

r

/

## NATIONAL DATA PROTECTION COMMISSION

OPINION/2019/5

### I - Order

The Ministry of Foreign Affairs, through the Directorate-General for Foreign Policy, requests the opinion of the National Data Protection Commission on the revision project amending the Convention between the Portuguese Republic and the Federative Republic of Brazil to Avoid Double Taxation and Preventing Tax Evasion in the field of Income Taxes approved in April 2001 and ratified by the President of the Republic by Decree of the President of the Republic No. 27/2001.

The CNPD, as an independent administrative entity with authority to control the processing of personal data, under the terms of Article 21(1) and Article 22(1) of Law No. 67/98 , of 26 October, as amended by Law No. 103/2015, of 24 August, issues this opinion under the provisions of Article 58(3)(b) of Regulation (EU) 2016/ 679, of the European Parliament and of the Council, of 27 April 2016 - General Data Protection Regulation (hereinafter, RGPD), restricted to aspects relating to the protection of personal data.

### li - 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 Federative Republic of Brazil, if that country has 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 that reason, before entering into a bilateral agreement with the Federative Republic of Brazil, 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 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

consideration, in particular, of the nature of the data, the purpose and duration of the

designed treatments, the country of origin and the country of final destination, the rules of law, general

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

Tel: 213 928 400 Fax: 213 976832

[www.cnpd.pt](http://www.cnpd.pt)

PRIVACY LINE

Weekdays from 10 am to 1 pm

[doubts@cnpd.pt](mailto:doubts@cnpd.pt)

PAR/2019/3 1v.

or sectoral, in force in the State in question, as well as the rules and security measures that are adopted in Brazil.

It should be noted that in the field of data protection legal instruments, the Federative Republic of Brazil has not acceded to Convention No. 108 of the Council of Europe<sup>1</sup>, open to countries not belonging to the Council of Europe. The new Data Protection Law of Brazil was approved on August 14, 2018, but it is not yet in force 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 draft 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 Pakistani territory, in compliance with the principle enshrined in Article 44. of the GDPR.

Ili - Appreciation

Article 26, which is intended to be added to the text of the Convention through the approval of the Protocol under consideration, regulates the exchange of information between the Parties, reproducing *expressis verbis*

<sup>1</sup> 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.

PAR/2019/3 2

"\

K

## NATIONAL DATA PROTECTION COMMISSION

Article 26 of the OECD Model Convention on Double Taxation of Income and Capital, in the 2008 abridged version.

### 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 pursue specific, explicit and legitimate purposes, and cannot be further processed in a way that is incompatible with those purposes (cf. subparagraph c) of paragraph 1 of article 5 of the GDPR). As will be better explained below, maxime in the section dedicated to the general principles of protection of personal data (cf. below, subparagraph d)), 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 the personal data, in order to be able to assess the suitability and necessity of data processing for its pursuit.

However, the final part of paragraph 1 of article 26, by 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)(c) of the GDPR .

### b) The principle of proportionality

The same paragraph 1 of the article under analysis provides that the competent authorities of the States

Contractors will exchange “foreseeably relevant information” with each other to apply the

Convention or for the administration or enforcement of domestic laws. \_\_\_\_\_

Rua de São Bento, 148-3° • 1200-821 LISBON Tel: 213 928 400 Fax: 213 976 832

[www.cnpd.pt](http://www.cnpd.pt)

LI MH PRIVACY

Weekdays from 10 am to 1 pm

[doubts@cnpd.pt](mailto:doubts@cnpd.pt)

PAR/2019/3 2v.

r

Referring the determination of the personal data subject to communication and exchange between the two States to a prognosis 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 regarding 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 Article 26(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 subject<sup>2</sup> the expression “necessary information” is used. equivalent, so, as the concept of need 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 data under banking confidentiality

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,

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 No. 2/2008, 66/2003, 85/2000, 28/2006, 22/2006 and 62/2000 respectively.

PAR/2019/3 3

It NATIONAL COMMISSION

DATA DEPROTECTION

another financial institution, a nominee, or by 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 weighing 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 precedence 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 under the heading "Use and transfer of personal data" - article 27 - therein bound to the duty to guarantee data subjects the right of access and the right of rectification. This is, therefore, a relevant provision insofar as it safeguards respect for two of the fundamental dimensions of the right to the protection of personal data, enshrined in Article 35(1) of the Constitution of the Portuguese Republic, even if they are not depletion, omitting other rights recognized to the data subject in the Portuguese legal system, such as the right to information.

On the other hand, the exercise of those rights must be coordinated with the different purposes of exchanging information.

We therefore suggest that a new paragraph be added to Article 27 in which the two purposes are coordinated. 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

Rua de São Bento, 148-3°

Tel: 213 928400

[www.cnpd.pt](http://www.cnpd.pt)

1200-821 LISBON Fax: 213 976832

(BJ S5EE3E3)

PRIVACY LINE

Weekdays from 10 am to 1 pm

[doubts@cnpd.pt](mailto:doubts@cnpd.pt)

PAR/2019/3 3v.

r\*

international double taxation elimination mechanisms, the competent authority must notify the affected taxpayers, informing them of the communication that will be made, its recipients, its purpose and how they can exercise their rights of access and rectification of data.

Only in this way will the Convention comply with the rights of the data subject guaranteed by Article 35(1) of the Portuguese Constitution.

b) In cases of exchange of information aimed at preventing or combating tax evasion and fraud, the data subjects' right to information cannot be guaranteed 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 exemption from the obligation to provide information 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 27(2).

#### IV - Conclusion

In view of the observations made, CNP D recommends revising the text of the draft revision of the Convention on Bilateral Cooperation between the Federative Republic of Brazil to Avoid Double Taxation and Prevent Tax Evasion in the field of Income Taxes, it 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 (last sentence);
- b) Replace, in paragraph 1 of article 26, the expression "information that is foreseeably relevant" by information that is necessary,

PAR/2019/3 4

#### NATIONAL DATA PROTECTION COMMISSION

- c) Introduce a new number to article 27 where coordination is made between the different purposes of exchanging information with regard to the exercise of the right of access by the holders.

Lisbon, February 5, 2019

Filipa Calvão (President)

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

Tel: 213 928400 Fax: 213 976832

[www.cnpd.pt](http://www.cnpd.pt)

#### PRIVACY LINE

Weekdays from 10 am to 1 pm

[doubts@cnpd.pt](mailto:doubts@cnpd.pt)