

NATIONAL COMMISSION ON DATA PROTECTION

AUTHORIZATION/2020/1

I. Order

1. Banco de Portugal (BdP) has submitted the authorization of the National Data Protection Commission (CNPd), pursuant to Article 46(3)(b) of the General Data Protection Regulation (GDPR))¹ 2, a draft Administrative Agreement (AA) to frame international transfers of personal data between the BdP, on the one hand, and the Bank of England (BoE), including in its capacity as prudential regulatory authority, and the Financial Conduct Authority (FCA) on the other.

2. This is a multilateral agreement that aims to provide a legal framework, from the point of view of the legal regime for the protection of personal data, to international transfers of data carried out between a Portuguese financial supervisory authority and its counterparts located outside the Economic Area European Union (EEA), in the absence of an adequacy decision from the European Commission, in accordance with Article 45(3) of the GDPR, and taking into account that the United Kingdom is now considered a third country, ending the transitional regime, also in terms of personal data protection, on 31 December 2020.

3. This agreement fully reflects the text of the administrative agreement negotiated between the European Markets and Securities Authority (ESMA) and the International Organization of Securities Commissions (IOSCO)², and which was the subject of Opinion 4/2019, of 12 February 2019, from the European Data Protection Board (CEPD)³.

4. The CNPD, as a member of the Article 29 WG and now of the Committee, closely followed the negotiations and participated in the work related to the adjustment of the agreement to the regime of

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and the free movement of such data and which repeals Directive 95/ 46/EC (OJ L 119 of 5.4.2016).

² There was a follow-up of the negotiation process by the Union's national data protection authorities, meeting in the Article 29 Working Group, and then in the European Data Protection Committee.

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<https://edpb.europa.eu/our-work-tools/our-documents/valdybos-nuomone-64-str/opinion-42019-draft-aa-between-eea-and-non->

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GDPR, in particular taking into account the case law of the Court of Justice of the European Union as to what should constitute adequate guarantees to carry out an international transfer of personal data.

5. Thus, in the absence of an adequacy decision from the European Commission, data controllers can only transfer personal data to a third country or an international organization if they have presented adequate guarantees, and on condition that the data subjects enjoy enforceable rights and effective corrective legal measures. Such guarantees can be provided for by means of provisions to be included in administrative agreements between public authorities or bodies, which contemplate the effective and enforceable rights of data subjects, subject to authorization by the competent supervisory authority, in this case the CNPD (Cf. Articles 46(1) and (3)(b) GDPR).

II. Analysis

6. Banco de Portugal, as the central bank and national authority for prudential and behavioral supervision, is entitled to be a party to this AA, which aims to ensure efficient international cooperation between public authorities, regulators and/or supervisory authorities, in accordance with its powers provided for by law, in the context of the prudential supervision of banking entities and their multinational establishments.

7. As for the guarantees included in the AA, whose section II lists a set of definitions, most of which stem from the GDPR, the following stand out:

The. Limitation of Purpose

8. Regardless of the request received, the BdP may only transfer data within the framework of its specific mandate and responsibility; likewise, authorities outside the EEA may not process the data received for purposes incompatible with those determined by their powers and competences. A periodic assessment of compliance with this principle set out in Article 5(1)(b) of the GDPR (Section III(1) of the AA) is foreseen.

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The. Data accuracy and minimization

9. The transmitting authority must ensure that the transferred data are accurate and current, being obliged to transfer only the adequate, pertinent and necessary data for the purpose of the transfer. It is also bound to ensure that inaccurate data are rectified or deleted, and must communicate this fact to the authority receiving the data. The Agreement thus mirrors the principles set out in Article 5(1)(c) and (d) of the GDPR (Section III(2) of the AA).

ç. Transparency

10. Each authority will publish on its website, alongside the text of the AA, an information note on the processing of personal data, the recipients of the data, the rights of data subjects and contact information for submitting complaints. The duty to inform data subjects individually is also foreseen, in accordance with the requirements of the RGD, thus complying with Articles 13 and 14 of the RGD (Section III, no. AA).

d. Limitation of data retention

11. The principle set out in Article 5(1)(e) of the GDPR is reflected in Section III(7) of the AA, which provides that transferred data are only kept for the period strictly necessary for the fulfillment of the purpose in question, in accordance with the requirements of applicable legislation.

and. Security and confidentiality measures

12. The UK authorities are expected to adopt technical and organizational measures that guarantee adequate security of personal data, namely through marks that identify information as personal data and restrictions on access to data. If they become aware of a personal data breach, the receiving authority must inform the transmitting authority as soon as possible, adopting appropriate and reasonable means to remedy the breach and mitigate potential adverse effects (Section III, paragraph 4, of the AA) . This point transposes the principle set out in Article 5(1)(f) of the GDPR.

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f. Rights of holders

13. The AA provides in Section III, no. 5, the exercise of the rights of access, rectification, elimination, limitation and opposition, and information must be published on the website of the signatory authorities on how to exercise these rights, in order to allow

its effectiveness. In addition to confirming the transfer with the authority transmitting the data, it is also possible to exercise the remaining rights either with the competent national authority or with the receiving authority. Any possible restriction on the exercise of rights must be provided for by law and is applicable to the extent necessary to comply with legal obligations. In this way, the rights provided for in Articles 15 to 18 and 21 of the GDPR become effective.

g. automated decisions

14. The AA provides that each authority can use automated means to fulfill its powers more effectively, making the exception, however, that no data subject can be subject to a decision that affects their legal sphere based exclusively on processing automated processing of personal data without human intervention, including profiling, in accordance with Article 22 of the GDPR (Section III, paragraph 5, AA).

H. Onward transfers or data sharing

15. As a general rule, the AA provides that onward transfers to third parties that are not party to the AA and to third countries not covered by an adequacy decision of the European Commission will only be allowed if there is prior written authorization from the transmitting authority and if the third parties offer guarantees appropriate in accordance with the safeguards in the AA. The same requirements apply if you want to share data with other third parties in the same country as the receiving authority.

16. However, in the field of data sharing within the same country of destination, some derogations are foreseen regarding the written authorization of the transmitting authority and regarding the adequate guarantees on the part of the third parties receiving the data. If these third parties cannot provide the aforementioned guarantees, the data can only be transferred

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if sharing is necessary for important reasons of public interest, which must be recognized by Portuguese or Union law; or if the purpose of the sharing is in accordance with the one that initially motivated the transfer and if such sharing is necessary to fulfill the attributions and powers of the receiving authority and/or the third party; or if such sharing is ordered by a decision with binding force or otherwise legally required, in which case it must be previously notified to the transmitting authority.

17. The AA's set of safeguards thus reflect the general principle of international transfers, set out in Article 44 of the GDPR, as

well as other applicable provisions of Chapter V of the GDPR (Section III, paragraph 6, of the AA).

i. Appeal and monitoring mechanisms

18. The AA provides for an appeal mechanism (Section III, paragraph 8) in order to guarantee data subjects the right to administrative or judicial protection and, where appropriate, to compensation. The appeal can be brought before a competent body (eg a court) in the country where the violation occurred. The transmitting authority will be informed of any dispute or claim. A four-step mechanism can also be used: amicable resolution, non-binding dispute mediation, alternative dispute resolution and suspension of data transfer.

19. Section IV of the AA provides for each Authority to carry out periodic reviews of its internal policies and procedures to ensure the proper execution of the agreement. A "review mechanism" will be established, through which the data protection officers (DPO/DPO) of the authorities that are party to the agreement will be notified of situations in which an Authority is unable to fulfill its commitments under the AA or does not intend to follow the outcome of mediation or other non-binding dispute resolution, provided for in paragraph 8 of Section III of the AA, seeking consensus in order to address deficiencies in the policies or procedures that an Authority has in place to implement the safeguards provided for in the AA (Section IV, paragraphs 1 to 4).

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20. It is also foreseen that an "independent body, made up of representatives of both Authorities" will be set up, to which the EPD/DPO can report if they consider that an Authority is not acting in accordance with the provisions of the AA, namely not taking measures to address the material shortcomings detected and not showing a willingness to do so. It is also envisaged that this independent body will operate under 'terms of reference' which will include the requirement to 'act independently' and to notify and provide an opportunity for a prior hearing. Lastly, that body may recommend to the administration of a given Authority that its participation in this agreement be terminated (Section IV, no. 5, of the AA).

21. In situations where the Authority transmitting the data is of the opinion that the receiving Authority is not acting in accordance with the safeguards provided for in the AA, it will suspend the transfer of personal data until the issue in question is satisfactorily resolved (Section IV, no. 6 of the AA).

22. Although the terms of reference for the constitution of this “independent body” are not known, the CNPD considers that, given its composition by representatives of the parties, it will not be possible to ensure, in fact, independent action. In this sense, not only is the constitution of a body to settle conflicts between three authorities considered unnecessary in this context, but its qualification as independent can be misleading and confused with an effective independent control mechanism. The CNPD understands that the involvement of the EPD/DPO is adjusted in the review mechanism, due to the position that the RGPD recognizes and the functions assigned to it (cf. Article 38(3) and Article 39 of the RGPD), but does not see any added value in creating another body just to make recommendations. Indeed, based on the assessment and advice given by the respective EPD/DPO, the transmitting Authority has the obligation to suspend international transfers if the receiving authority continually fails to comply with the conditions of this Agreement, in compliance with the requirements of the GDPR.

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j. review and interruption

23. Section V of the AA provides that the authorities may, by mutual agreement, review the terms of this agreement in the event of substantial legal changes that affect its operation. It is also provided that each authority may, at any time, interrupt its participation in the AA in relation to another authority or authorities, whenever adequate protection of the transferred personal data cannot be ensured, and must notify them of its intention, in writing, 30 days in advance. Data already transferred will continue to apply the safeguards provided by the AA. The respective national data protection authorities will be informed of any proposed material changes to this AA or its termination. These rules appear to be adjusted, not raising any objections.

24. Finally, given the most recent case law of the Court of Justice of the European Union (CJEU), regarding international data transfers⁴, it is the data exporter, in this case, the BdP, which is responsible for verifying, if necessary with the support of data importers (BoE and FCA), whether the legislation of the third country guarantees, in the specific case of these transfers, a level of data protection essentially equivalent to that guaranteed in the Union. To this end, it should take into account

Recommendations 1/2020⁵ on supplementary measures to transfer instruments and Recommendations 2/20 20⁶ on European

Essential Guarantees regarding surveillance measures, both of the ECPD.

III. Decision

25. In conclusion, in view of the data protection requirements set out above and the Opinion 4/2019 of the CEPD, the CNPD considers that the provisions of the Administrative Agreement in question offer adequate guarantees in accordance with the GDPR.

4 Judgment of July 16, 2020, Case Schrems II (C-311/18), ECLI:EU:C:2020:559.

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<https://edpb.europa.eu/our-work-tools/public-consultations-art-704/2020/recommendations-012020-measures-supplement-transfer-en>

6 <https://edpb.europa.eu/our-work-tools/other-documents/recommendations/edpb-recommendations-022020-european-essential-en>

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26. However, the text of the AA regarding the creation of an 'independent body' must be amended, for the reasons set out in point 22 of this authorisation.

27. In accordance with the case law cited by the CJEU and taking into account the recommendations of the CEPD, it is for the Banco de Portugal to assess whether the level of data protection required by EU law is respected in the United Kingdom, in order to determine whether the guarantees contained in this AA can be fulfilled in practice, considering the possible interference that the legislation of the third country may have on fundamental rights. It must therefore be ensured that a level of protection essentially equivalent to that existing in the Union is offered in the country of destination, even if it is necessary, if suitable and effective, to resort to additional measures to the transfer instrument used.

28. In this context, and in order to allow the CNPD to supervise the application of this AA, Banco de Portugal must:

The. Keep duly documented all cases in which you provide prior consent for onward transfers of data and for data sharing within the same country, as well as the respective appropriate guarantees provided. It must also have a list of prior notifications of exceptional cases of sharing personal data, without adequate guarantees, that it may receive;

B. Keep a record of complaints or disputes of which you are aware or in which you are involved, pursuant to Section III, no. 8, of the AA;

ç. Submit to the CNPD the result of its periodic internal assessments, in accordance with Section IV of the AA;

d. Inform the CNPD of any suspension of the transfer of personal data, pursuant to Section III, no. 8, and Section IV, of the AA, as well as any modification or interruption of participation in this Agreement, in accordance with Section V of the AA.

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29. Thus, with the conditions set out above, under the combined provisions of Article 46(3)(b) and Article 58(3)(i), both of the GDPR, the CNPD decides to authorize the Administrative Agreement that aims to frame international transfers of personal data between the Bank of Portugal and the Bank of England and the Financial Conduct Authority, of the United Kingdom.

Lisbon, December 16, 2020

Filipa Calvão (President)

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