

National Data Protection Commission

OPINION/2021/73

I. Order

1. The Assembly of the Republic, through the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, requested the CNPD to pronounce on Draft Law No. 89/XIV/2.8 (GOV), which transposes Directive (EU) 2019 /11531, which establishes rules to facilitate the use of financial and other information for the purpose of preventing, detecting, investigating or prosecuting certain criminal offences.

2. The CNPD issues an opinion within the scope of its attributions, as the national authority to control the processing of personal data, conferred by paragraph 2 of article 30, in conjunction with paragraph 1 of article 43 and with subparagraphs a) and c) of no. 1 of article 44, all of Law no. 59/2019, of 8 August.

3. In Draft Law No. 89/XIV/2.a (hereinafter “PPL”), the scope of application of the diploma covers, on the one hand, access to and use of financial information and access to and use of information on bank accounts by some competent national authorities for the purposes of prevention, detection, investigation and prosecution of serious criminal offenses, which are identified, and, on the other hand, access to information of a police nature by the Financial Information Unit (FIU)) for the purpose of preventing and combating money laundering, predicate offenses and terrorist financing, as well as cooperation between the FIUs of the European Union (EU) Member States.

4. It is made clear that the measures now foreseen do not prejudice the application of other national regimes, namely that of Law No. 83/2017, of 18 August, which approves measures to combat money laundering and the financing of terrorism, in its current wording, and that of Law No. police cooperation or relating to mutual legal assistance in criminal matters (cf. Article 2 of the PPL).

5. The Draft Law establishes which national authorities are competent for the prevention, detection, investigation and prosecution of serious criminal offences, which can have direct, immediate and unfiltered access to the database of accounts maintained by the Bank of Portugal, with the amendment of article 81-A of the General Regime for Credit Institutions and

Financial Companies, approved by Decree-Law no. 298/92, of 31 December, in its current wording. They are the judicial authorities, the Central Department of Investigation and Criminal Action of the Attorney General's Office (DCIAP), the Judiciary Police (PJ), the

1 Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules to facilitate the use of financial and other information for the purpose of preventing, detecting, investigating or prosecuting certain offences and repealing Council Decision 2000/642/JHA (JOL186. of 11.7.20191

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Financial Information Unit (UIF) and the Asset Recovery Office (GRA). It is also foreseen that the precise terms of this direct access will be deferred for later regulation by the Bank of Portugal (BdP) or in a protocol to be established between it and the competent authority (cf. Article 4 of the PPL).

6. The conditions for accessing and searching information on bank accounts are also defined, which are subject to a case-by-case search, carried out only by users specifically authorized for this purpose within each competent authority and subject to the duty of secrecy. It is also foreseen the adoption of the necessary technical and organizational measures to protect personal data and prevent improper access, as well as control mechanisms, such as the realization of audit records (logs), to be kept for five (5) years. and its periodic analysis (cf. articles 5 and 6 of the PPL).

7. With regard to the exchange of information between the FIU and the other competent authorities, it is foreseen that the judicial authorities, the DCIAP, the PJ and the GRA may request from the FIU 'financial information', that is, any information or data held by the FIU, in the context of the prevention, detection and suppression of money laundering and terrorist financing, or request 'financial analyses', i.e. the results of the operational analysis or strategic analysis already carried out by the FIU, in

the exercise of its attributions and powers, under the terms of Law No. 83/2017, of 22 August. Requests must be substantiated and are subject to a principle of necessity to be assessed on a case-by-case basis. It is foreseen that the FIU may not comply with the requests in certain circumstances, namely if it is disproportionate in relation to the legitimate interests of a natural or legal person or irrelevant to the requested purposes, in which case it must justify its refusal. Subsequent use for a purpose other than that for which the request was made is subject to prior approval by the FIU.

8. On the other hand, it is provided that the FIU may request from the competent authorities already identified 'information of a police nature', defined as any information held by the competent authorities for the purposes of prevention, detection, investigation and prosecution of criminal offences, as well as as information held by public authorities or private entities in the context of the prevention, detection, investigation and prosecution of criminal offenses and which is available to the competent authorities without the need to adopt coercive measures under national law.

9. The text of the draft diploma defines “serious criminal offences”, which include especially violent crime and highly organized crime, as defined in the Criminal Procedure Code; the crimes provided for in no. 1 of article 1 of Law no. 5/2002, which establishes measures to combat

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organized crime; and the forms of crime listed in Annex I of the Europol Regulation². The illegal acts referred to in Article 386-A(1) of the Penal Code are also defined as 'underlying offences' (cf. Article 2(g) and h) of the PPL).

10. Also in terms of exchange, it is foreseen that the FIU may exchange, in exceptional and urgent cases, with its counterparts in the EU Member States, relevant financial information related to terrorism or organized crime associated with terrorism (see article 9 of the PPL).

11. The PPL also provides that the competent authorities listed above may exchange information or financial analyzes received from the FIU with the designated competent authorities of other EU Member States, on a case-by-case basis and to the extent necessary. for purposes of combating money laundering, 'underlying' offenses and terrorist financing, always subject to prior authorization from the FIU. Any use of the information for purposes other than those initially approved by the FIU is also subject to your prior authorization. All exchanges of information carried out in this context must be carried out

through secure and specific electronic means of communication that guarantee a high level of data protection and security (cf. Article 10).

12. In article 11 of the PPL, it is established that the PJ responds to reasoned requests made to it by Europol, within the limits of Europol's responsibility and for the exercise of its attributions, regarding information on bank accounts, being applicable in that where the provisions of Article 7(6) and (7) of the Europol Regulation. Pursuant to these provisions of the Europol Regulation, Member States cooperate with Europol, inter alia by providing information that it may need, while ensuring compliance with their national legislation when providing such information (cf. points a) and d) of paragraph 7(6) of the Europol Regulation), and Member States are not required to transmit this information to Europol in the cases listed in Article 7(7)(a) to c) of the Europol Regulation.

13. Article 12 of the PPL provides that the FIU responds to Europol's reasoned requests, on a case-by-case basis, that are related to financial information or analyses, and may likewise refuse to provide such information, either for the same reasons that it may do so in the case of requests from national competent authorities, or for the reasons set out in Article 7(7)(a) to c) of the Europol Regulation. In either case, you must give reasons for your refusal.

2 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 establishing the European Union Agency for Police Cooperation (Europol) and replacing and repealing Decisions 2009/371/JHA, 2009 /934/JAI, 2009/935/JAI, 2009/936/JAI and 2009/968/JAI of the Council (JOL 135 of 5.24.2016)

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14. The PPL also establishes that the supply of information to Europol, whether by the PJ or the FIU, takes place through the Europol National Unit, and requests must be processed as soon as possible. For data sent to Europol on bank accounts,

financial information and financial analyses, Article 18 of the Europol Regulation applies, which sets out the various purposes for which Europol may process the data.

15. Finally, the PPL provides for some additional provisions on the protection of personal data, to be observed by the FIU and the authorities referred to in paragraph 1 of article 7 of the PPL, within the scope of all exchanges foreseen under the scope of of this diploma between the FIU and the other competent national authorities, between the FIUs of the EU Member States, between the designated competent authorities of the EU Member States, and between Europol and the PJ or the FIU, with particular emphasis on the obligation to keep a record of all requests for information submitted to them, which contains information that allows identifying who requests the information and contextualizing the request and its follow-up. Such records are kept for a period of five (5) years for the exclusive purpose of verifying their legality by the CNPD (cf. article 17).

II. Analysis

16. The proposed law under consideration here closely follows the text of the directive, and therefore, from a substantive point of view in terms of data protection, there are no particular remarks to be made. However, some clarifications are suggested in the text of the diploma, both in terms of terminology and in terms of safeguarding rights.

17. It should also be noted that the Portuguese language version of the text of the Directive now being transposed contains some errors in the terminology of data protection that result only from the translation, as they are not present in the English language version, which was the version presented by the European Commission and subject to negotiation between the Member States and between them and the European Parliament. The CNPD considers that, despite the Portuguese version of the Directive constituting an official text, these errors should not be replicated and perpetuated in national legislation, otherwise the necessary clarity and legal certainty will not be achieved. We will allude to them later.

18. The PPL contains an article containing definitions relevant to the text of the diploma, which the CNPD already recognizes as an extreme benefit. It is suggested, however, a review of the order of definitions so that all are aligned, on the one hand, the definitions relating to information or analysis that will be the object of access and exchange and, on the other hand, those relating to criminal offenses and types of crime. It is also noted the lapse in the remission of paragraph 2 of article 3 to subparagraph e) of the same article when it should be to subparagraph d).

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19. Regarding the regulation of access to information on bank accounts, provided for in paragraph 2 of article 4, in order to reinforce a better level of compliance with the law, it is suggested to explicitly refer to the obligation of prior consultation with the CNPD , in accordance with paragraph 2 of article 30 of Law no. 59/2019, of 8 August.

20. Regarding the exchanges foreseen with Europol in the context of this diploma, either with the PJ with regard to information on bank accounts, or with the FIU with regard to financial information and financial analyses, the PPL provides, respectively, in the Article 11(1) and Article 12(1) that these communications take place through the Europol National Unit (UNE). The CNPD considers that this is the appropriate channel for this purpose, in addition to reinforcing the obligation, which falls on the UNE, to only transmit data to Europol in accordance with national law, thus being responsible for the legality of data transmission (cf. Article 7(6)(d) of the Europol Regulation). Therefore, it is not understood that Article 13 provides that this exchange can take place through FIU.net, in addition to the SIENA application.

21. In fact, the UNE is only connected to Europol through the SIENA channel, the system through which all communications are processed. FIU.net is a network used exclusively by the Financial Intelligence Units of the Member States to exchange relevant information with each other, which the Portuguese FIU already does and will continue to do under Article 9 of the PPL. EUROPOL, although temporarily hosting this network and providing infrastructure services³, is not part of FIU.net and therefore it is not possible to send information to EUROPOL via FIU.net. Neither the Europol National Unit can be linked to FIU.net. It is therefore recommended that Article 13(1)(b) be deleted.

22. There is also an oversight, evident in paragraph 2 of article 12 of the PPL, in which reference is made to paragraph 3 of article 6, when in fact it should be to paragraph Article 7(2)

23. With regard to Article 14 of the PPL, under the heading '[data protection requirements]', paragraph 1 provides that the processing of data carried out pursuant to Articles 11 and 12 .° of the PPL, ie personal data relating to bank accounts or personal data included in operational 'financial information' or 'financial analyses', sent to Europol, are processed in accordance with Article 18 of the Europol Regulation. This is a rule embodied in Article 14 of the directive being transposed.

24. However, Article 18 of the EUROPOL Regulation, which defines in which contexts and for what purposes EUROPOL may process personal data, specifically provides in paragraph 2(a) that EUROPOL may carry out

³ It is planned that FIU.net will be transferred to another Union body in the near future.

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cross-checks⁴ to identify links to other relevant information concerning suspected or co-authors of a criminal offense within the competence of EUROPOL or convicted of such offences, as well as 'persons for whom there are factual indications or reasonable grounds to believe that they will commit criminal offenses within the competence of EUROPOL'.

25. This rule is particularly relevant in the context of this PPL, since the FIU processes a large amount of personal data, most of which come from systematic reports due to legal obligation concerning individuals who do not have the status of suspects, such as defined in subparagraph e) of article 1 of the Criminal Procedure Code. Law no. 59/2019, of 8 August, also refers to "persons for whom there are reasonable grounds to believe that they have committed or are about to commit a criminal offence" (cf. point a) of article 9).

26. Therefore, personal data relating to such persons must under no circumstances be transmitted to EUROPOL unless they meet the criteria set out in Annex II of the EUROPOL Regulation⁵, both in terms of the categories of personal data and the categories of data subjects, in this case interpreted in the light of national law. The negative impact of this transfer on the rights, freedoms and guarantees of the holders is extremely high.

27. Since the Member State is responsible for the legality of the transmission of data, EUROPOL will assume that the personal data received concern persons suspected of having committed or about to commit criminal offenses within its competence.

Furthermore, information on accounts or other financial information passes the test of the accuracy of the information and reliability of the information source with distinction, being classified by the UNE accordingly, which is of an additional value for EUROPOL. EUROPOL can process the data for a period of at least three years, boosting hits based on false premises of suspicion, but which end up reinforcing them. This can be all the more serious given that we are dealing with a European

database of police information in a context of growing international exchanges of data.

4 Cross-referencing information received from its sources with information already processed in information systems, including in its analysis projects, or even temporarily held precisely for the purposes of cross-control, that is, to identify potential links and verify that the data are relevant to their assignments.

5 Article 18(5) of the EUROPOL Regulation, which defines which personal data and about which data subjects may be collected and processed by EUROPOL, refers to Annex II to the EUROPOL Regulation, which establishes, depending on the purposes, listed in Article 18(2), which categories of personal data and which categories of data subjects can be processed.

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28. In short, it is not a question of Portuguese legislation providing for what EUROPOL can or cannot do, but of ensuring that data are not transmitted in violation of national law and in breach of the EUROPOL Regulation. In this sense, in article 14 of the PPL, safeguards must be introduced so that the PJ or the FIU, as the case may be, analyze in each request for which of the purposes provided for in paragraph 2 of article 18 of the Europol Regulation is made. the request for data, ensuring that data are only transmitted from persons who, in the light of national law, are effectively suspected (or have been convicted of offenses within the competence of EUROPOL), and not solely on the basis of a principle of availability of information on a particular natural person. Therefore, the CNPD considers that the wording of paragraph 1 of article 14 of the PPL should be revised, in line with the above.

29. On the other hand, the CNPD considers that paragraph 2 of article 14 of the PPL, which prescribes that EUROPOL informs its data protection officer of each exchange of information that takes place in this context, should be deleted, as the national legislator cannot directly impose any obligation on EUROPOL. It can be seen that this rule results from a similar precept contained in the Directive, but not even the Union legislator can dictate obligations to EUROPOL, through a legal instrument intended only for the Member States.

30. As for Article 16(2) of the PPL, which mentions the "data protection officer"⁶, which is an example of a clear mistranslation of the Directive, it is strongly recommended that the expression be replaced by 'data protection officer' ('data protection officer', in the English version of the Directive and the EUROPOL Regulation), as this is the terminology used in national data

protection legislation, including the GDPR, in addition to giving rise to confusion with the term 'data controller'.

III. Conclusion

31. The CNPD considers that the proposed law in question closely follows the text of Directive 2019/1153, in transposition, which already contains relevant safeguards in terms of the protection of personal data, so there are no general observations that should be made .

32. The CNPD considers, however, that there is an obvious lapse, resulting from the translation of the Directive into Portuguese and that, due to its lack of rigor, it should not be reproduced in national law. Therefore, the term 'data protection officer' should be replaced by 'data protection officer'.

33. Article 13(1)(b) should be deleted, as the PPL already determines, and rightly, that exchanges with EUROPOL take place through the Europol National Unit, so the FIU .net never

6 The same term is also included in paragraph 2 of article 14 with the meaning of 'data protection officer'.

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could be used in this context, for the reasons mentioned above, and only the SIENA system is applicable for this purpose.

34. The CNPD considers that Article 14 should be revised, in order to eliminate paragraph 2 thereof, as national law cannot impose obligations on EUROPOL, and, more importantly, in order to introduce safeguards that clearly limit the sending of personal data to EUROPOL, in response to requests made by it, to the verification of the requirements contained in Annex II of the EUROPOL Regulation, especially by the FIU, regarding the categories of data and regarding the categories of holders, preventing in particular that personal data of non-suspected persons are transmitted under national law.

Lisbon, June 7, 2021

Filipa Calvão (President, who reported)