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DATA PROTECTION

OPINION/2020/106

## I. Order

The Insurance and Pension Funds Supervisory Authority (ASF) asked the National Data Protection Commission (CNPd) to issue an opinion on two Draft regulatory standards aimed at regulating the provision of information to this Authority by, respectively, the pension fund management companies and insurance companies for the purposes of exercising the supervisory powers legally entrusted to them.

The request made and the opinion issued now derive from the attributions and powers of the CNPD, as the national authority for controlling the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57 and paragraph 4 of article 36 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Regulation on Data Protection - RGPD), in conjunction with the provisions of article 3, no. Article 4(2) and Article 6(1)(a), all from Law No. 58/2019, of 8 August.

The assessment of the CNPD is limited to the rules that provide for or regulate the processing of personal data.

## II. appreciation

A) Draft regulatory rule that regulates the information that pension fund management companies must submit to the ASF

The Project in question aims to define the set of reports and elements of a financial, statistical and behavioral nature that pension fund management companies must submit to the Insurance and Pension Funds Supervisory Authority (ASF) for the purposes of exercising supervisory powers. that are legally committed to you.

Pursuant to paragraph 4 of article 150 of the Legal Regime of the Constitution and Operation of Pension Funds, approved by Law no. , the scope, the

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the periodicity and format of the information to be provided to ASF by pension fund management entities, necessary for

supervision purposes, which is now being implemented.

From the analysis of the Project, it appears that the essential information to be reported to the ASF is not related to identified or identifiable natural persons, so their communication to the ASF does not correspond to a personal data processing operation (cf. paragraphs 1) and 2) of article 4 of the GDPR). However, Articles 11 and 12 provide for the communication to this Authority of information on the identity of the provider of participants and beneficiaries for individual memberships to the designated open pension funds, as well as the contact details of the interlocutor privileged for the purposes of contacting that Authority in the context of managing complaints and responding to requests for information or clarification, as per Annex I to this Draft regulatory standard. The suitability and necessity of processing this data for the exercise of ASF's supervisory powers, provided for in articles 190 and 191 of Law no. data minimization enshrined in Article 5(1)(c) of the GDPR, the provisions of Annex I referred to above, however, give rise to some reservations as to its content, given the manifestly insufficient and unclear nature of its provisions.

This Annex, referred to in Articles 11 and 12 of the Project, concerns the right to information on the processing of personal data. It so happens, however, that the text under analysis confuses, in several points, the right to information to be provided by ASF in the context of the indirect collection of personal data, with the right to information, on a totally different level, that fund management entities of pensions have to provide to the data subjects in the context of the direct collection of the data, in accordance with Article 13 of the GDPR. This overlapping of plans for the right to information is reflected in some of its provisions, calling for the necessary clarification.

Bearing in mind this previous point, it is important to proceed with the analysis of Annex I, as a document that substantiates the right to information that ASF must provide to the holders of personal data. In the case of information to be provided when personal data are not collected from the data subject, they must include all the information referred to in paragraphs 1 to 4 of article 14 of the GDPR. personal data collected through this regulatory standard are processed by the ASF, with

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based on the exercise of public interest functions in which ASF is invested, as set out in Article 6.0(1)(e) of the GDPR, with the purpose of exercising supervisory powers that are legally assigned to ASF', and may also be processed by the ASF for the

following purposes: management of complaints submitted to the ASF; application of sanctions and dissemination of statistical data.

Pursuant to Article 6(3) of the GDPR, the legal basis for the processing of data referred to in Article 6(1)(e) is defined by Union law or the law of the Member State which the controller is subject or the purpose must be necessary for the exercise of public interest functions or the exercise of public authority vested in the controller. However, articles 190, 191 and 196, all of Law no. 27/2020, of 23 July, grant ASF the powers of supervision of pension funds established in Portugal as well as of fund management entities. of pensions authorized in Portugal, so the lawfulness of the processing of personal data is fulfilled for the indicated purpose.

With regard to the other subsequent purposes indicated, specifically the application of sanctions, the basis for the lawfulness of the data processing must be found in Article 10 of the GDPR. In fact, the processing of personal data related to infringements can only be carried out under the control of a public authority. As the ASF is a legal person governed by public law, with the nature of an independent administrative entity, endowed with administrative and financial and management autonomy, and which has the powers in the sanctioning field provided for in paragraph 5 of article 16 of the Statutes of the Authority Supervision of Insurance and Pension Funds approved in the Annex by Decree-Law no. of legitimacy.

As for the processing of data for statistical purposes, Article 5(1)(b) of the GDPR admits the compatibility of further processing for statistical purposes with the initial purposes in accordance with Article 89(1). of the same degree.

It should be noted that pursuant to recitals 156 and 162 and Article 89(1) of the GDPR, such processing is subject to an adequate guarantee of the rights and freedoms of data subjects, including the existence of technical and organizational measures that

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in particular ensure the principle of data minimization. It is therefore important that these measures are enshrined in the text under analysis.

It is therefore recommended to amend point a) of the Annex in order to contain the different legal grounds for the various purposes indicated, in compliance with point c) of paragraph 1 of article 14 of the GDPR.

A note only regarding the obligation provided for in Annex I to provide data for the purposes indicated. Since the treatments in

question are necessary for the exercise of public authority vested in the person responsible for the treatment, the obligation in question refers to the communication of data by pension fund management entities to ASF and not to the obligation to provide given by the data subject, so its mention in this context seems redundant. In fact, paragraph 1 of article 150 of Law no. 27/2020, of 23 July, provides that pension fund management entities must provide the ASF with the necessary information for supervision purposes. It is therefore recommended to clarify this precept in order to define that the context of the obligation is for the management entities to communicate to the ASF, thus moving away from the regime of paragraph 2 of article 13 of the RGPD, applicable only in collection of data by the managing entities and their holders.

A relevant question concerns point d) of Annex I, which, under the heading “Recipients.”, contains some legal inaccuracies. Thus, it begins by stating that «ASF is the recipient of the personal data collected». Such a statement is strange when the ASF is previously assigned the role of responsible for the processing of personal data. Furthermore, pursuant to Article 4(9) of the GDPR, public authorities that may receive personal data in the context of specific investigations under Union or Member State law are not considered recipients; the processing of these data by these public authorities must comply with the data protection rules applicable depending on the purposes of the processing.

Thus, as ASF is responsible for the processing of personal data in question and not the recipient thereof, it is recommended that this statement contained in the

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norm, which seems to result, once again, from the overlapping of different information rights.

In turn, also in paragraph d) of Annex I, it is stated that: «the personal data collected may also be shared under the terms of the legal regime of professional secrecy and exchange of information applicable to ASF»

However, although articles 202 and 203 of Law No. 27/2020 regulate the professional secrecy of the members of the ASF bodies and of the persons who exercise or have exercised functions therein, the principle of data minimization and the need to know principle, enshrined in Article 5(1)(c) of the GDPR. Thus, access to personal data should be limited to certain categories of professionals for whose activity they prove necessary.

Another point that deserves reflection concerns point f) of Annex I, concerning the transfer of personal data. The provision contained therein that "Personal data collected may be communicated under the terms of chapter V of the GDPR and other applicable data protection legislation" is clearly insufficient, not complying with the provisions of paragraph 1 f) of article 14. . of the GDPR. In fact, from this section it follows that the controller must inform the data subject of the transfer of personal data to a third country, indicating the existence of an adequacy decision adopted by the Commission, or, failing that, the reference to the appropriate safeguards. or appropriate and the means of obtaining copies thereof, or where they have been made available. It is therefore important that Annex I specifies the type of information to be provided to the data subject in the event of data transfer to a third country, and the mere vague and generic reference to Chapter V of the GDPR is not enough. It should be noted that for the transfers of personal data to a third country, provided for herein, to be in accordance with the provisions of the GDPR, it is necessary that, whenever that third State has not been subject to an adequacy decision by the European Commission , under the terms of article 45 of the GDPR, there is a collaboration agreement that presents adequate guarantees and that the enforceable and effective rights of the data subjects are foreseen, as well as effective corrective measures, under the terms imposed by article 46 of this diploma of the Union.

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Finally, a reference to the provisions of point g) of Annex I, concerning the rights of data subjects: in addition to the right of access and rectification, the data subject has the right to request limitation, opposition to processing and erasure of the data, and in relation to the latter "their exercise may suffer justified and proportional limitations in the balance with the pursuit of the public interest pursued by ASF in the specific case". While not questioning the possibility of these rights being limited, it is recalled that such limitations must be provided for in Union or Member State law (cf. Article 23(1) of the GDPR) provided that such limitation respects the essence of fundamental rights and freedoms and constitutes a necessary and proportionate measure, and not, as appears from the articles, remain at the disposal of the controller. Such legislative measures must include explicit provisions concerning, among others, the categories of personal data, the scope of the limitations imposed, the specific risks to the rights and freedoms of data subjects and the right to be informed about the limitation, in accordance with the provided for in Article 23(2) of the GDPR.

B) Draft regulatory standard amending Regulatory Standard No. 8/2016-R, of August 16

This Draft regulatory standard aims to amend Regulatory Standard No. 8/2016-R, of August 16, in the wording provided by Regulatory Standard No. 1/2018-R, of January 11, whose purpose is to regulate the provision of information by the supervised entities to the Insurance and Pension Funds Supervisory Authority (ASF) for the purposes of exercising the supervisory powers legally entrusted to it.

Under the terms of the preamble, the Project under analysis essentially intends to reflect in the national legislation, the changes introduced in the Implementing Regulation (EU) no. 2018/1844, of the Commission, of 23 November 2018, as well as the changes made by EIOPA on 25 June 2018 to the guidelines on the provision of information for the purposes of financial stability.

Law No. 147/2015, of September 9, approves the new legal regime for accessing and exercising insurance and reinsurance activities (RJASR).

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Article 81(1) of the RJASR determines that insurance and reinsurance companies subject to the supervision of the Insurance and Pension Funds Supervisory Authority must provide it with the necessary information for supervision purposes, taking into account the objectives supervision and for the performance of other legal powers entrusted to it, establishing subparagraph a) of no. previously defined.

The amendments made to articles 3, 24, 26, 27, 31, 32 and 35 of Regulatory Standard No. 8/2016-R, of August 16, as amended 1/2018-R, of 11 January, do not include the processing of personal data, since the information to be reported to ASF does not concern identified or identifiable natural persons (cf. paragraphs 1) and 2 ) of Article 4 of the GDPR). However, in paragraphs b), c), d) and f) of paragraph 2 and paragraph 9 of article 33, the communication to this Authority is provided for by insurance companies based in Portugal, by the branches of insurance companies based in another Member State of the European Union that carry out activities in Portuguese territory and by insurance companies based in another Member State of the European Union that carry out activities under the freedom to provide services regime, information regarding the

identification of the point centralized reception and response of complaints management and respective contact details, and any changes to these elements, in accordance with the provisions of article 18 of Regulatory Standard No. 10/2009-R, of 25 June, as amended by Regulatory Norm No. 2/2013-R, of January 10; information on the identity of the designated customer's provider, accompanied by a copy of the respective operating regulation, as well as any changes that may occur to these elements, in accordance with the provisions of article 19 of Regulatory Standard No. 10/ 2009-R, of June 25, amended by Regulatory Norm No. 2/2013-R, of January 10; the contact details of the privileged interlocutor for the purposes of contacting the ASF, within the scope of managing complaints and responding to requests for information or clarification, as well as the respective changes to these contacts, as established in article 20 of the Regulatory Standard No. 10/2009-R, of June 25, amended by Regulatory Norm No. 2/2013-R, of January 10; where applicable, information on the identity of the provider of participants and beneficiaries for individual memberships of designated open pension funds, together with the

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procedures that regulate its activity, as well as any changes that may occur to these elements, and all communications must be made in accordance with Annex VIII to this Draft regulatory standard, added by Article 6 of the Draft.

Also regarding the communications provided herein, the suitability and necessity of the processing of this data for the exercise of ASF's supervisory functions, provided for in articles 20 and 27 of Law No. 147/2015, of 9 September, in compliance with the principle of data minimization enshrined in Article 5(1)(c) of the GDPR, the provisions of Annex VIII referred to above, however, raises the same reservations as to its content, a since it is identical to Annex I of the Draft regulatory rule on the information that pension fund management companies must send to the ASF, as discussed above.

Thus, the considerations made in point A) of this Opinion are reproduced here.

### III. Conclusion

On the grounds set out above, and in relation to Annexes I of the Draft regulatory rule that regulates the information that pension fund management companies must send to the ASF and Annex VIII of the Draft added by article 6 of the regulatory rule amending the Regulatory Standard No. 8/2016-R, of August 16 (Annexes) the CNPD recommends:

a) The amendment of subparagraph a) of the Annexes in order to contain the various legal grounds for the various purposes indicated, in compliance with subparagraph c) of paragraph 1 of article 14 of the RGPD;

- b) The clarification of point b) of the Annexes specifying the context of the mandatory communication of the managing entities to the ASF;
- c) The deletion in paragraph d) of the Annexes of the statement that ASF is the recipient of the personal data collected;
- d) Also in subparagraph d) the clarification that access to personal data should be limited to certain categories of professionals for whose activity they prove necessary;

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- e) The densification of paragraph f) of the Annexes concerning the legal regime for data transfers; and
- f) The reformulation of subparagraph g) specifying that the limitation of rights can only occur through a legislative measure under the terms set out in paragraphs 1 and 2 of article 23 of the GDPR.

Lisbon, September 3, 2020

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