

National Data Protection Commission

OPINION/2022/89

I. Order

1. Banco de Portugal asked the National Data Protection Commission (CNPD) to issue an opinion on the Draft Notice «which regulates Law no. 1 of Article 4'.

2. The CNPD issues an opinion within the scope of its attributions and competences, as an independent administrative authority with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57, subparagraph b) of Article 58(3) and Article 36(4), all of Regulation (EU) 2016/679, of 27 April 2016 - General Data Protection Regulation (hereinafter GDPR) , in conjunction with the provisions of article 3, paragraph 2 of article 4 and paragraph a) of paragraph 1 of article 6, all of Law No. 58/2019, of 8 of August, which implements the GDPR in the domestic legal order.

3. In addition to the draft notice, at the request of the CNPD, the corresponding data protection impact study was presented.

II. Analysis

4. The Draft Notice under analysis regulates, under the terms of its article 1, the way in which the registration, reporting and frequency of the information provided for in article 4 of Law No. 78/2021 must occur, of 24 November, to be communicated by notaries, solicitors and lawyers to Banco de Portugal, in accordance with the competence provided for in paragraph 8 of the aforementioned article 4.

5. The information to be communicated concerns legal acts that may contribute to the exercise of unauthorized financial activity, within the scope of the new regime for preventing and combating unauthorized financial activity and consumer protection established by Law No. 78/2021.

6. Firstly, it is noted that article 3 of the Draft Notice only regulates information regarding the legal acts that are the subject of the report - among which personal data relating to the parties or grantors of the legal acts provided for in paragraph 1 of article 4 of Law no. 78/2021 -, which is in accordance with the provisions of paragraph 7 of article 4 of Law no. 78/2021. However, nothing regulates the information to be collected regarding the reporting persons, who are subject to a legal reporting duty,

despite the fact that the impact study presented in the meantime indicates, in point 3.1., as personal data to be collected, the name, the number of the professional card and the NIF of the reporter.

Av. D. Carlos 1,134.1° 1200-651 Lisbon

T (+351) 213 928 400 F (+351) 213 976 832

geral@cnpd.pt

www.cnpd.pt

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7. Such omission in the Draft Notice will eventually arise from the fact that the Law itself that this notice regulates is silent on various elements of the processing of personal data, as the CNPD pointed out in the opinion it issued on the draft diploma that gave rise to that law (Opinion/2021/59, of May 17). However, because such personal data are, in fact, adequate and necessary for the purpose of the treatment, for the purpose of verifying the author of the report and compliance with the legal duty of reporting, the CNPD considers that the Draft Notice must include a provision to be provided for. the processing of this personal data concerning the reporting persons.

8. It remains to be clarified whether the given address, indicated in the table of categories of data to be processed in point 3.1. of the impact study, is related to the grantors or the reporting parties. As it is true that, as far as the grantors are concerned, the law has exhaustively defined the list of data to be processed, only the reporting parties can be taken into account here. If this is the case, this data, which is admitted to be still necessary insofar as it refers to the professional address, must be included in that new provision.

9. It is now important to focus the analysis on the reporting procedure described in the Draft Notice, which raises the greatest reservations.

10. At issue is article 4 of the Project, entitled "Duty of Communication", which provides that "[...] notaries, solicitors and lawyers communicate the report with the information to the respective professional bodies, which send them to the Bank of Portugal.'.

11. However, this provision, contained in paragraph 1 of article 4 of the Project and developed in paragraphs 2 and 3 of the

same article, represents the imposition of a duty (of sending the information to Banco de Portugal) to Professional Orders that do not have any legal support.

12. It is recalled that the duty of communication to Banco de Portugal falls exclusively and expressly on notaries, solicitors and lawyers, so the legal obligation invoked in the impact study for the purpose of legitimizing the processing of personal data regulated in the Project does not cover this treatment operation.

13. In fact, Article 6(1)(c) of the GDPR can only serve as a legal basis for transactions on personal data necessary for the fulfillment of a legal obligation, that is, a legal obligation or regulate. It so happens that Law no. 78/2021 does not result in any obligation for Professional Associations, nor does Banco de Portugal appear to be able to impose such an obligation, by regulatory means, on these public entities. Let's see.

14. The processing of data provided for in Law No. 78/2021 and now regulated in the Draft Notice is primarily responsible for processing the notary, solicitor or lawyer, who is responsible for collecting and communicating

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personal data to Banco de Portugal, pursuant to paragraph 5 of article 4 of the aforementioned law. These are, therefore, objectively operations necessary for the performance of a legally imposed duty.

15. Also under the terms of the law, another set of operations is carried out by Banco de Portugal that involves the collection, conservation and availability of the personal data reported, under the terms of paragraph 6 of article 4 of the same legal regime, being, therefore, , also this treatment carried out in fulfillment of a legally imposed duty.

16. However, Article 4(5) is clear in determining that '[...] notaries, solicitors and lawyers communicate information electronically to Banco de Portugal [...]', not providing for or leaving space for possible regulatory provision of an intermediation by another public entity in that electronic communication.

17. Therefore, under the terms of paragraph 5 of article 4, those professionals are only entitled to communicate such data to

Banco de Portugal, not being able to carry out such communication with another public entity, under penalty of violation of the law, not The law provides for the possibility for Banco de Portugal to determine another recipient, even if transitory, of such personal data.

18. In fact, the regulatory power of Banco de Portugal in this matter is delimited in paragraph 8 of article 4, covering only '[...] the way in which the registration, reporting and frequency of information must occur by notaries, solicitors and lawyers», the law having left no room for the regulatory imposition of legal obligations or duties on other public entities in this seat.

19. Furthermore, given the nature of an autonomous administrative entity of the Professional Associations and the regulatory powers of the Bank of Portugal, characterized in article 17 of its Statute, it is not possible to see how it is possible, through an administrative regulation, to subject to an obligation or duty to process personal data a professional order, when the law precisely defines the subjects obliged to carry out the treatment and the Orders do not fall within the universe of institutions subject to financial supervision.

20. In these terms, the CNPD, while understanding that the complexity of the data processing operations to be carried out, due to the extent of the subjects obliged to report - a fact to which, moreover, it drew attention in its above-mentioned opinion -, did not cannot fail to emphasize that the statutory imposition on notaries, solicitors and lawyers of a duty to communicate data to professional bodies and to the latter of a duty to send them to Banco de Portugal is contrary to article 4 of Law no. 78/2021, and therefore these processing operations are not covered by Article 6(1)(c) of the GDPR.

III. Conclusion

21. On the grounds set out above, the CNPD considers that:

Av. D. Carlos 1,134.1o T (+351) 213 928 400 geral@cnpd.pt

1200-651 Lisbon F (+351) 213 976 832 www.cnpd.pt

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the Notice Draft should provide for the processing of personal data relating to reporting persons;

Article 4 of the Draft Notice has to be revised, since the statutory imposition on notaries, solicitors and lawyers of a duty to communicate personal data to Professional Associations, as well as the imposition on the latter of a duty to send them to the Bank of Portugal, is contrary to article 4 of Law no. have that extension.

Lisbon, October 4, 2022

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Filipa Calvão (President, who reported)