuguese Republic and the People's Democratic Republic of Algeria.

The request for an opinion stems from the powers conferred on the National Data Protection Commission by paragraph 2 of article 22 of Law no. 67/98, of 26 October, amended by Law no. 24th of August (Data Protection Law - LPD), and the opinion is issued in accordance with the competence set out in paragraph a) of paragraph 1 of article 23 of the same legal diploma.

II - International contracting and transfer of personal data

Pursuant to Article 25(1) of Directive 95/46/EC of 24 October 1995 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and the free movement of such data, as well as Article 19 of the LPD, which transposes the Directive, the Portuguese Republic may only transfer personal data to a third country located outside the European Union, such as the People's Democratic Republic of Algeria, if that country ensures an adequate level of data protection.

In the light of Article 3(a) of the LPD, the tax data subject to transfer constitute personal data and can even be classified as sensitive data whenever they refer to the reservation of the privacy of their holders. Therefore, before concluding a bilateral agreement with the People's Democratic Republic of Algeria, the Portuguese authorities must ensure that this 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 project¹.

¹ It should be noted that under the terms of paragraph 3 of article 19 of the Personal Data Protection Law, it is up to the CNPD to decide whether a State that does not belong to the European Union ensures an adequate level of protection.

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 professional rules and security measures that are respected in the People's Democratic Republic of Algeria.

It should be noted that in the field of data protection legal instruments, the People's Democratic Republic of Algeria has not acceded to Convention No. 108 of the Council of Europe², open to countries not belonging to the Council of Europe, nor is it in force in the country. a data protection law. It is therefore not possible to state that the People's Democratic Republic of Algeria, under the terms of the law, has an adequate level of data protection regarding the matters under analysis.

Thus, it remains to be seen whether the Draft Agreement, the specific regulator of information exchange, offers sufficient safeguards for the international transfer of personal data.

In the Portuguese case, although the transfer of data does not result from an express provision provided for in the tax legislation, it is considered that article 81 of the Personal Income Tax Code, on the elimination of international double taxation, 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.

III - Appreciation

Article 27 of the Convention entitled "Exchange of information" regulates the exchange of information by the Parties, reproducing *expressis verbis* Article 26 of the OECD Model Convention on Double Taxation of Income and Capital, in the abridged version of 2008,

² 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 1993 and ratified by Decree of the President of the Republic No. 21/93, of the same date.

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with the exception of paragraph 6, which refers to the application of the directives on the regulation of computer files containing personal data approved by the United Nations General Assembly.

a) Purposes of exchanging information

Article 27(1) attributes to the exchange of information two cumulative purposes: a) the application of the Convention; b) the administration or enforcement of domestic laws on taxes, insofar as the taxation provided for therein is not contrary to the agreement.

With regard to the protection of personal data, information is required to be collected for specific, explicit and legitimate purposes, and cannot be further processed in a way that is incompatible with these purposes. For this reason, it would be appropriate to make a finer distinction between purposes. We therefore recommend that this article clearly distinguishes two purposes for exchanging information:

- that relating to the application of the Convention and the administration and enforcement of domestic tax laws of the Contracting Parties with regard to income taxation, exemptions and other mechanisms for the elimination of international double taxation;
- that aimed at preventing or combating tax evasion and fraud.

As will be better explained below, maxime in the section dedicated to the general principles of protection of personal data (see below, point d), the clear specification of the purposes of the processing of personal data is relevant with regard to the protection of the rights of data subjects personal.

The CNPD also notes that the provision at the end of paragraph 1 of article 27 - that the exchange of information is not restricted by the provisions of articles 1 and 2 - appears to be incompatible with the principles in force in personal data protection and, specifically, the purpose principle.

In fact, such a provision opens the processing of data to any purpose and for any subject, going beyond the limits arising from the object (and objective) of the Convention - in clear violation of the purpose principle, enshrined in paragraph 1(b) of article 5 of the LPD. It is recalled that the precise indication of the purpose of the processing of personal data is essential for the

assessment of the proportionality of the information exchanged or to be exchanged. The same goes for the delimitation of the category of holders of personal data

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Rua de São Bento, 148-3° • 1200-821 LISBON

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covered by this treatment. When Article 1 defines the subjective scope of application of the Convention, it also defines the subjects whose data can be exchanged. If it is intended to extend this legal regime to other subjects or for other purposes, it is imperative that they be specified in the text of the Convention.

b) Respect for 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 information that is foreseeably relevant 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 data protection 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 the light of legislation in force in our legal system (cf. article 30 of the LPD which requires that the legal diplomas referred to in paragraph 2 of article 7 of the LPD - to be read any normative instrument that fulfills this function of legitimizing data processing sensitive - indicate the categories of personal data processed). 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 LPD, which requires that they can only be subject to exchange the necessary, 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 a similar content is contrary to the general principle contained in Article 5 of Convention 108 of the Council of Europe and Articles 5(1)(c) of the LPD, and is not consistent with the regime assumed to be desirable for data transfers to third countries.

It is therefore recommended that, at least, in paragraph 1 of article 27, instead of “foreseeably relevant information” the expression “necessary information” is used, which appeals to the principle of proportionality. It should be noted in this regard that in several

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conventions on the same subject³ 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.

c) Access to bank secrecy data

In a provision reproducing Article 26(5) of the Model Convention, Article 27(5) of the proposal provides that a Contracting State cannot refuse to provide information solely because it is in possession of a bank, other financial institution, a nominee or by a person acting as an agent or trustee, or because such information is connected with a person's proprietary rights.

This precept makes it clear that in the weighing of assets carried out in the OECD Model Convention, the public interest of the States Parties in the effective taxation of the covered income prevailed over the fundamental right of individuals to have their private life safeguarded, even if this sacrifice be accompanied by adequate guarantees regarding the confidentiality of the information transmitted.

In this regard, the CNPD notes that Article 27(5) must, however, be interpreted in its proper context. Thus, despite the literal terms of the first part of paragraph 3 of Article 27, 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 28 - on the rights of data subjects.

3 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.

Rua de São Bento, 148-3°

Tel: 213 928 400

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In this regard, it is also important to refer here to paragraph 6 of article 27, which makes the Contracting States subject to compliance with the directives for the regulation of computer files containing personal data approved by the United Nations General Assembly Resolution A /RES/45/95, of December 14, 1990.

In our opinion, and reiterating what was said in Opinion No. 12/2012, rather than referring to these directives globally, it is preferable to directly state the principles that must bind the Parties in the reciprocal exchange of information. In fact, the pure and simple reference to directives, whose regulatory content is not very precise, runs the risk of not having any useful effect in terms of the protection of transferred personal data, since it seeks to make a regulatory framework that is too indeterminate, a framework that is too indeterminate. where, along with principles, there are also wide exceptions and norms not immediately enforceable in the domestic order.

Effectively, the reference to United Nations General Assembly directives obliges States Parties to respect the affected taxpayers' rights to information and rectification. These are not, however, the only rights of data subjects that must be safeguarded. On the other hand, the exercise of these rights must be coordinated with the different purposes of exchanging information.

We therefore suggest that a new paragraph be added to Article 28 in which this coordination takes place. This number must

observe the following general lines:

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 their rights of access and rectification of data.

Only in this way will the Convention be in conformity with the rights and freedoms of the data subject guaranteed by Article 35(1) of the Constitution of the Portuguese Republic.

b) In cases of exchanges of information aimed at preventing or combating tax evasion and fraud, the data subjects' right to information cannot be guaranteed

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without harming the very pursuit of this public interest. A good balance of the interests involved imposes their waiver in the treatments carried out for this purpose. The right of access and rectification should also not be granted if it is foreseeable that its exercise could affect the success of the investigation.

c) In the event of information being exchanged with the aim of investigating and prosecuting tax crimes and infractions connected with the international operations of taxpayers, the waiver of the information obligation by the authority responsible for processing may also be justified. However, States Parties must ensure that the data subject can exercise their right of access to them through independent authorities to whom domestic law assigns the verification of compliance with personal data protection legislation and not exactly as provided for in the Article 26(2).

Finally, attention is drawn to the fact that the current proposal does not foresee - and therefore is not regulated in accordance with our legal system - the transmission to third States or to international organizations of personal data received from the other Contracting Party to the under the Convention.

IV - Conclusion

In view of the observations made, it is considered that the text of the bilateral cooperation agreement between the Portuguese Republic and the People's Democratic Republic of Algeria to Avoid Double Taxation and Prevent Tax Evasion in the field of

Income Taxes, despite satisfactory, needs some reformulations, in compliance with the Portuguese and European legal framework for data protection.

This is our opinion.

Lisbon, April 3, 2018

Filipa Calvão (President)

Rua de São Bento, 148-3º • 1200-821 LISBON

Tel: 213 928400 Fax: 213 976 832

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