

NATIONAL DATA PROTECTION COMMISSION

OPINION/2019/20

I - The order

The Director-General for European Affairs of the Ministry of Foreign Affairs requests the opinion of the National Data Protection Commission on the Draft Protocol revising the Convention between the Portuguese Republic and the Kingdom of Sweden to Avoid Double Taxation and Prevent Evasion Tax on Income Taxes held on August 29, 2002 and published in Diário da República n.º 59, I series-A - of March 11, 2003.

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 paragraph 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 - LPDP).

II - International contracting and transfer of personal data

Bearing in mind that Sweden has been a State belonging to the European Union since 1995, with a very comprehensive legal framework, there are no doubts, either from a legal or institutional perspective, about the Kingdom of Sweden's respect for the data protection rules enshrined at European level.

The text of the draft is then analyzed to verify whether it offers sufficient guarantees for personal data to be transferred, for the intended purpose, in compliance with the principle enshrined in Article 44 of the GDPR.

III - Appreciation

Article 25, 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, expressly reproducing Article 26 of the OECD Model Convention on Double Taxation of Income and Capital, in the abridged version of 2008.

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a) Purposes of exchanging information

Article 25(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). 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 25, 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, harming 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 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.

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

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tax matters, also in question 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 Article 25(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 subject¹ 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.

c) Access to bank secrecy data

In the provision in which, as mentioned above, article 26(5) of the Model Convention is reproduced, article 25(5) of the Draft provides that a Contracting State cannot refuse to provide information solely because it is owned by a credit institution, another financial institution, an agent or a person acting as an agent or trustee, or because such information is connected with a person's proprietary rights.

This precept makes it evident 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

¹ 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.

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effective taxation of the income covered by the fundamental right of individuals to have their privacy protected, even if this sacrifice is accompanied by adequate guarantees regarding the confidentiality of the information transmitted. In this regard, the CNPD notes that Article 25(5) must, however, be interpreted in its proper context. Thus, despite the literal terms of the first part of paragraph 3 of Article 25, 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.

IV - Conclusion

In view of the observations made, the CNPD recommends revising the text of the draft Protocol that revises the Convention between the Portuguese Republic and the Kingdom of Sweden to Avoid Double Taxation and Prevent Tax Evasion, in order to introduce the following changes:

- a) Delete the final part of paragraph 1 of article 25 (last sentence);
- b) Replace, in paragraph 1 of article 25, the expression “information that is foreseeably relevant” by information that is necessary.

Lisbon, April 9, 2019

Filipa Calvão (President)