

National Data Protection Commission

OPINION/2023/13

I. Request

1. Banco de Portugal (BP) submitted to the National Data Protection Commission (CNPd), for an opinion, the Draft Instruction regulating the procedure applicable to the registration with BP of agents of Payment Institutions (IP) and Institutions of Electronic Money (IME) and electronic money distributors of the IMES.

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

II. Analysis

3. Decree-Law No. 91/2018, of 12 November, establishes the Legal Regime for Payment Services and Electronic Money (RJSPME), transposing Directive (EU) 2015/2366 of the European Parliament of the European Parliament and of the Council of 25 November 2015.

4. Pursuant to articles 31 and 32 of the RJSPME, agents of IPs, IMEs and electronic money distributors of IMEs must request registration from the BP indicating (i) their name and address, (ii) the description of the internal control mechanisms that will be used by the agent to comply with legal provisions or regulations aimed at preventing money laundering and terrorist financing; (iii) the identity of the persons responsible for managing the electronic money distributor or agent that they use to provide payment services and, for agents who are not payment service providers, demonstration of their suitability and competence; (iv) identification of the payment services and/or electronic money services to be provided through the agent and, (v) in the case of EMI agents, information on whether they distribute and refund electronic money.

5. In this context, BP determines that information be provided, by filling in a form, on the identity, suitability and professional experience of the IP and IME agents and the electronic money distributors of the IME.

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6. Pursuant to Article 2 of the Project, IPs and IMEs must carefully assess compliance by their agents and distributors with the elements and criteria contained in Annex I and send Annex II, duly completed, to the BP. Among the documents to be analyzed by the IP and IME to comply with the registration with the BP is a simple photocopy of the identification document, which contains the signature and the civil identification number of the Person (citizen card, identity card, passport or document equivalent) or registration of face-to-face identity confirmation. The CNPD expresses, once again¹, the reservations that the copy of an identification document raises regarding the value of proof of identity, since the scanning of an identification document is easily manipulated, thus not guaranteeing the veracity of the data, in disrespect by the principles of accuracy and completeness of personal data enshrined in paragraphs d) and f) of paragraph 1 of article 5 of the RGPD. It is reaffirmed that the simple copy of identification documents constitutes a document without probative legal value, precisely because of the ease of handling, which is why it is recommended to reconsider criterion 1 of Annex I of the Project.

7. In turn, article 3 enshrines a simplified transitional regime for IP and IME agents and for IME distributors who, until the date of entry into force of this Instruction, are in business without the respective registration has been completed with the Bank of Portugal, which must send the information in Annex III to the Bank of Portugal.

8. Annex II, which constitutes the registration form for IPs and EMIs and distributors of electronic money, in relation to natural persons, contains identification data of the agent or distributor of electronic money (full name, address(es) as agent, NIF, telephone number, email, trademark if applicable) and identifying elements of the persons responsible for managing the Agent or Electronic Money Distributor (full name, NIF, telephone number and email).

9. It also includes declarations issued by IP or IME regarding the verification of the training path and professional experience of the Agent or Electronic Money Distributor and, if this is a legal person, of the members of its management or administrative

body; the statement attesting to the absence of a criminal record on the part of the Agent or Distributor of electronic money and if it is a legal person of the members of its management and administration body, the statement attesting to the sufficiency and suitability, in light of the activity to be carried out on behalf of the institution in question, of internal control mechanisms that will be used by the Agent or by the Electronic Money Distributor to comply with legal or regulatory provisions aimed at preventing money laundering and financing of terrorism and the

1 See Opinion No. 3172017, of May 17, 2017, available at

[https://www.cnpd.pt/bin/decisoes/Par/40 31 2017.pdf](https://www.cnpd.pt/bin/decisoes/Par/40%2031%202017.pdf) and also Opinion No. 142/2020, of December 3, 2020 available at

[https://www.cnpd.pt/decisoes /history-of-decisions/?year=2020&type=4&ent=](https://www.cnpd.pt/decisoes/history-of-decisions/?year=2020&type=4&ent=)

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declaration attesting that the evaluation of agents was carried out by consulting databases of persons and entities sanctioned or identified in lists of restrictive measures.

10. The data subject to processing are adequate and limited to what is necessary for the purpose in question in compliance with the principle of necessity and the minimization of data provided for in paragraph c) of paragraph 1 of article 5 of the RGPD.

11. Finally, Annexes II and III contain information regarding the processing of personal data, substantiating the right to information of data subjects provided for in articles 13 and 14 of the RGPD. This includes information on the person responsible for processing personal data, its basis and purpose, categories of personal data processed, obligation, data retention period, recipients, lack of automated individual decisions, rights of data subjects, contacts and complaint form.

12. Without questioning the detailed information in Annexes II and III, it is important to note that with regard to the purposes of data processing, it is referred in subparagraph a) that data may also be processed for "Other activities carried out by the Bank, which are part of its supervisory powers, as well as for the exercise of other public interest functions, including the application of sanctioning measures, maintaining the rights of the data subject, under the terms referred to below".

13. Pursuant to paragraph 3 of article 6 of the GDPR, the legal basis for the processing of data referred to in paragraph 1(e) of the same article is defined by Union law or by the law of the Member State to which the controller is subject or the purpose is necessary for the exercise of functions in the public interest or the exercise of public authority vested in the controller.

However, article 17 of Law no. 5/98, of January 31, attributes to BP supervisory powers over credit institutions and financial companies and other entities that are legally subject to it, whereby the lawfulness of the treatment of personal data is fulfilled for the indicated purpose.

14. With regard to the remaining subsequent purposes indicated, specifically the application of sanctions, the basis for the lawfulness of data processing must be found in article 10 of the RGPD. In fact, the processing of personal data related to offenses can only be carried out under the control of a public authority. Since BP is a legal person governed by public law, with the nature of an independent administrative entity, endowed with administrative and financial autonomy and its own assets, and which has the competences in the sanctioning domain provided for in article 213 of the General Regime of Credit and Credit Institutions of Financial Companies, approved by Decree-Law No. 298/92, of December 31st, is under the first

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It is part of the provisions of article 10 of the RGPD that this data processing has a basis of legitimacy.

15. With regard to the processing of data for statistical purposes, point b) of paragraph 1 of article 5 of the RGPD admits the compatibility of subsequent processing for statistical purposes with the initial purposes in accordance with paragraph 1 of article 89th of the same diploma.

16. It should be noted that under the terms of paragraphs 156 and 162 and paragraph 1 of article 89 of the RGPD, such processing is subject to the adequate guarantee of the rights and freedoms of data subjects, including the existence of technical and organizational measures that specifically ensure the principle of data minimization. It is therefore important that

these measures are enshrined in the text under analysis.

17. It is therefore recommended to amend subparagraph a) of Annexes II and III in order to contain the various grounds for the lawfulness of the various purposes indicated, in compliance with subparagraph c) of paragraph 1 of article 14 of the GDPR.

III. Conclusion

18. Thus, based on the reasons set out above, the CNPD recommends:

The. The re-weighting of criterion 1 of Annex I of the Project, privileging other forms of proof of identity; It is

B. The amendment of subparagraph a) of Annex II and III in order to contain the various grounds for the lawfulness of the various purposes indicated, in compliance with subparagraph c) of paragraph 1 of article 14 of the RGPD.

Approved at the meeting on February 9, 2023

Filipa Calvao (President)