

National Data Protection Commission

OPINION/2023/20

## I. Order

1. On February 7, 2023, the Directorate-General for Justice Policy requested the National Data Protection Commission (CNPD) to issue an opinion by February 28, 2023 on the Proposal for a Directive of the European Parliament and of the Council harmonizing certain aspects of insolvency law (hereinafter Proposal for a Directive).

2. The CNPD issues an opinion within the scope of its attributions and competences as an independent administrative authority with authoritative powers for the control of the processing of personal data, conferred by articles 57, paragraph 1, point v); 58, paragraph 3, subparagraph b); both of Regulation (EU) 2016/679, of April 27, 2016 - General Regulation on Data Protection (hereinafter RGPD), in conjunction with the provisions of articles

3. °; 4th No. 1 and 2; 6, n.° 1, letter a), all of Law n.° 58/2019, of August 8, which implements the GDPR in the internal legal order (hereinafter LERGD).

## II. Analysis

### i) The axiological-normative frame of reference

3. This Opinion focuses only on the repercussions of the Proposal for a Directive regarding the fundamental rights of respect for private life and the protection of personal data, which have their normative records, both at national level (articles 26, paragraph 1 and 2; 35th both of the Constitution), and of the European Union (Articles 7 and 8 of the Charter of Fundamental Rights of the European Union - CDFUE). But it also calls for the specific regulatory framework that includes: i) the RGPD and the LERGP; ii) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings; iii) Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by Union institutions and bodies and agencies and free circulation of this data.

4. However, this multilevel framework is also complemented by: iv) Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015, on preventing the use of the financial system for the purposes of money laundering or financing of

terrorism, meanwhile amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018; v) Directive (EU) 2018/1673 on combating money laundering through criminal law; vi) Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019, on preventive restructuring regimes, debt forgiveness and disqualifications, and on measures to increase the efficiency of

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processes relating to restructuring, insolvency and debt forgiveness, in particular Articles 28 regarding the use of electronic means of communication and 29 regarding the collection of data; vii) Law No. 58/2020, of August 31, which established preventive and repressive measures to combat money laundering and terrorist financing, transposing the aforementioned Directive (EU) 2018/843 and the Directive (EU) 2018/1673.

ii) The proposed legal design and its sustainability

5. From the explanatory memorandum of the Proposed Directive and to better understand its legislative purpose, we consider it opportune to highlight some passages of its point 3, more precisely those that focus on fundamental rights regarding the respect for private life and the protection of personal data, previously noted.

6. Thus, it mentions that "The proposal will give designated courts access to national bank account registries and electronic data extraction systems, as well as to the interconnected system of centralized bank account registries, the single point of access for account registries The proposal will also provide insolvency practitioners with access to the register of beneficial owners established in the Member State where proceedings were opened, as well as to the system of interconnection of registers of beneficial ownership (BORIS)".

7. Refers that "National bank account registries and electronic data extraction systems, as well as beneficial owner registries, centralize personal data. Therefore, expanding access to these registers and systems, as well as single access points, will have an impact on the fundamental rights of data subjects, namely the right to privacy and the right to protection of personal data. Any resulting limitations on the exercise of the rights and freedoms recognized by the Charter must comply with the requirements set out in the Charter, in particular Article 52(1).

8. It goes on to explain that "The proposal specifies, in particular, the purposes for which personal data are processed and requires Member States to designate insolvency courts empowered to request information directly from national bank account registries and electronic data extraction systems. The proposal also stipulates that Member States must ensure that officials of designated courts maintain high professional standards in terms of data protection, that technical and organizational measures are in place to ensure data security in accordance with high technological standards for the purposes of the exercise of the power, by the designated courts, to access and carry out searches relating to bank account information and that the authorities that manage the centralized records of

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bank accounts retain records relating to each access and search of bank account information by a designated court."

9. It ends as follows: "Furthermore, the proposal clearly identifies the scope of information contained in the beneficial owner registers to which insolvency practitioners have access. Finally, the proposal specifies that the Commission does not store personal data relating to the interconnection of national e-auction systems and contains provisions concerning the Commission's responsibility for data processing".

10. In the development of this legislative project, the Preamble mentions in its recitals (13) and (14) the powers of the insolvency administrators to identify and detect assets belonging to the insolvent estates through the Interconnection System of Companies Registries (BRIS), the System of Interconnection of Insolvency Registers (IRI) or the System of Interconnection of Registers of Beneficial Beneficiaries (BORIS).

11. In turn, recital (15) states that "Immediate direct access to centralized bank account registers or data extraction systems is often indispensable to maximize the value of the insolvent estate. Therefore, rules must be established guaranteeing direct access to the information contained in centralized bank account registers or data extraction systems to the courts designated by the Member States competent to hear insolvency proceedings".

12. However, the identification of assets and access to said data must respect the rights to privacy and protection of personal data.

13. In this guarantee alignment, recital (16) expressed that "direct and immediate access to bank account records should only

be granted to courts competent to hear insolvency proceedings that are designated by Member States for that purpose.

Insolvency practitioners should be allowed to access information in bank account registers only indirectly by asking designated courts in their Member State to access the registers and carry out searches."

14. Recital (18) also mentions that "Any personal data collected pursuant to this Directive should only be processed by courts and designated insolvency practitioners in accordance with applicable data protection rules, where necessary and proportional for the purposes of identifying and detecting assets belonging to the debtor's insolvent estate in ongoing insolvency proceedings".

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15. Thus, the purposes of this Proposal for a Directive have been clearly outlined in terms of certain personal data involved with the insolvency estates, through the information to be obtained by insolvency administrators: 1) the efficient detection of assets in the context of insolvency proceedings , whether at national or cross-border level in the context of the European Union; 2) guarantee the protection of the personal data involved in this asset investigation.

iii) The impact of the Proposal on the protection of personal data

16. The rules with an impact on the protection of personal data are essentially part of Title III, more precisely in Chapter 1 designated as "Access by designated courts to information on bank accounts" (Articles 13, 14, 15 , 16), Chapter 2 entitled "Access for insolvency practitioners to information on beneficial owners" (Article 17) and Chapter 3 on "Access for insolvency practitioners to national asset registers" (Article 18 .°).

17. But also in Title VI, and also with an impact on the protection of personal data, we find Chapter 4 headed "Liquidation of assets and distribution of revenues", more precisely Articles 50 (Electronic auction system for the sale of debtor's assets), 51st

(Interconnection of electronic auction systems), 53rd (Responsibilities of the Commission related to the processing of personal data in the interconnection system of electronic auction platforms).

18. The European Data Protection Supervisor (hereinafter AEPD), through its Opinion No. 5/2023, of February 6, 2023 and reactively to this Proposal for a Directive (accessible at [https://edps.europa.eu/svstem/files/2023-Q2/2022-1323\\_d0360\\_opinion\\_en.pdf](https://edps.europa.eu/svstem/files/2023-Q2/2022-1323_d0360_opinion_en.pdf)), issued the following recommendations (the Rapporteur being responsible for translation):

(1) clarify in the articles of the future directive that access by insolvency practitioners to national registers of assets is only allowed when necessary for the purposes of identifying and locating assets belonging to the insolvency estate of the debtor in an ongoing insolvency proceeding;

(2) introduce at EU level the necessary safeguards for the new access by insolvency practitioners, established by the proposal, to personal data contained in registers of beneficial ownership and national registers of assets;

(3) clarify that the future directive establishes the interconnection of national electronic auction systems;

(4) ensure that the implementing acts to be adopted by the Commission for setting up the interconnection of national e-auction systems are in force when the national laws transposing the Directive are

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applicable, so that the data protection guarantees, to be specified through these implementing acts, are also in force;

(5) clarify, as appropriate, whether the future regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters will be invoked for electronic communications provided for in the proposal.

19. The CNPD notes the Proposal for a Directive's willingness and effort to respect the essential core of the rights to privacy and the protection of personal data (article 52, paragraph 1, of the CDFUE).

20. The CNPD underlines, however, the need for some improvements in order to guarantee such fundamental rights.

21. For this purpose, it begins by reiterating the recommendations of the AEPD conveyed by the aforementioned Opinion 5/2023.

22. The CNPD also considers that the Proposed Directive should densify the functions of the courts in accessing and searching for information on bank accounts regulated in article 14, more precisely if the courts can officially "access directly

and immediately" to such information or if they can only carry out the same upon impulse from the insolvency administrator.

23. The independence of the judicial function, the design of the jurisdictional functions, the literality of the text-norm in question, as well as the corresponding program-norm, point in the direction of the mentioned officiality. But such a purpose must be duly clarified.

24. Likewise, the supervisory powers of the courts regarding requests for access to personal data made by insolvency administrators should be specified, assessing their reasonableness or/and proportionality, which may be implicit in the rule-regime of article 14. ° of the Proposed Directive, as the latter only have the possibility of indirect and mediate access, but which deserves due clarification.

25. The control of access and carrying out searches by the designated courts is provided for in article 16 of the Proposed Directive, its paragraph 3 setting a period of five (5) for the conservation of records of the access control.

26. This rule period of five (5) years is also foreseen for data protection, conservation of records in other community legislation related to the present Proposal for a Directive, as is the case with article 40 of the aforementioned Directive (EU ) 2015/849.

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27. In turn, this Proposal for a Directive empowers insolvency administrators with direct access to information on beneficial owners, as provided for in Article 17, covering, in accordance with its paragraph 2, the name , month, year of birth, country of residence and nationality of the legal owner (a), nature and extent of the economic interest held (b).

28. Insolvency practitioners also now have direct access to national asset registers in accordance with Article 18 of the Proposed Directive.

29. However, the CNPD finds that the insolvency administrator's access control and searches by the insolvency administrator,

as well as the retention period of the respective electronic records, are not minimally regulated in Articles 17 and 18 of the Proposed Directive .

30. In this way, it becomes incomprehensible that there is a stronger discipline in the protection of personal data when the activity of the courts is at stake and, concomitantly, a weaker regulation regarding the performance of insolvency administrators, when in both cases it is in causes access to personal data.

31. Accordingly, and in order to standardize the regime of guarantees for the protection of personal data, it is suggested the addition of a normative segment in articles 17 and 18 of the Proposal for a Directive to be referred to the aforementioned article 16. ° of the Proposed Directive.

### III. CONCLUSIONS

32. Under the terms and grounds set out above, the CNPD:

- a) Reiterates the EDPS recommendations outlined above in point 18; It is
- b) It also recommends:
  - i) the expansion of the functions of the chosen courts in accessing and researching information on bank accounts regulated in article 14 of the Proposed Directive, namely with regard to the non-official nature of this investigation and the inspection of requests by insolvency administrators;
  - ii) the regulation of access control and searches carried out by the insolvency administrator within the scope of articles 17 and 18 of the Proposed Directive, as well as the retention period of the respective electronic records, similarly to that established in Article 16 of the Proposed Directive.

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