

National Data Protection Commission

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OPINION/2021/151

i. Request

1. The Office of the Secretary of State for the Presidency of the Council of Ministers submitted to the National Data Protection Commission (hereinafter CNPD), for an opinion, the draft Decree-Law approving the regime for investment companies and transposing several directives relating to its operation - (Reg. DL 1240/XXII/2021).
2. The CNPD issues an opinion within the scope of its attributions and competences as an independent administrative authority with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57, in conjunction with subparagraph b) of paragraph 3 of article 58, and with paragraph 4 of article 36, all of Regulation (EU) 2016/679, of 27 April 2016 - General Regulation on Data Protection (hereinafter GDPR), in conjunction with the provisions of article 3, paragraph 2 of article 4, and paragraph a) of paragraph 1 of article 6, all of Law n° 58 /2019, of 8 August, which enforces the GDPR in the domestic legal order.
3. This decree-law transposes Directive (EU) 2019/2034, of the European Parliament and of the Council, of 27 November 2019, on the prudential supervision of investment firms, approving the Regime for Investment Firms.
4. Pursuant to the preamble, 'the prudential framework of investment firms is separate from the prudential regime of credit institutions, except in situations provided for in Union law, which correspond to large investment firms or of a systemic nature'.
5. Among the main changes introduced, we highlight the elimination of the current autonomous typologies of investment companies and the consequent consecration of a single type. In this way, the regulatory requirements come to result from the scope of the authorization, which defines the investment services and activities that the investment firm may exercise, and not from the typology of the entity, as is currently the case.
6. Note that the registration of these entities becomes unofficial. Finally, it should be noted that the Investment Firms Regime concentrates the supervisory functions relating to these companies in the Securities Market Commission (hereinafter CMVM).

II. Analysis

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PÂR/2021/116

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7. This decree-law also transposes Directive (EU) 2021/338, of the European Parliament and of the Council, of 16 February 2021, which amends the Markets in Financial Instruments Directive¹. This Directive adjusts, in particular, the regime for providing information to investors, who will now receive the required information in electronic format.

8. Finally, the Commission's Delegated Directive (EU) 2021/1269 of 21 April 2021 is transposed, which requires the integration and consideration of risk and sustainability factors in the fulfillment of duties related to governance and distribution of financial instruments and structured deposits.

9. In this way, this decree-law makes: a) First amendment to the Legal Framework for the Design, Marketing and Provision of Consultancy Services Regarding Structured Deposits, approved by Law no. 35/2018, of 20 July; b) First amendment to the Securities Central Regime, approved by Law No. 35/2018, of 20 July; c) Fifty-fifth amendment to the General Regime for Credit Institutions and Financial Companies, approved by Decree-Law No. 298/92, of 31 December, in its current wording; d) Fourth amendment to Decree-Law No. 222/99, of 22 June, amended by Decree-Law No. 252/2003, of 17 October, 162/2009, of 20 July, and 144/ 2019, of 23 September, which creates and regulates the functioning of the Investor Compensation System, in its current wording; e) Fortieth amendment to the Securities Code, approved by Decree-Law No. 486/99, of 13 November, in its current wording; f) Third amendment to Decree-Law No. 145/2006, of 31 July, amended by Decree-Law No. 18/2013, of 6 February, and 91/2014, of 20 June; g) Fourth amendment to Decree-Law No. 199/2006, of October 25, amended by Decree-Law No. 31-A/2012, of February 10, and by Laws No. 23-A/ 2015, of March 26, and 23/2019, of March 13; h) Eighth amendment to Decree-Law No. 357-C/2007, of October 31, as amended by Decree-Law No. 52/2010, of May 26, 18/2013, of

February 6, 40 /2014, of March 18, 157/2014, of October 24, by Laws No. 28/2017, of May 30, and 35/2018, of July 20, and by Decree-Law No. 56/2021, of 30 June.

10. However, from the point of view of the protection of personal data, not all the legislative changes introduced by the draft Decree-Law have legal relevance as they concern legal persons. However, the diploma provides for a significant set of processing of personal data of the holders of the management bodies of investment companies and of a regulated market management company,

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1 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61

PAR/2021/116

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National Data Protection Commission

holders of qualifying holdings in investment companies, consultants for autonomous investments and tied agents established in Portugal or in the host Member State.

11. Thus, among the amendments to the General Regime for Credit Institutions and Financial Companies, Article 199-i(8) stands out, which establishes that the CMVM is the supervisory authority competent to apply the measures provided for in chapter II of Title VIII to investment firms that carry out trading activities on their own account or activities involving the underwriting of financial instruments and/or placement of secured financial instruments, applying the suitability requirements of the members of the management bodies investment companies provided for in the Investment Companies Regime.

12. Likewise, paragraph 6 of article 10 of Decree-Law no. 357-C/2007, of 31 October, now extends to holders of qualifying holdings in investment companies that carry out the activity of management of multilateral trading systems or organized subject to the adequacy requirements contained in the Investment Firms Regime. In turn, paragraph 2 of article 16 extends the provisions of the Investment Firms Regime and the respective regulations to be adopted by the CMVM to the assessment of the requirements of suitability, professional qualifications and adequate availability of the holders of the management and management bodies. supervision of a regulated market management company and the people who effectively manage them.

13. In turn, article 301 of the Securities Code provides in paragraph 1 that the exercise of the activity of consultants for

autonomous investments depends on authorization from the CMVM, being granted only to reputable individuals who demonstrate qualification and professional aptitude in accordance with high standards of demand appropriate to the exercise of the activity and sufficient material means. It should be noted that under the terms of no. 7, the material requirements applicable to consultants for autonomous investments are established by CMVM regulation. Also noteworthy is the novelty introduced in paragraph 11 of article 323 of the financial intermediary's duty to keep a record of communications made when providing services to professional investors.

14. Regarding the amendment to the Legal Framework for the Design, Marketing and Provision of Consulting Services in relation to Structured Deposits approved in Annex to Law No. 35/2018, of 20 July, the addition of Article 2, -The one which establishes that credit institutions and entities authorized to provide consultancy services in relation to structured deposits provide customers with all the information required by this regime in electronic format.

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PÂR/2021/116

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15. In this sense, Article 2(c) now introduces the definition of 'electronic format', with Article 5(4) providing for the possibility that, in the event that the structured deposit agreement is concluded through a means of distance communication that does not allow the prior provision of information on the fees and expenses associated with the structured deposit, credit institutions may provide them in electronic format. It should be noted that the provision of information in electronic format, if it contains personal data, must occur in a secure manner in compliance with the principle of integrity and confidentiality provided for in paragraph 1 f) of article 5 of the GDPR.

16. It is now important to mention that the project adds to the RGICSF - Decree-Law no. 298/92, of 31 December, a set of provisions regarding the need to identify tied agents, established in Portugal or in a Member State and the persons responsible

for the management of tied agents². Thus, Article 43b provides in subparagraph iii) of subparagraph a) the reference to the address, in the host Member State, where documents and mention of the names of the persons responsible for the management of tied agents can be obtained; and in point b) that the identity of tied agents established in Portugal or in the host Member State, as applicable, is communicated to the supervisory authority of the host Member State; also point f) refers to the indication of the credit institution's intention to use tied agents in the host MS, as well as, if so, their identity. As regards Article 43c, paragraph 1(f) includes an indication of the credit institution's intention to use tied agents in the host Member State, as well as, if so, their identity and the Member State in which they are established; subparagraph h) states that following the communications referred to in Article 37(1) and Article 43(2), the identity of tied agents established in Portugal or in the host Member State, as applicable, is communicated to the supervisory authority of the host Member State. Finally, pursuant to paragraph 4 of article 61-B "The CMVM publishes the identity of the related agents of the investment firm established in the home Member State that provide investment services or activities in Portugal. It should be noted that paragraphs b) and c) of paragraph 2 of article 31 of the Regime for Investment Firms contained in the Annex to the draft Decree-Law also require the identification of the related agents and the persons responsible for their management and address. in Portugal of tied agents.

2 It should be noted that under the terms of paragraph 5 of article 199-A of the RJIFSC, the «Tied agent» is «a natural or legal person who, under the full and unconditional responsibility of a single credit institution or investment on whose behalf it operates, promotes investment services and/or services ancillary to investment services to clients or potential clients, receives and transmits instructions or orders from clients in relation to investment services or financial instruments, places financial instruments or provides advice to customers or potential customers in relation to those financial instruments or services.»

PAR/2021/116 3

National Data Protection Commission

17. The identification data of tied agents, in the case of natural persons, are necessary for the CMVM's supervisory activity, so their treatment is lawful in subparagraph e) of paragraph 1 of article 6 of the RGPD .

18. As for the Annex, referred to in article 2 of the Project, which creates the Regime for Investment Companies, Article 8 is highlighted, which establishes that the start of activity of investment companies in Portugal depends on prior authorization from the CMVM, which defines the investment services and activities, as well as the auxiliary services, that the Investment Company is authorized to provide or exercise.

19. From the point of view of data protection, paragraph 4 of this article is relevant, which provides that the authorization request is instructed in the terms of the European Union regulation on the authorization of investment companies. However, under the terms of Commission Delegated Regulation (EU) 2017/1934, of 14 July 2016, which complements Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on information and requirements for the authorization of investment firms, the authorization application must be accompanied by the name, legal structure (including information on whether it will be a legal person or, if authorized by national law, a natural person), address of the registered office ; contact details; identification number, copies of official documents, information about shareholders, information about the management body and the persons who manage the company (personal data, including name, date and place of birth, national personal identification number, if available, the person's address and contact details, the position to which the person is or will be appointed, a CV/vitaeque indicating the relevant academic qualifications and professional training, professional experience, documentation relating to their reputation and experience, in particular a list of reference persons including contact details and letters of recommendation.

20. The processing of this personal data is appropriate and necessary for the exercise of the CMVM's supervisory powers under the terms of no. principle of data minimization enshrined in Article 5(1)(c) of the GDPR.

21. It should be noted that the application for authorization of investment companies must, under the terms of the Commission's Delegated Regulation (EU) 2017/1934, of 14 July 2016, still be accompanied by criminal records of the holders of the management and the persons who manage the company, or investigations or criminal proceedings, relevant civil and administrative proceedings and disciplinary measures, including a ban on exercising the office of director of a company, or bankruptcy, insolvency or proceedings

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PAR/2021/116

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similar, namely through an official certificate or other equivalent document, for the last ten years.

22. However, such elements are necessary as the CMVM assesses the competence and suitability of the members of the management and supervisory bodies of investment companies, having to take into account, under the terms of subparagraph b) of paragraph 5 of article 30 .º-D of the RGICSF «the accusation, indictment or conviction, in Portugal or abroad, for crimes against property, crimes of forgery and forgery, crimes against the execution of justice, crimes committed in the exercise of public functions, crimes tax, crimes especially related to the exercise of financial and insurance activities and the use of means of payment and even crimes provided for in the Commercial Companies Code».

23. Therefore, since paragraph 4 of article 67 of the Regime for Investment Companies, which is being analysed, assigns to the CMVM the competence to carry out an assessment of the suitability of the members of the management and supervisory bodies, as well as the suitability of holders of qualifying holdings³, with the processing of personal data related to criminal convictions and offences being at stake, its legal basis lies in paragraph 5 of article 111 of Law No. 83/2017, of 18 August, which provides adequate guarantees for the rights and freedoms of data subjects, in accordance with Article 10 of the GDPR.

24. A note only regarding the duty of secrecy provided for in article 111 of the Investment Firms Regime. Paragraph 3 of this item provides that the information covered by the duty of secrecy may be disclosed in a summarized or aggregated form, as long as the entities concerned are not identified, or with the express and prior authorization of the authority or institution or entity concerned that provided the information. It should be noted that, if this information contains personal data, its disclosure complies with the legal data protection regime, so it is recommended to reformulate this article in order to safeguard the personal data protection regime - since, for the mere authorization of the institution or entity concerned does not serve, *prima facie*, as a legal basis for the disclosure of personal data of third parties.

25. In turn, pursuant to article 131 of the Investment Firms Regime, the CMVM draws up the regulations necessary to implement the provisions of this regime, namely as regards the criteria used to assess the suitability of members of governing bodies and of qualifying holdings in investment firms and instructional elements to be submitted in the application. It is recalled that whenever the legal diplomas that provide for the processing of personal data do not exhaust

³ It should be noted that under the terms of article 10, the CMVM consults the Bank of Portugal and the ASFP in advance on

the suitability of shareholders and the suitability and professional experience of the members of the management bodies of the Investment Firm to be constituted and of the people involved in the management of the same group

PAR/2021/116

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National Data Protection Commission

their regulation and refer the definition of aspects of the regime to other legal instruments, it is essential to subject such instruments to prior control by the CNPD, under penalty of defrauding, in this way, the provisions of subparagraph a) of paragraph 1 of article 6 . of Law No. 58/2019, of August 8.

26. Finally, under the terms of article 137, the CMVM may exchange information subject to a duty of secrecy with authorities of third countries if the authorities in question, in the CMVM's assessment, are subject to legal regimes of secrecy equivalent to those provided for in this regime. and in the Securities Code, if the transmission of personal data to these authorities and the respective processing is possible in accordance with national and European Union legislation on the protection of personal data, when the exchange of information contains such data; and if the information is necessary for the performance of resolution functions, by the authorities of the relevant third countries, considered equivalent to that provided for in the legislation on credit institutions, and may only be used for that purpose'. In turn, Article 138 provides for the conclusion of cooperation agreements with third countries for the exchange of information.

27. It should be noted that, in order for the transfers of personal data to a third country, provided for herein, to be in accordance with the provisions of the RGPD, it is necessary that, whenever that third State has not been subject to an adequacy decision by the of the European Commission, under the terms of article 45 of the GDPR, adequate guarantees are presented, and on condition that the data subjects enjoy enforceable rights as well as effective corrective measures, under the terms imposed by article 46 of this Union diploma .

28. The European Data Protection Committee has already commented in Opinion 4/2019⁴ on the Administrative Agreement for the transfer of personal data between the Financial Supervisory Authorities of the European Economic Area (EEA) and the Financial Supervisory Authorities of countries third parties, concluded under Article 46(3)(b) of the GDPR.

29. Thus, the transfers referred to in Articles 137 and 138 of the Investment Firms Regime under analysis must take place under the conditions and with the entities provided for therein.

30. Furthermore, the draft Decree-Law does not raise reservations from the point of view of personal data protection.

4 Available at https://edpb.europa.eu/sites/default/files/files/file1/2019-02-12-opinion.2019-4_art.60.esma_en..pdf

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PAR/2021/116 4v.

III. Conclusion

31. Thus, on the grounds set out above, the CNPD recommends:

The. The reformulation of paragraph 3 of article 111 of the Investment Firms Regime in order to establish that the disclosure of the information in question, if it contains personal data, complies with the legal data protection regime; and

B. The specification in article 131, that the regulations in question are subject to prior assessment by the CNPD.

Lisbon, November 24, 2021

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Maria Cândida Guedes de Oliveira (Rapporteur)