

NATIONAL COMMISSION

DATA PROTECTION

OPINION/2020/14

I. Order

Banco de Portugal asked the National Data Protection Commission (CNPd) to comment on the draft Instruction on low and high risk factors for money laundering and terrorist financing and the adoption of specific identification and due diligence measures, simplified or reinforced.

The request made and the present opinion fall within the attributions and powers of the CNPD, as the national authority for the control of the processing of personal data, in accordance with the provisions of subparagraph c) of paragraph 1 of article 57 and n. 4 of article 36 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of article 3. , in Article 4(2) and Article 6(1)(a), all of Law No. 58/2019, of August 8 (which aims to ensure the execution , in the domestic legal order, of the GDPR).

The assessment of the CNPD is restricted to aspects of the regime relating to the processing of personal data, that is, operations that focus on information concerning natural, identified or identifiable persons - cf. lines 1) and 2) of article 4 of the RGPD - focusing on the precepts that provide for or imply processing of personal data.

II. appreciation

Banco de Portugal is the authority empowered to exercise the supervision of credit institutions, financial companies and other entities that are legally subject to it, namely by establishing directives for their performance and to ensure the centralization of credit risk services as well as applying them preventive and corrective intervention measures under the legislation governing financial supervision. Banco de Portugal is also responsible for participating in the Framework of the Single Supervisory Mechanism, in defining the principles, rules and procedures for the prudential supervision of credit institutions, as well as exercising such supervision under the terms and with the specificities provided for in the applicable legislation (cf. article 17 .° of the Organic Law approved by Law No. 5/98, of January 31, in its current wording).

AV. D. CARLOS I. 134 • lo | 1200-651 LISBON | WWW.CNPD.pt | TEL: +351 213 928 400 | FAX: +351 213 976 832

Through this draft instruction, Banco de Portugal defines risk factors and specific simplified and reinforced due diligence measures, in addition to the provisions of article 6 of Notice of Banco de Portugal No. 2/2018, of 26 September, which incorporates the Guidelines on risk factors and simplified and enhanced due diligence measures, issued by the European Supervisory Authorities in accordance with Article 17 and Article 18(4) of Directive (EU) 2015/849, of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system and of activities and professions specially designated for the purposes of money laundering and terrorist financing (see Article 72(5)) of Notice no. 2/2018, of 26 September, of the Bank of Portugal).

Pursuant to article 1, this Instruction complements the list of factors and types of potentially lower risk contained in Annex II of Law No. 83/2017, of 18 August, and defines the concrete content of measures identification and diligence procedures, in addition to those provided for in the aforementioned Law and in Notice No. 2/2018. It also aims to complement the list of factors and types indicative of potentially higher risk contained in Annex III of Law no. (cf. subparagraph c) of number 5 of article 72 of Notice 2/2018)¹.

As a preliminary note, it is important to note the fact that Banco de Portugal submits this draft Instruction, which complements the provisions of article 6 of Notice of Banco de Portugal no. of the CNPD, as it follows from paragraph 4 of article 36 of the RGPD, without, however, having submitted the aforementioned Notice to the same procedure.

The Instruction project provides for various processing of personal data, so it is necessary to analyze the articles that regulate them. Let's see.

Article 7 (of Chapter III - Simplified Measures), concerning payment initiation services and account information service, states that "in contracting these services referred to in paragraphs g) and h) of article 4.0 of the Services Legal

1 Determines subparagraph b) of paragraph 5 of article 72 of Notice no. 2/2018: "Through an Instruction, define the concrete content of simplified measures of identification and diligence, in addition to those provided for in the Law and in this Warning;"

Process PAR/2020/1 2

r

NATIONAL COMMISSION

DATA PROTECTION

of Payment and Electronic Currency (RJSPME) attached to Decree-Law no. beneficial owners and also: a) in the case of

natural persons: i) Type, number, expiry date and entity issuing the identification document; or ii) Tax identification number, or, when they do not have a tax identification number, the equivalent number issued by a competent foreign authority.'

Pursuant to Article 11(1)(b), and Articles 23 and 24 of Law No. 83/2018, of 18 August, obligated entities are subject, in their , compliance with the duty of identification and diligence when establishing business relationships and in other circumstances described therein, with the identification of customers and their representatives being carried out by collecting and recording the identifying elements referred to in article 24 of the aforementioned Law. Thus, article 7 of the Instruction implements the duty of identification and diligence enshrined in Law no. .

However, a note is required regarding the type of personal data collected: by including the expression "at least" in the text, the rule opens up the possibility for financial entities to process any other personal data, without delimiting, by objective and selective criteria , the universe of data object of treatment. However, the use of a rule with this degree of indeterminacy in terms of personal data is not admissible in view of the restriction that the same embodies the rights, freedoms and guarantees of data subjects. Furthermore, it is not possible, by regulatory means, to enshrine a regime different from that provided for in the respective framework law. If it is true that the personal data expressly listed are adequate, relevant and not excessive in relation to the purpose in question, in compliance with the principle of minimization, enshrined in Article 5(1)(c) of the GDPR, and are among those provided for in article 24 of Law No. 83/2017, of 18 August², open the

2 In the case of a natural person: photograph, full name, signature, date of birth, nationality on the identification document, type, number, expiry date and issuing entity of the identification document, tax identification number or, in its absence, the number equivalent issued by a competent foreign authority, profession and employer, if any, full address of permanent residence and, when different from tax domicile, place of birth, other nationalities not listed in the

AV. D. CARLOS I, 134' 1° I 1200-651 LISBOA I WWW.CNPD.PT j TEL:+351 213 928 400 I FAX:+351 213 976 832

Process PAR/2020/1 2v.

The possibility of processing other unspecified data is contrary to the legal regime in this matter. It is therefore suggested to refer in this article to the list of personal data provided for in article 24 of the aforementioned law, or to point a) of paragraph 2 of article 21 of the Notice of Banco de Portugal no. 2/2018, or, alternatively, the densification of personal data subject to processing, in accordance with the provisions of the law.

In turn, paragraph 3 of article 7 of the draft Instruction provides as a cumulative precondition for the application of paragraph 1

that the financial entity collects a “simple copy of the original, in physical or electronic form, of a source document independent and credible document issued by a public authority, proving the identifying elements provided for in paragraph 01’.

The CNPD has already commented on a similar option contained in the draft law on measures to combat money laundering and terrorist financing, in Opinion No. 31/2017, of May 17, 2017, which is reproduced here .³ It thus expresses, once again, the reservations that the copy of an identification document raises regarding the value of proof of identity, since the digitization of an identification document is easily manipulated, thus not guaranteeing the veracity of the data, in disregard for the principles of accuracy and completeness of personal data enshrined in points d) and f) of paragraph 1 of article 5 of the GDPR. In addition, in the national legal system, paragraph 2 of article 5 of Law no. 7/2007, of 5 February, last amended by Law no. 32/2017, of 1 June, determines that “the reproduction of the citizen's card in photocopy or any other means without the holder's consent is prohibited, except in the cases expressly provided for in lei or by decision of a judicial authority”.

Thus, as Law no. 83/2017, in paragraph 4 of article 25, only allows the reproduction of identification documents - which includes photocopying or scanning of the civil identification document -, if customers and their representatives do not have or do not express an intention to use the means provided for in paragraph 2 of the same article, do not (reproduce the civil identification document). In the case of a legal person, the elements contained in paragraph 1, subparagraph b), paragraphs V and VI.

³ Available at https://www.cnpd.pt/bin/decisooes/Par/40_31_2017.pdf

Process PAR/2020/1

3 y'

NATIONAL COMMISSION

DATA PROTECTION

may, by mere administrative regulation, exclude the legally defined conditions for the use of the reproduction of the civil identification document when, precisely, none of the exceptions provided for in that same law are verified.

It should be noted that this draft Instruction is limited to reproducing subparagraph a) of paragraph 4 of article 25 of Law no. 83/2017, of 28 August, which provides for the reproduction of the civil identification provided for in that article, in an attempt to simplify procedures to the detriment of greater security in the protection of personal data. It should also be noted that paragraph 4 of article 21 of Notice 2/2018 of the Bank of Portugal also includes, as means of proving the identifying elements of customers and representatives, a vast set of means, not limited to to

the mentioned option.

It is therefore recommended to amend paragraph 3 of article 7 of the draft Instruction, in order to comply with the provisions of Law no. 83/2017, as follows from Law no. 7/2007.

Article 10 (of Chapter IV - Enhanced Measures), of the draft Instruction, for the purposes of the provisions of paragraph a) of paragraph 6 of article 36 of Law No. 83/2017, of 18 August, provides examples of concrete measures to obtain additional information about customers, their representatives and beneficial owners, including the collection of information on the reputation of the customer, its shareholders and its beneficial owner, as well as the collection of information about close members of the company, family and persons recognized as closely associated. Given the sensitivity of the information in question, and because it is understood that the processing of personal data of a financial nature conflicts strongly with the fundamental right to reserve the privacy of the data subjects, enshrined in article 26 of the Constitution of the Portuguese Republic, the CNPD suggests reformulating these precepts, densifying or delimiting the type of information collected. It should be noted that articles 12, 14 and 15 extend these procedures for the identification and diligence of reinforced measures to the customers of the customer who owns a pooled account, who are treated as beneficial owners, and also whenever they provide private banking or trade finance.

AV. D. CARLOS I, 134 - 1st | 1200-651 LISBON | WWW.CNPD.PT | TEL: +351 213 928 400 | FAX: +351 213 976 832

Process PAR/2020/1 3v.

III. Conclusion

Based on the above grounds, the CNPD recommends:

- 1 - The reformulation of paragraph 1 of article 7 in order to specify the type of personal data subject to processing;
- 2 - The amendment of the provisions of paragraph 3 of article 7, paragraph 3, in order to respect the limits and conditions defined in paragraph 4 of article 25 of Law no. 83/2017;
- 3 - The densification of the information collected under the terms of subparagraphs c) and d) of paragraph 1 of article 10.

Approved at the plenary meeting of February 4, 2020

Filipa Calvão (President)