CYBERLAW

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Cyberlaw by CIJIC, ***Direito: a pensar tecnologicamente.***

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REVISTA CIENTÍFICA SOBRE CYBERLAW DO CENTRO DE INVESTIGAÇÃO JURÍDICA DO CIBERESPAÇO – CIJIC – DA FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA

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NOTAS DO EDITOR:

Os últimos tempos, assim e porque não os vindouros, sobressaltam-nos com três complexidades *esdrúxulas*: acesso universal e aberto à Rede e democratização desta; capacitação humana numa era de diluvio informacional; a relação da tecnologia, do digital, ao serviço das organizações e/ou Estado com a pessoa humana.

É inegável que o acesso à Rede é um direito fundamental da pessoa humana. Da mesma forma que a liberdade, a inclusão e democratização do espaço físico possibilitou uma dinamização de valor acrescentado ao elevador social, é já hoje mais do que óbvio, que a inclusão digital trará idênticos efeitos. Quantas mais pessoas acederem à Rede, melhor. E tudo gira em torno de uma característica universal da pessoa humana: o ser social que somos. É, pois, essencial determinarmos, enquanto ente coletivo, a necessidade da prossecução, por via da pólis, de um acesso universal e aberto à Rede. É tema de agenda política.

Preocupam-nos, com efeito, as questões supranacionais que envolvem, desde logo o 5G. O tabuleiro político mundial, neste momento, está partido ao meio. E tal como Harari referiu – ainda que a propósito do combate à pandemia -, é imperioso que saibamos "*criar princípios éticos globais e restaurar a cooperação internacional* (…).". Obviamente, tudo se resume às escolhas que fizermos, *Ie, "(…) Depende das escolhas que fazemos no presente. Os países podem optar por competir por recursos escassos e prosseguir uma política egoísta e*

isolacionista, ou podem escolher ajudarem-se mutuamente através de um espírito de solidariedade global."[1].

Assim, nem *a great firewall* chinesa, uma agenda económica protecionista e isolacionista, ou a pressão e separatismo estaduais servem a humanidade. Não será sobre esta toada *belicista* que a humanidade produzirá ganhos conjuntos. Se é que os almeja produzir. O espírito de solidariedade internacional tem-se perdido na espuma dos dias.

Curiosamente, na era de dilúvio informacional, parece-nos comprometida a capacitação humana. Severa, a incompreensão de que a pessoa humana não pode ser um objeto. Sendo-o, emerge do *trade-off* entre o acesso a um serviço "*free*" e a quantidade de dados pessoais que liberta, não só para lhe aceder como depois no usufruir desse serviço.

Zuboff[2] alerta-nos para o *direct and personal targeting*, um assombro de *direct emotional manipulation* , em que sobressai o modelo de negócio das *big tech trendy* de sempre: o parcelamento informacional da pessoa, vendido a outras corporações como ponto de dados; métricas, perfis, com o intuito de retornar (ao titular dos dados) sob a forma de bem ou comodidade (que julga querer adquirir). Qual rato de laboratório. Uma pirâmide financeira suportada à conta da pessoa titular dos dados pessoais, por esta e para esta.

O resultado concreto, analítico, sob a forma de capitalização bolsista, demonstra-nos que a era da informação, na verdade, não está a funcionar para as massas. Pelo contrário. Erige-se num paradoxo: empobrece as suas (nossas) vidas, quer pelos dados pessoais que *capta* quer pelos bens/comodidades que impinge, e enriquece o pecúlio dos (*famosos*) 1%. A robustez financeira acumulada por tais 1%, por sua vez, demonstra uma capacidade, por si só, de manipulação de pilares fundamentais dos estados de direito democrático: a capacidade para atingir diretamente o núcleo legislativo internacional. Com acesso a leis-fato (à medida), só o Direito poderá colocar travão a esta distopia.

Infelizmente, a erosão, de direitos fundamentais humanos, não fica sustida apenas no aspeto mercantil em que opera a redução da pessoa humana a uma objetificação pronunciada. Intrometida e diligentemente, o próprio Estado passou a focar a pessoa como um "*asset*", como um meio, rasgando os pilares fundacionais de toda a doutrina kantiana.

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1 Harari @ https://en.unesco.org/courier/2020-3/yuval-noah-harari-every-crisis-also-opportunity (ultimo acesso setembro 2020).
2 *The age of surveillance capitalism: the fight for a human future at the new Frontier of power*.

A observação da realidade presente, ainda comprometida pela atualidade da pandemia, não olvida que, à semelhança do *surveillance capitalism*, aqui converge a dualidade relacional humano/tecnologia (digital). Se o Estado se comporta como um ente egoísta, usando as pessoas como mero valor, ponto de dados, métrica ou perfil, miríade informacional para prosseguir determinadas agendas (quais?), o que o distinguirá das organizações privadas que procuram o lucro por todos e quaisquer meios?

Note-se, por exemplo, no caso de Portugal – sendo que é uma prática participada por uma maioria de países democráticos deveras preocupante –, o "estado de vigilância" começa, geralmente, como demonstrando ter um propósito justificado por um "*objetivo*" publicamente aceitável. Daqui deriva para uma moção rotineira, *ie*, uma vez implementado – mesmo que *"a título experimental*" –, passa a fazer parte da rotina diária de todos os cidadãos, planeado e executado de acordo com um cronograma racional, não aleatório, seguindo diretrizes perfeitamente concretas, focado em detalhes, como agregação e armazenamento de *dados*[3].

A justificação, para esta aceitação passiva e obediente, por parte do cidadão, reduz-se a uma vacuidade: "*eu não tenho nada a esconder*…". Contudo, o *estado de vigilância* (à semelhança do homónimo capitalismo) serve quem? O quê? Para quê?

Aquiesçamos, um *estado de vigilância* é um que contempla a vigilância como a solução para a esmagadora maioria das questões sociais complexas. Um *estado de vigilância* é respaldo da incompetência, manifestação de uma viciação por tecnologias (criadas por quem?) e dados (para quê? para quem?), com as limitações aí inerentes.

Tal como na problemática do *surveillance capitalism*, o *estado de vigilância* aparece-nos pressuposto no equilíbrio entre as suas necessidades (quais, porque não são coletivamente sufragadas) e desejos/ansias individuais egoístas. Neste jogo de soma zero para o cidadão - ainda que negociado como uma troca de soma não nula -, a propósito de segurança (ou saúde) prometidos pelo estado, este cede, no todo ou em partes, a sua individualidade. Uma vez tal cedência concretizada, a superioridade informacional granjeada, detida pelo *estado de vigilância,* tende a exaurir os mecanismos democráticos de supervisão do próprio estado, na

3 Podemos trazer à colação, para melhor percebermos, desde logo, os sistemas de videovigilância municipal já implementados. De igual forma, podemos pensar sobre a *vigilância*, embora míope quando o cidadão contribuinte tem uma riqueza pessoal assinalável – e tal miopia poderá explicar a constância de acesso de tais cidadãos a regime excecionais de regularização tributaria - exercida pela Autoridade tributária. Recentemente, uma *novidade*, a *app* stayawaycovid.
Entre reconhecimento facial, pelas cameras de videovigilância; rastreamento através do cartão Mb – incentivado o seu uso massivo também a propósito da pandemia, sendo o *contactless* qual "sabão azul" nas medidas de mitigação da propagação da doença – não só através da localização como também do perfil de consumo, entre outros; à coleta de dados de saúde que a *app* permite, bem como o rastreio geolocalizado; de tudo temos experimentado. Os propósitos são "*claros*": segurança, combate ao crime e saúde. Aliciantes…

medida em que o monopólio do conhecimento lhe permite controlar tudo o que pode ser divulgado. Bem coordenado com uma assinalável retórica de medo, tal *estado* passa a dispor da faculdade de usar os seus poderes para propósitos indiferentes à origem e finalidades registadas aos *baby-step* da sua implementação. Distopia? Sim. E já representada nas nossas vidas.

Urge, pois, contrariar as pulsões totalitaristas de *estados de vigilância*, promotores de exclusão e discriminação, sob pena de o nosso futuro, enquanto ente coletivo, ser irreparavelmente composto por cidadãos desprovidos da sua individualidade intrínseca.

Tal distopia estadual não serve à pessoa humana. A luta convoca-nos a todos.

O núcleo não pode, em momento algum, ser desfocado da sua essência: Estado ao serviço da pessoa. Tecnologia ao serviço da pessoa. É pela pessoa que o Estado se materializa. É para a pessoa que o Estado se organiza numa comunhão de direito democrático. É por um Estado que promove e prossegue o cardápio de direitos, liberdades e garantias fundamentais da pessoa que cumpre lutar. De igual forma, o recurso à ferramenta de auxílio – a tecnologia (digital) – pode e deve ser feito sempre que a finalidade seja construir um ente coletivo em que a pessoa é e sempre, também pela sua individualidade intrínseca, um fim em si mesmo. É por tal *futuro por design*, na disponibilidade da pessoa e pela pessoa humana que devemos concentrar o nosso esforço coletivo.

Nesta nova edição da Cyberlaw by CIJIC, perseguidos por tais inquietações, tivemos o ensejo de provocar os autores participantes à procura de juízos sobre a realidade desafiante que convoca a sociedade atual. E futura. Entre a inteligência artificial e a *algocracia* e os desafios que estas convocam ao Direito (e aos juristas); passando pelo crime de violência domestica num contexto de abuso (mais uma forma de abuso) através das redes sociais e a proteção jurídico-penal que a vida privada exigem; à utilização de *benware* como meio de neutralização das técnicas e medidas antiforenses que os criminosos usam; à engenharia do "direito penal sobre rodas" e ao agente inteligente automóvel num contexto de um certo desarranjo terminológico - todos escritos em língua portuguesa - e ante as responsabilidades – que já demos conta oportunamente – impondo-se-nos a difusão de conteúdo em inglês escrito, juntamos três temas desafiantes: *State surveillance; fake news & social networks; open banking*.

Como era expectável, *ab initio*, os temas são desafiantes. Para todos. São, como sempre, abertos a colaboração múltipla e, de preferência, participada. A prova foi, quer-nos parecer, superada com mestria.

Entretanto abre-se a janela da próxima edição, para Março de 2021. Não sem antes sublinhar que, nos próximos tempos, ante os critérios definidos pelo corpo diretivo e pelo editor, em parceria com a Associação académica da faculdade de direito de lisboa, passaremos a dispor de um número da revista, anualmente, em formato de papel.

Resta-me, por fim, agradecer a todos quantos contribuíram para mais esta nova edição da Revista, pelo esforço, pela disponibilidade, pela obra, endereçando a todos, em nome do Centro de Investigação Jurídica do Ciberespaço – CIJIC – da Faculdade de Direito da Universidade de Lisboa, um merecidíssimo: - Muito Obrigado.

Cyberlaw by CIJIC, ***Direito: a pensar tecnologicamente*.**

Boas leituras.

Lisboa, FDUL, 29 de Setembro de 2020

Nuno Teixeira Castro

CYBERLAW
by CIJIC

THE BRAZILIAN OPEN BANKING, THE EUROPEAN PSD2 DIRECTIVE & COMPETITION IN THE BRAZILIAN PAYMENT SERVICES MARKET

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ABSTRACT

BACEN instituted Resolution nº 1, of 12 August 2020, which creates its own payment arrangement for the Open Banking market called "PIX". In this Resolution, BACEN is the "payment arrangement institute" itself – however, it would be up to BACEN to encourage new market entrants and promote competition in the sector. More importantly, BACEN, as a regulator and federal authority, does not have the competence or legal authorization to operate in the private market and license the PIX brand as an exclusive private brand: Resolution nº 1, of August 12nd, 2020, creates a public monopoly of dubious legality. Most worrying is that BACEN will have, within the scope of this monopoly, an "advisory committee" formed by the large Brazilian financial conglomerates and large technology groups, to assist in the formulation of the only brand for payment service markets in Brazil. As BACEN is, at the same time, a regulator and antitrust authority for the Brazilian financial market, the PIX arrangement will be an insurmountable barrier to any other possible payment service brands, in particular medium and small enterprises. Finally, this paper offers a comparative perspective of the foregoing vis a vis the Payment Services Directives (Directive 2007/64/EC) and the Portuguese Decree Law nº 91/2018, as of November 12th, 2018.

Keywords: Payment Services; Open Banking; PIX; Payment Schemes.

Summary: 1. The Newborn Brazilian Open Banking. 1.1. Interoperability, Transparency and Cybersecurity. 1.2. Aspects related to Data Privacy. 1.3. Third Party Providers - TPP and cybersecurity policies. 1.4. Brazilian Payment Arrangements Regulation. 2. Brazilian Payment Arrangement and PSD2: a brief comparison. 3. PIX – BACEN Resolution nº 1, of 12 August 2020; 3.1 Schedule; 3.2. PIX Payment Arrangement Regulation; 3.3. PIX Brand Licensing; 4. Final Considerations - Regulatory Value and Interest.

INTRODUCTION

Although in many parts of the world the concept of instant payment and open banking seems to be very a great novelty, the European experience along until the most recent Directive (EU) 2015/2366 of the European Parliament and of the European Council, as of November 25, 2015, i.e., the Revised Payment Services Directive, is a important reminder that such features were being developed in financial markets wat before 2007, namely, the than Payment Services Directives (Directive 2007/64/EC), has already set the basic regulatory structure today repeated, with some differences and different terminology, around the globe.

Our main objective in this paper is to analyze the recent system of payment on the midst of being implemented in Brazil, the so called "PIX", as a what the Central Bank of Brazil Regulation ("BACEN") defines as a "payment arrangement" which rules were defined by the BACEN itself. The main oddity of the PIX is the fact that it is payment arrangement settled and approved by the BACEN, whereas both in the Brazilian regulation and legislation, market practices and traditions, as well as the PSD2, a monetary authority should restrain itself from providing payment systems, whenever such provision conflicts with the regulator inbuilt purpose and activities.

Moreover, we will verify that the Brazilian financial system legislation is, as a matter of fact, even more strict than the PSD2 regulation, and the BACEN actually has no constitutional or legal grounds to deploy the PIX as system payment to be marketed and licensed under contractual private law. For example, in Portugal, the definition of a "payment scheme" under Decree Law nº 91/2018, as of November 12th 2018, article 2 (gg): "*payment*

scheme means a single set of rules, practices, standards and/or implementation guidelines agreed between payment service providers for the execution of payment transactions across the Union and within Member States, and which is separated from any infrastructure or payment system that supports its operation".

Before commenting over the PIX, we will explore the Brazilian *Open Bank* regulation and the payment services regulation, set a brief comparison of its institutes with the PSD2, and then apply the preliminary finding over the PIX itself.

1. THE NEWBORN BRAZILIAN OPEN BANKING

The Open Banking initiative in Brazil started with the Brazilian Central Banking Public Notice nº 73/2019, as of November 28th 2019 and followed the parameters already stablished in the guidelines n° 33.455, April 24th, 2019, in which *Open Banking* was considered as the "in the standardized sharing of data and services by opening and integrating information systems platforms and infrastructures, using a dedicated interface for this purpose, by financial institutions and other institutions authorized to operate by the Central Bank".[1]

Its objectives would be to increase efficiency in the credit and payments market in Brazil, as well as to promote a more inclusive and competitive business environment. These objectives must be compatible with the security of the financial system, the protection of consumers and the protection of personal data.

The draft regulatory act is built on the perspective that Open Banking is based on the sharing of data, products and services by financial institutions and other authorized institutions, at the discretion of its clients, through information systems platforms and infrastructures.

The than proposed regulation established that the largest financial institutions, in the case of those with a size equal to or greater than 1% of GDP or that exercise relevant international activity, are members of prudential conglomerates in Segments 1 (S1) and 2 (S2) (pursuant to Resolution nº 4,553, of January 30, 2017) will be required to participate in Open Banking, with voluntary participation being ensured to other smaller institutions.

Regarding the organization and governance of the institutions, the Public Notice suggests an associative governance model, in which the participating institutions agree on the number and mandate of the members of a given "strategic level", based on criteria such as: (i) the number of members financial institutions or institutions authorized by BACEN, (ii) the existence of two groups of associations with the same degree of participation, the first being composed of institutions from Segment 1 (S1), Segment 2 (S2) and Segment 3 (S3), and the second by institutions in Segment 4 (S4) and Segment 5 (S5).

Following the public consultation of Public Notice nº 73/2019, of November 28, 2019, and the parameters and guidelines already set in the Communication nº 33.455, of April 24, 2019, the Central Bank of Brazil (BACEN) and the National Monetary Council (CMN)

1 https://www.bcb.gov.br/detalhenoticia/392/noticia

approved the Joint Resolution nº 01, of May 4, 2020, which regulates the so-called Open Banking in Brazil.[2]

It worth to note that the Brazilian Open Banking is largely inspired in the Revised Payment Services Directive ("PSD2"), i.e., Directive (EU) 2015/2366 of the European Parliament and of the European Council, as of November 25, 2015, as we will further explore in the second part of this paper.

In this sense, the Brazilian Open Banking is a set of rules for organizing the sharing of data and services in the financial system through the opening and integration of information. It will make possible for financial institutions, payment service providers, and other technologies applicable to the banking and financial market, to be able, with the prior consent of their clients, to grant access to their clients' financial information to Third Party Providers - TPP, through dedicated interfaces (Applications Programming Interfaces - API).

The Brazilian Open Banking aims at a means to standardize and share data and services between participating institutions, such as the transmitters, receivers, initiators of payment transactions and account holders. Thus, it is not only applicable to the Brazilian National Financial System ("SFN"), but also to the Brazilian Payment System ("SBP"), that is, payment arrangements will have to be structured in order to include its data and services sharing interface. In fact, we can expect the impact of Open Banking to be very significant among the payment services (payment initiation services, account information services or payment instrument issuance services), with numerous applications, as we have seen since 2015 in the European Union.

Resembling PSD2, the implementation of Open Banking aims at increasing efficiency in the credit and payments market in Brazil, as well as promoting a more inclusive and competitive business environment. However, these objectives must be made compatible with the cyber security premises of the CMN, the protection of consumers and the protection of personal data - topics of great relevance for this new market.

The sharing of data, products and services by financial institutions and other authorized institutions is also dependent on the client's consent, which deserved special attention regarding its treatment by the participating institutions' systems platforms and infrastructures.

It should be noted that Open Banking will only be mandatory for larger financial institutions, that is, those that have a size equal to or greater than 1% of GDP or that exercise relevant international activity, members of prudential conglomerates in Segments 1 (S1) and

2 The Central Bank of Brazil Public Notice is available at: https://www3.bcb.gov.br/audpub/DetalharAudienciaPage?3.

2 (S2) (according to Resolution nº 4,553, of January 30, 2017). The remaining smaller institutions have their voluntary participation ensured.

The BACEN will have total interference and participation in the structuring of the governance model to be adopted by Open Banking participating institutions, which is an alteration in relation to the draft submitted to public consultation: the Article 46 of the Joint Resolution nº 01 establishes the BACEN duty to establish the initial structure responsible for the governance of the implementation process of Open Banking in Brazil, which must be followed, necessarily, by the participating institutions when preparing the sharing convention regulated in art. 44 of the Resolution. This strong regulatory presence, however, must be followed by the promotion of public discussions between the participating institutions, through industry unions and associations.

Among BACEN's concerns in relation to the governance model to be implemented, we could highlight the need for (i) participating institutions and industry segment representation and plurality, (ii) non-discriminatory access, (iii) conflicts of interest mitigation, and (iv) sustainability, which evidently depends on its practical feasibility with the final consumer, as well as the integrity of the system, which must prevent possible security breaches, loss or theft of data, and fraud in general.

It is important to remember that during the public consultation, BACEN made it clear that the organization and governance of the institutions would follow an associative/representative governance model, in which the participating institutions should agree on the number and mandate of the members of a given “strategic level” based on specific criteria, such as: (i) the number of associated financial institutions or authorized institutions by BACEN, (ii) the existence of two groups of associations with the same degree of participation, the first being composed of segment 1 institutions (S1), Segment 2 (S2) and Segment 3 (S3), and the second by institutions in Segment 4 (S4) and Segment 5 (S5).

This governance model would also establish the prohibition of simultaneous participation in the two groups mentioned above and the majority representation by a single association in each of the groups, and would also establish other suggestions for self-regulation like governance and cost sharing provisions. These prescriptions, however, are not contained in the Open Banking Resolution, and will be implemented based on the aforementioned Article 46, through the Convention regulated in Article 44.

1.1. Interoperability, Transparency and Cybersecurity

Among the modifications of the draft submitted to public consultation in November 2019 and the published Resolution, there is a better adequacy to the information security rules, according to both the Brazilian Data Protection General Law (LGPD) and CMN Resolution nº 4,658, of April 26, 2018 - but not only. The Joint Resolution nº 01 requires non-discriminatory treatment and interoperability between systems.

These concerns were already present in the draft submitted to public consultation, however, interoperability lacked additional guarantees, since there is not always reciprocity, that is, an institution with its own network does not always allow access to other networks. Thus, reciprocity was established as a premise for the implementation of Open Banking and will be observed as in the parameters of the Convention of art. 44.

Another additional guarantee is the principle of data quality, inserted as a premise to be observed by the market, which must be seen both from the perspective of information integrity and security, as well as a requirement for updating and consistency of databases - therefore, it is also a concern with data standardization.

Sharing requirements are conditioned by criteria of security, agility and convenience. Article 23 also began to demand greater systemic transparency, as data sharing interfaces must ensure their free access to the public, with the possibility of defining limits for interface calls, under justified and equitable parameters.

Thus, information about the APIs must be made available in a clear manner, appropriate to the nature of the sharing and accessible, including regarding version control and connection support.

The BACEN regulation follows a global trend, and will result in greater vulnerabilities and threats within the market, given the high usage of APIs in public networks with SFN and SBP, that is, more complexity, dynamism and innovation in these markets means more risk. From the technological point of view, it is important to emphasize that Open Banking Joint Resolution nº 01 is absolutely interconnected with CMN Resolution nº 4,658, of April 26, 2018 (“Brazilian Information Security Regulation”). And more, as Open Banking encompasses not only entities authorized under the SFN and SBP, other companies and entities will eventually have to adopt minimum cybersecurity levels to remain or enter the banking, financial and payment industries.

In particular, this generalizing trend of information security practices can be noted, as Joint Resolution nº 01 ensures the standardization, integrity and availability of data transmitted via API within the scope of Open Banking through the aforementioned Article 44

Convention, regarding the "technological standards and operational procedures" to be adopted by the industry. Participating institutions must agree in this Convention, at a minimum, the implementation of the APIs, including the interface design, the protocol for data transmission, the format for data exchange and the access controls to the interfaces and data, standards and certificates of security measures to be adopted, as well as for the request to share data and services.

This standardization should be detailed in terms of standardizing the layout of the data and services, including the definition of the common data dictionary and similar data clustering processes. Without prejudice to the freedom granted to market agents to establish the standardization parameters, in Circular nº 4,015, of May 4, 2020[3], BACEN already delimits the data and services that will be the object of treatment through Open Banking.

In addition, the Convention must establish industry rules for the other legal aspects of its relationship, such as (i) channels for forwarding customer demands, (ii) procedures and mechanisms for handling and resolving disputes, (iii) reimbursement situations among participants, (iv) repository of participants, (v) rights and obligations of participants, and (vi) among others.

The convention will be negotiated and structured by entities representing the participating institutions and segments and may be adhered to directly by the institutions (individually) or by their unions or national associations.[4]

1.2. Aspects related to Data Privacy

Consent

There is a clear concern by the regulator to equalize the requirements of technological innovation and greater market competitiveness with the guarantees of cyber security and data protection, when establishing consent as a prerequisite for data sharing. In this sense, it can be seen that the very definition of consent provided for in Joint Resolution nº 1 is more restrictive than that contained in the LGPD, with 5 articles – articles 10 to 15 – being reserved only to address the rules applicable to consent. According to Joint Resolution nº 1, consent is

3 Provides for the scope of data and services of the Open Financial System (Open Banking). Its article 2 sets, for example, that the data on the service channels shared under the open banking systems, covers, at a minimum, the mandatory disclosure of certain data and certain electronic channels. It aims at allowing uniformity through the public system, regarding, for example account typology and tariffs to be charged.

4 This convention seams as way to mimic the market soft regulation that resulted in the PSD, with the difference that Brazilian financial market is far from reaching the same diversity of the EEA initial effort.

defined as the free, informed, prior and unequivocal manifestation of will, made by electronic means, by which the customer agrees to share data or services for specific purposes.

The Joint Resolution nº 01 reinforces the role of consent and is in line with international industry practices and with recent international ones regarding the treatment of consent. Thus, Joint Resolution nº 01 establishes that not only is the use of subscription contracts or forms for contracting data sharing prohibited, but the adoption of the opt-out system was also prohibited. Thus, consent must be established actively ("opt-in"), and using authentication systems for security and user identification. However, there is no indication of specific mechanisms or forms of authentication. The strong authentication is one of the innovations brought by the PSD2, it worth commenting the banking and financial markets in Brazil have long adopted quite sophisticated means for authentication.

It should be noted that Joint Resolution nº 01 also sought to establish the time limits for both the exercise of consent and its revocation. Article 15 ensures "the possibility of revoking the respective consent, at any time, upon the client's request, through a safe, agile, precise and convenient procedure, observing the provisions of the legislation and regulations in force".

The revocation of consent must take effect within 1 (one) day, counted from the client's request, in the case of sharing the payment transaction initiation service, and immediately, for the other cases.

It is interesting to note that, although the Regulation establishes the revocation of consent, it is silent on the right of rectification, so necessary to ensure that the information transferred is correct and accurate. On the other hand, although it does not refer directly to the right to rectification, the inclusion of the data quality principle, mentioned above, is an indirect form of reference to the right to rectification (which is also regulated in the LGPD).

Finally, consent may be opposed by participating institutions whenever there is a justified suspicion of fraud.

Purposes

The Regulation correctly limit the sharing under specific purposes and allow the customer to control the data clustering. In this sense, it is important to note that participating institutions may or may not choose to cluster data. Evidently, the clustering must necessarily be consented, as part of the transferred data treatment.

Such consent must be requested through clear language, aim at specific purposes, and have a validity period compatible with the purposes, limited, however, to 12 months.

Articles 30 and 31 provide for the institutions' responsibility for data security, however this responsibility is already provided for in specific legislation.

There is also a regulatory obligation to hire a statutory Director, who can accumulate other functions, and who will have the institutional function of supervising the transmission process and ensure its reliability.

1.3. Third Party Providers - TPP and cybersecurity policies

A very important aspect of the Regulation is the recognition of the TPPs (referred to as partner companies) broad role in an Open Banking environment. They will perform numerous services associated with the financial and banking market, notably related to payment services, as has occurred in other jurisdictions. With the entry into force of Joint Resolution nº 01, these entities will be subject to BACEN regulations, in particular CMN Resolution nº 4,658, of April 26, 2018, which already provides for the mandatory implementation of cybersecurity policy, as well as requirements for the contracting of data processing and storage and cloud computing services.

Thus, TPPs should, in the very near future, adopt procedures and controls that include, at a minimum, authentication, encryption, intrusion prevention and detection, of prevention information leakage, periodic testing and scanning for vulnerability detection, protection against malicious software, the establishment of traceability mechanisms, access controls and segmentation of the computer network and the maintenance of backup copies of data and information – practices specified in their respective policies and extendable to their own suppliers (applications and components in particular).

As the Resolution allows the hiring of foreign TPPs directly, and as several jurisdictions already have very complete information security policies, it is extremely important to raise the awareness of the Brazilian national market to its update in view of the new criteria, which will overflow from SFN and SBP to others downstream and upstream industries.

There are limits to the performance of TPPs, insofar as the Resolution provides: (i) the prohibition of contracting between financial institutions, and (ii) the prohibition of total assignment of activities, that is, the transmitting institution must be maintained at all times as direct participant in the sharing process, being able to only subcontract the other authorized activities.

In the same way that privacy and data protection has gained a prominent role in recent years with the advent of the Internet Regulation, the BACEN and CMN Regulation, and finally through the edition of the LGPD, as occurred in other jurisdictions, Joint Resolution nº 1 already indicates that, in addition to SFN and SBP, national markets should already begin

to be concerned with their cyber security practices and policies, otherwise they will be excluded from the market.

1.4. Brazilian Payment Arrangements Regulation

The previous topics allowed us to set a clear understanding of the Open Bank regulation in Brazil as, actually, a *payment services* regulation, with considerable similarities to the PSD2, as we will further discuss in the next topic. In any case, before advancing in our argument, it is necessary to set the basic terminology and structure of a payment scheme under Brazilian regulation, as it is not possible to discuss any related PSD2 and Open Banking subject without, of course, touch basis with what is undergoing in the actual market.

The Brazilian payments services framework has its own standardized terms, but they all refer to what is generally known as a "payment scheme". The existing market framework were addressed both in the PSD, evidently, and as well as in the Brazilian regulation, which we will very briefly comment below, as an introduction to the main goal of this paper, i.e., the our concern over the use of the Brazilian Regulation so called "Originator of the Payment Arrangement" (Instituidor de Arranjo de Pagamento), which is neither the PSD2 *payment* system nor the Portuguese *payment scheme*. The PSD2 payment system, is rather a fund transfer system governed by formal and standardized provisions and common rules regarding the processing, not necessarily set under regulation itself, but under the monetary authority supervision. It is related to a private set of rules, in which a "payment brand" is also defined as an essential element hereto. The Portuguese definition does not fall to far from the PSD2, as it is also a ser of rules stablished by payment service providers for the execution of payment transactions – it is also something freely set by the market agents, and further supervised by the Monetary Authority, in this case, the Bank of Portugal.

The Brazilian version does not have a self-regulation origin, on the contrary, the Open Banking in Brazil is set as means to substitute the State owned Brazilian Payment System ("SPB") owned and controlled by the Brazilian Central Bank[5]. This State-owned infrastructure centralizes and controls the procedures for processing and settlement of funds transfer operations (including foreign currency, financial assets, securities). It is formed by

5 It is true, though, that one could argue that the a centralized payment system does also exist in Europe and is a fundamental part of the payment and banking basic infrastructure – nevertheless, the Brazilian Open Bank regulation main argument upon public hearing was the replacement of traditional payment methods by instantaneous payment services – i.e., the BACEN would be releasing part of its basic payment infrastructure to create a new market – whereas the EU example seems to be the opposite, as the market set the basic rules for the PSD.

operators of the so-called Financial Market Infrastructures (IMF), which, since 2013, also included new players, namely, the "payments arrangements" and "payment institutions" introduced by Federal Law nº 12,865/2013[6].

Payment arrangement: Set of rules and procedures that govern the provision of a specific payment service to the public, accepted by more than one recipient ("Merchant"), (item I of Article 6 of Law 12.865 / 2013)

The "Originator of the Payment Arrangement" is defined as the legal entity responsible for the payment arrangement and, when applicable, for the use of the associated trademark[7]. This regulatory payment service provider does not have any equivalent in the European or Portuguese regulation, since the possibility to license a trademark or to set certain rules for a payment scheme or payment system is freely agreed among market entities and individuals, provided it is done within the limits of the applicable laws and regulations.

As per the mentioned Federal Law, a "Payment Institution" is a legal entity that provides services for the purchases and sales and transference of funds, within the scope of a *payment arrangement*, without the possibility of granting loans and financing to its customers.[8]

A Payment Account under the Brazilian legislation is the registration account held in the name of end user, used for the execution of payment transactions[9] while a Payment Instrument is the *device* or set of procedures agreed between the end user and a Payment Institution, to initiate a payment transaction[10].

The Federal Law also set the meaning of Electronic Currency, as resources stored in an electronic device or system that allow the end user to make a payment transaction[11].

Furthermore, under the Brazilian framework a three-part payment scheme is called "closed payment arrangement"[12], the Brazilian regulation defines it as the payment arrangement in which account management, issuance and accreditation are carried out:

(i) by only one payment institution, which is also the originator of the arrangement or

6 The law itself is very confusing statute, as it regulates several unrelated topics, including the new payment arrangements, in a bad practice of Brazilian Congress to disrupt pending political deadlocks. The diploma is available at: http://www.planalto.gov.br/ccivil_03/_Ato2011- 2014/2013/Lei/L12865.htm.
7 item II of art. 6 of Law 12.865/2013.
8 item III of art. 6 of Law 12.865/2013.
9 item IV of art. 6 of Law 12.865/2013.
10 item V of art. 6 of Law 12.865/2013.
11 item VI of art. 6 of Law 12.865/2013.
12 Central Bank of Brazil Circular nº 3,682/2013; item I of Article 2 of the Attached Regulation of Circular nº 3,705/2014, and Ciruclar nº 3,886/2018.

(ii) by a controlling payment institution or controlled by the originator of the arrangement.

As seen above, the Originator of the Payment Arrangement, as well as the need to such entity to formally obtain an authorization to its own "payments arrangement" is very different from the European model. As it describes, the Brazilian Framework seem to consider as possible different kind of payment arrangement, in such extent that it would be possible to require a prior approval from regulator – which is odd since the regulation itself already set the limits and basic conditions for any payment arrangement eventually agreed among private entities.

To simplify the Brazilian framework, we can consider a three-party scheme and a four party-scheme depicted below in figures one and two:

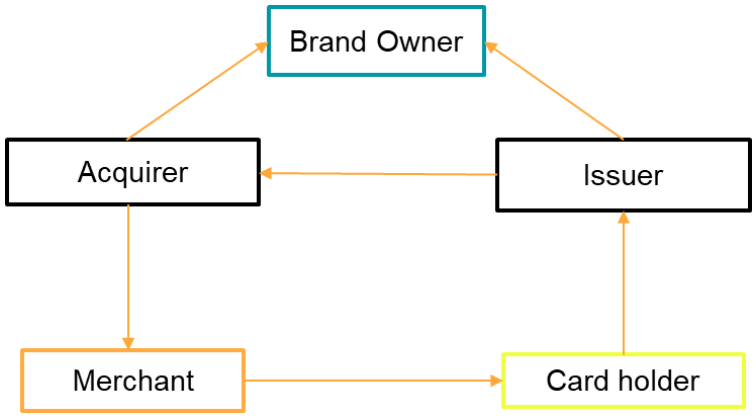

Figure one: Four party-scheme (Brazilian opened payment arrangement)

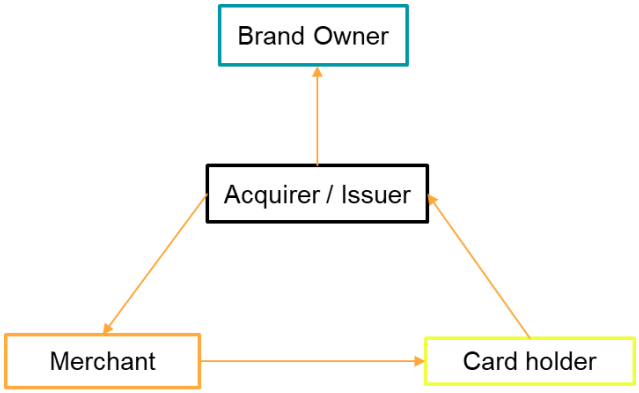

Figure two: Three party-scheme (Brazilian closed payment arrangement)

The payment institutions are the acquirer and the issuer, which can provide payment services. The Originator of the Payment Arrangement would be the Brand Owner, which licenses its brand to certain payment institutions, upon a payment of a fee.

2. BRAZILIAN PAYMENT ARRANGEMENT AND PSD2: A BRIEF COMPARISON

The Report from the Commission to the European Parliament and the Council on the application of the PSD2 on payment services, dated as of July 24th, 2013 offer us an excellent summary of the PSD and PSD2 history and implementations, most of the following remarks are direct references or transcriptions of it.[13]

The PSD entered into force on December 25th, 2007 with, with some Member States failing to achieve the then regulated deadline for its implementation, due to the need of each State Member to introduce a new compatible legal framework. Full harmonization and functionality across Europe took time, also in view of the twenty-five (25) optional provisions, meant to address each domestic market particularities.

PSD initially set four kind of entities allowed to develop payment services, which are: (i) credit institutions; (b) electronic money institutions; (c) post office giro institutions; (d) payment institutions and (e) the ECB and national central banks, when not acting in their capacity as monetary authority or other public authorities.

It is clear that PSD2 allows Central Banks and National Banks to develop payment services – provided, of course, that such practice does not conflict with its capacity of monetary authority.

PSD2 Annex I cover seven (7) different categories of payment services namely: (i) Services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account; (ii) Services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account. (iii) Execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider: (a) execution of direct debits, including one-off direct debits; (b) execution of payment transactions through a payment card or a similar device; (c) execution of credit transfers, including standing orders.

Execution of payment transactions where the funds are covered by a credit line for a payment service user: (d) execution of direct debits, including one-off direct debits; (e) execution of payment transactions through a payment card or a similar device; (f) execution of credit transfers, including standing orders; (iv) Issuing of payment instruments and/or

13 REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the application of Directive 2007/64/EC on payment services in the internal market and on Regulation (EC) No 924/2009 on cross-border payments in the Community (Text with EEA relevance). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0549&from=EN

acquiring of payment transactions; (v) Money remittance; (vi) Payment initiation services; (v) Account information services.

As viewed above, the Brazilian framework, including the very recent payment initiation service on a specific regulation called "PIX" (as will be decried bellow), refers to five (5) entities, on a much more restrict set of services, each associates with the respective entity: (i) the Originator of the Payment Arrangement is the entity responsible for setting the payments arrangement governing rules and the licensing of any trademarks associated thereto – we can relate this entity to the definition set in the PSD2 for Payment System and Payment Trademark, and correctly associated in the market to the owners of brands such as VISA, MasterCard and Diners; (ii) The Electronic Money Issuer are equivalent to PSD2 *electronic money institutions*; (iii) Issuer of postpaid payment instrument re equivalent to PSD2 *credit institutions;* (iv) Acquirer is the same as in PSD2, and (v) Payment transaction initiator is the same as in PSD2.

The Brazilian "Originator of the Payment Arrangement", which is associated to the brand or trademark used for the payment services has not equivalent in the PSD2, as already mentioned above. The Portuguese regulation also does not require a prior approval of the payment scheme, provided it does not breach the applicable laws, regulations and business rules.[14]

Also, the PSD2 has no equivalent for the term "Payment Arrangement", as something specifically created by a kind of service provider – rather the "Payment System" definition set in PSD2 as "a fund transfer system governed by formal and standardized provisions and common rules regarding the processing, clearing and/or settlement of payment transactions, along with the definition of "Payment brand" as the "a term, a sign, a symbol or a combination thereof, in physical or digital form, capable of showing the card payment system under which card-based payment transactions are carried out" and, finally, Payment Multibrand, as the "the inclusion of two or more payment brands, or payment applications of the same payment

14 Whereas in the Portuguese regulation, for example, as per article 151, it is clear that the payment scheme is supervised, not preapproved, as it is considered as a major offence *"the establishment of rules or provisions with equivalent effect in licensing agreements, rules on card payment schemes or agreements entered into between card acquirers and payees in breach of business rules laid down in Articles 6 and 8 (except second paragraph of paragraph 6), 10 (except paragraph 4) and 11 in Chapter III of Regulation (EU) No 2015/751 of the European Parliament and of the Council of 29 April 2015"* – although to operate as a service provider is necessary to obtain a prior licensing from Portugal Bank. There is no such a thing as the previous authorization of a payment scheme, nor in the PSD2. The Bank of Portugal has clear prudential and supervisory powers ser in articles 6 to 8 of Decree Law nº 91/2018, as of November 12th 2018.

brand, in the same payment instrument" reflects the fact that the SEPA and the PSD have origins in the financial markets self-regulation[15].

Not be free of criticism, the PSD2 and the Portuguese payment services regulation has a list of negative scope, on Article 3, which is a set a list of payment transactions or services to which the PSD does not apply. The EU 2019 Report consider such negative scope as would makes it difficult for consumers to figure out which activity falls under which regulatory framework.[16]

The list of negative scope comprises, for example, payment transactions made exclusively in cash directly from the payer to the payee, without any intermediary intervention; (b) payment transactions from the payer to the payee through a commercial agent authorized via an agreement to negotiate or conclude the sale or purchase of goods or services on behalf of only the payer or only the payee; (c) professional physical transport of banknotes and coins, including their collection, processing and delivery; (d) payment transactions consisting of the non-professional cash collection and delivery within the framework of a nonprofit or charitable activity; (e) services where cash is provided by the payee to the payer as part of a payment transaction following an explicit request by the payment service user just before the execution of the payment transaction through a payment for the purchase of goods or services; (f) cash-to-cash currency exchange operations where the funds are not held on a payment account, along a total of twenty four (24) exclusions.[17]

The Brazilian Payment arrangement, in this sense, is extremely more simple, as the exclusion applies only to the "the set of rules" governing the use of a payment instrument issued by a company, intended for the purchase of goods or services offered by it, is not characterized as a payment arrangement, or issued by an agency or governmental body for State purposes.

Low-value payments and e-money are regulated in Articles 34 and 53, setting principles for derogations over regulatory requirements and conduct of business rules for simple payment products for to low-value transactions.

The PSD provides for flexibility, as Member States can choose to reduce or double the amounts laid down in the provisions for national transactions as well as increase those

15 Report from the Commission to the European Parliament and the Council, *idem*.
16 Idem, ibdem. p.p. 3-4.
17 Article 4 of the Directive (EU) 2015/2366 of the European Parliament and of the Council, of 25 November 2015.

amounts for prepaid instruments. Although PSD2 is concerned about prudential risk and ensure the passporting[18] rule for State Members[19].

18 These concerns are jointly referred in paragraphs 47 and 48 of the PSD2 preamble, Directive (EU) 2015/2366 of the European Parliament and of the Council, of 25 November 2015: *"(47) It is important to ensure that all persons providing payment services be brought within the ambit of certain minimum legal and regulatory requirements. Thus, it is desirable to require the registration of the identity and whereabouts of all persons providing payment services, including of persons which are unable to meet the full range of conditions for authorisation as payment institutions. Such an approach is in line with the rationale of Special Recommendation VI of the Financial Action Task Force on Money Laundering which provides for a mechanism whereby payment service providers who are unable to meet all of the conditions set out in that Recommendation may nevertheless be treated as payment institutions. For those purposes, even where persons are exempt from all or part of the conditions for authorisation Member States should enter them in the register of payment institutions. However, it is essential to make the possibility of an exemption subject to strict requirements relating to the value of payment transactions. Payment institutions benefiting from an exemption should not benefit from the right of establishment or freedom to provide services and should not indirectly exercise those rights while being a member of a payment system. (48) In view of the specific nature of the activity performed and the risks connected to the provision of account information services, it is appropriate to provide for a specific prudential regime for account information service providers. Account information service providers should be allowed to provide services on a cross-border basis, benefiting from the 'passporting' rules."*

19 The *passporting rules*, nevertheless, were not entirely accommodated and even today the PSD2 is solely in force in the EEA, as explained in the Report From the Commission to the European Parliament and the Council: "*The number of "passported" payment institutions in Member States varies greatly across the EEA. In some countries, a significant number of payment institutions applied for passports; in others, no payment institutions have sought to obtain a passport to operate abroad21. For stakeholders, "passporting" is an important feature. Competent authorities tend to apply divergent approaches. Nevertheless, the introduction of the passporting regime is a significant change and although the effects of this provision on the market have not yet been witnessed, the PSD set a stable framework for a pan-European development of payment institutions*".

3. PIX – BACEN RESOLUTION Nº 1, OF 12 AUGUST 2020

The Central Bank of Brazil Resolution nº 1, as of August 12th, 2020 ("Resolution") introduced the *PIX payment arrangement*, which, as the name indicates, is a Payment Arrangement as defined by Brazilian Federal Law nº 12.865, as of October 9th, 2013, and is not a State Owned platform or infrastructure. The confusion, however, is understandable, after all, how could the Monetary Authority act in as private market payment service provider – in particular, how could it be a Originator of a Payment Arrangement, authorized and supervised by itself?

The Article 1 of the Resolution states that: "the PIX payment arrangement is instituted", and who is its originator? Now, item I of § 2 of Article 90 of the Resolution leaves no doubt: the "Central Bank of Brazil, as the originator of the PIX".

Additionally, it is important to note that Article 3 of the Regulation attached to Circular nº 3,682, as of November 4th, 2013, issued by the Central Bank of Brazil (PIX Originator), establishes that:

"Art. 3 The Originator of the Payment Arrangement must be constituted in the country as a legal entity with a corporate purpose compatible with the institution of payment arrangements." (emphasis added)

BACEN is a federal agency, created by Law nº 4,595, as of December 31st, 1964 and bound to the Brazilian Ministry of Finance. Its internal regulations are clear in stating: "the Central Bank has the purpose of formulating, executing, monitoring and controlling monetary, exchange rate, credit and financial relations policies abroad; the organization, discipline and supervision of the National Financial System (SFN) and the Consortium System; the management of the Brazilian Payment System (SPB) and the money supply services". Still, there is no provision in Law nº 4,595,as of December 31st, 1964, that BACEN has the competence to institute a payment arrangement or act directly in the private market as a payment service provider – such as, for example, entering into a licensing agreement under a payment scheme brand.

The Resolution seems to have justified BACEN's competence to act as monopolist of a market that it regulates in the Article 10, item IV, of Law nº 4,595, as of December 31st, 1964 – It happens that such provision governs BACEN's private attribution in "receiving the compulsory deposits mentioned in the previous item and, also, voluntary deposits in sight of financial institutions", that is, it does not authorize BACEN to act as an Originator of Payment Arrangement, nor as a payment service provider or a brand licensor in the private payment

markets: it does regulate the one of the most important prudential regulatory attributions under the Basel principles.

The other legal provisions cited by the Regulation as their preamble also do not help to resolve the the conundrum: (i) Article 10 of 10.214, of March 27, 2001 establishes that BACEN (jointly with Monetary Committee and Brazilian Securities Authority - CVM) will have the competence to lower the rules and instructions necessary to comply with the regulation of clearing houses and providers of clearing and settlement services, within the scope of the Brazilian payment system, and (ii) nothing in Arts. 6th, 7th, 9th, 10th, 14th and 15th of Law nº 12,865, as of October 9th, 2013 authorizes the regulator itself to act as a Originator of a Payment Arrangement, a payment service provider, or a licensor of a service provision market brand. On the contrary, its attributions are restricted to the regulation, standardization, supervision and monitoring of the Brazilian Payment System.

Evidently, as we reviewed above, would we be able to apply the PSD2 there would be no space for discussion, as Central Banks and National Banks could only develop payment services whenever in conflict with its capacity of being a monetary authority, and of course, when authorized by law.

It is true that PIX was widely reported, since December 2018, when BACEN informed that, through Communication nº 34.085, August 28th, 2019 that it would be responsible for defining the rules for the arrangement of instant payments that came to be called PIX, "for the implementation and operation of its unique and centralized settlement infrastructure and for the set and operation of the unique and centralized database of addressing data of the arrangement". Now, the entire public debate focused on the uniform rules of a payment arrangements, and even the Public Consultation Notice nº 76/2020 raised many doubts about the mandatory nature of the PIX brand, in particular, we highlight the questions presented by the Brazilian Institute of Studies Competition, Consumption and International Trade - IBRAC.[20]

Now, one could easily accept that the Brazilian Central Bank has authority to set the governing rules for the payment service market, as, for example under Circular nº 4,027, as of June 12nd, 2020, which is perfectly compatible and adequate with the purpose or a Monetary Authority. It is, though, difficult to make it compatible with the BACEN setting its own private brand for the private payment service market, notably as it is contrary to its own institutional interests and purposes.

20 Available at BACEN website: https://www3.bcb.gov.br/audpub/DetalharSugestaoPage?10.

The Brazilian Central Bank is not a State-Owned company, and could not, under any circumstances, develop a private activity in competition with private market agents, which are subject to the BACEN regulation. It is even worse to consider that, if PIX is to be offered as free brand, it will undoubtedly be an unbeatable *payment arrangement*: there will be no room for any new market entrant in Brazilian payment services: it seems that PIX might be a true State monopoly of dubious legality.

It is of notice to highlight that the Brazilian Financial System, unlike other Brazilian industries, has little or no interference from Brazilian Antitrust Authority Agency (CADE), in a sad chapter of Brazilian antitrust history[21]. The Central Bank is the all-powerful entity that regulates both the ex post and ex ante markets - and now, it seems, it is also a monopolist of instant payment methods.

Even though we can consider the PIX to be perfectly legal and constitutional, the singular role that BACEN intends to develop among the countries that currently have Open Banking systems is curious. It is not too much to remember that the payment arrangement most widely used in Portugal, for example, is owned by a private entity, and instituted by the SIBS Group, owner of the Multibanco brand.

Adherence to PIX is mandatory for all financial and payment institutions authorized to operate by BACEN with more than 500 thousand active customer accounts (demand deposit, savings, and prepaid accounts). From the date of publication, these institutions will have 90 days to adhere to the PIX, that is, until 11/10/2020.

Only a small portion of the market will have the freedom to join other Open Banking arrangements (if any), as this is a faculty granted to institutions below the limit.

Many payment institutions have already applied for membership in the PIX, but may reconsider this membership within 15 days of the publication of the Resolution: after this period, they must either require authorization, or they must adhere to the set of minimum regulatory standards established for the sector. This means that adherence to PIX result in regulatory cost, in any case.

PIX, as a payment arrangement, presupposes governance rules that are apparently democratic, and supposedly compatible with market competition, among them (art. 4) the "representativeness and plurality of institutions and participating segments", "non-

21 In the judgment of merger act no. 8012.006762 / 2000-09 the authority of the competent authority responsible for analyzing and authorizing mergers in the Brazilian Financial system was questioned, being submitted to General Attorney Opinion AGU/LA-01/2001 (attached to opinion GM-020), through which it was BACEN's private competence to assess the authorization of mergers, acquisitions, merger or any merger, including transfer of share control. Left Therefore, CADE's competence to assess mergers in the Financial System is excluded.

discriminatory access" and the "mitigation of conflicts of interest". This apparent openness is contradictory to the mandatory adherence, and to the fact that the arrangement's creator is the regulator who supervises it.

Also in this sense, to the extent that PIX has a permanent advisory committee (which subsidizes BACEN in defining the rules and operating procedures), the governance structure of PIX has the following members: (i) associations representing nationwide, which are already formed by large financial conglomerates, (ii) the providers and potential providers of information technology services (Circular nº 3,970, of November 28th, 2019, provides for the requirements and prohibitions applicable to the Service Provider Information Technology – "PSTI"), (iii) clearing and settlement clearinghouses and service providers that offer liquidity provision mechanisms within the scope of PIX, and finally, (iv) paying and receiving users, through representative associations nationwide.

It is evident that the first three member groups of the committee above represent large conglomerates and economic groups, while the representative national associations of "users and payers", because they are so dispersed, will certainly have no influence on the design of the PIX rules.

3.1 Schedule

The implementation phases of the PIX are as follows: the processes for identifying accounts subject to regulation will be carried out by a body called the "Transactional Account Identifiers Directory" or "DICT", whose operation will start on October 5, 2020, in restricted operation, and November 16, 2020, in full operation. The PIX will start operating on November 3, 2020, in restricted operation and on November 16, 2020, in full operation.

In spite of the governance rules of the Forum carried out by the aforementioned Advisory Committee, it will be up to the Central Bank itself to detail the complementary guidelines and determinations regarding the PIX sending and receiving transaction, but that is only within a restricted transition phase – after that, the Advisory Committee will have a broader role.

3.2. PIX Payment Arrangement Regulation

PIX, as a payment arrangement, has a set of manuals and specific rules detailed in different documents to be made available by BACEN, in particular: (i) PIX Brand Use Manual; (ii) PIX Initiation Standards Manual; (iii) Cash Flow Process Manual; (iv) Minimum Requirements for User Experience; (v) SFN Networking Manual; (vi) SFN Security Manual;

SFN Service Catalog; (vii) Communication Interfaces Manual; (viii) PIX Times Manual; (ix) Operational Manual; (x) Dispute Resolution Manual; and (xii) Penalties Manual.

The centralization of the PIX as an official payment arrangement of the Brazilian Central Bank will also have repercussions on the downstream and upstream markets. For example, Article 3 of the Regulation establishes that the "PIX key" and "QR Codes" will be used by DICT[22] to authenticate all transactions – this means that the provider of the PIX authentication solutions will have, in practical terms, the monopoly of this market in Brazil .

On the other hand, if there is an intention to promote competition, this resolution has not yet been made clear.

If the whole concept of Open Banking lies precisely in the opening of new markets, where the payment infrastructure centralized by the State is transferred to individuals, it is somewhat confusing that PIX is mandatory, and that the majority of its rules are set by the few existing conglomerates.

It could not even be estimated that the PIX has a limited scope to certain more sensitive transfers in the market, since it covers all possible payment transfer forms, namely: (i) purchase, based on deposit and domestic account, (ii) purchase, based on prepaid and domestic payment account, (iv) transfer, based on deposit and domestic account, and (v) transfer, based on prepaid and domestic payment account.

Regarding the procedures for executing the instant payment, the PIX admits the manual insertion of data by the paying user or the use of information sent or previously made available (reference code). Each operation will be linked to an individual or corporate taxpayer register number.

In addition, several "Identifier Code in the Brazilian Payment System" or "ISPB" will be created for each PIX participant.

PIX participants, similarly to the Portuguese SIBS Group, Multibanco brand, will be able to offer initiation of payments through a participant's main application, in terms of the number of users, which can be used by natural persons and which is accessible by cell phone.

There is also the functionality of scheduling operations, "Scheduled PIX", for operations on future dates.

22 The Central Bank of Brazil ICT Department.

3.3. PIX Brand Licensing

Another issue present in the new Regulation is the possibility for the Central Bank to establish, through regulation, a contract for the right to use of the PIX brand, which is exclusively owned by the Central Bank of Brazil. Participants authorized for the arrangement will have a temporary, non-exclusive and non-transferable license to use the brand, in its nominative and figurative forms.

The licensing shall be regulated under Article 139 of the Brazilian Industrial Property Code ("CPI"), which means that BACEN will retain the title of a commercial brand, a trademark, for use in the payment services private markets: it is not a collective brad nor a certification mark (which would be regulated by Articles 147 to 154 of the CPI): thus, there is no doubt that the PIX brand is set to directly compete with any payment arrangement brands in the Brazilian market.

It is evident that the consolidation of the PIX brand, both due to the huge reputation that BACEN, as Monetary Authority, attributes to it, and the fact that the platform will probably be free, will prevent the creation of any competitor to PIX.

4. Final Considerations - Regulatory Value and Interest

It is true that the Resolution contains important rules for the Brazilian Open Banking market, as it is obviously adherent to the BACEN regulation: such Resolution should rather establish the minimum standards for payment service systems and schemes, rather than compete with them: the possibility of several institutions of payment services in the Brazilian market would certainly bring great benefits to the final consumers and to the economy as whole – but such effect may be considerably hindered by the PIX effect.