

NATIONAL DATA PROTECTION COMMISSION

OPINION No. 8/2018

I. Order

The Office of the Assistant Secretary of State and Finance sent the National Data Protection Commission (CNPd), for pronouncement, the draft proposal for a Decree-Law amending the General Regime for Collective Investment Undertakings, approved by Law no. 16/2015, of 24 February, the Legal Regime for Venture Capital, Social Entrepreneurship and Specialized Investment, approved by Law No. 18/2015, of 4 March and Decree-Law No. 77/2017, of June 30th.

The request made stems from the powers conferred on the CNPD by paragraph 2 of article 22 of Law no. 67/98, of 26 October, amended by Law no. Protection of Personal Data (hereinafter, LPDP) -, and the opinion is issued using the competence set out in paragraph a) of paragraph 1 of article 23 of the same legal diploma, being restricted to aspects related to data protection personal.

II. appreciation

The draft Decree-Law under examination makes the sixth amendment to Law No. 16/2015, of 24 February, which partially transposes Directives No. 2011/61/EU and 2013/14/EU, proceeding the review of the legal framework for collective investment bodies and the amendment to the General Regime for Credit Institutions and Financial Companies and to the Securities Code. Amends Law No. 18/2015, of 4 March, which partially transposes Directives No. 2011/61/EU, of the European Parliament and of the Council, of 8 June, and 2013/14/EU, of the European Parliament and of the Council, of 21 May, which ensure the implementation, in the domestic legal order, of Regulations (EU) No. 345/2013 and 346/2013, of the European Parliament and of the Council, of 17 April, and reviews the regime applicable to the exercise of venture capital investment activity. Finally, it also amends Decree-Law No. 77/2017, of 30 June, which creates measures to stimulate the capital market, with a view to diversifying the sources of financing for companies, and thus: a) regulates companies of securities investment for the promotion of the economy (SIMFE), establishing the respective legal regime; b) creates short-term debt certificates,

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making the third amendment to Decree-Law No. 69/2004, of 25 March, amended by Decree-Law No. 52/2006, of 15 March, and 29/2014, of 25 February; c) makes the twenty-eighth amendment to the Securities Code, approved by Decree-Law no. 486/99, of 13 November.

From reading the draft Decree-Law, it appears that, among the amendments introduced to the aforementioned legal diplomas, there is no specific rule aimed at their adequacy to the general regime for the protection of personal data.

However, some of the changes translate into new processing of personal data, so they must be analyzed:

a) Therefore, and taking into account the amendments contained in the Proposed Decree-Law to the General Regime for Collective Investment Undertakings, article 85 enshrines a duty on UCITS management entities to adopt all reasonable measures to ensure that the orders subscription and redemption requests relating to UCITS given by customers or participants, or transmitted by marketing entities are centralized and registered immediately after the respective receipt. A paragraph 2 is added containing the breakdown of the information contained in the registration, which includes the person who gives or transmits the order, the person who receives the order, the date and time of the order, the conditions and method of payment, the order type, the execution date of the order, the number of units subscribed or redeemed, the unit subscription or redemption price, the total subscription or redemption value of units, the gross value of the order including the subscription charges or the net amount after deducting redemption charges. Paragraph 3 of this article establishes that the managing entities of OIA observe, in this matter, the provisions of article 65 of the Delegated Regulation 231/2013.

However, from the analysis of article 85, it appears that the essential aspects of the processing of personal data that translate into the transmission and recording of information (listed in article 30 of the LPDP) are not regulated, and the above-mentioned Delegated Regulation nor does it make any reference to the legal regime for the protection of personal data.

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b) The Proposal under analysis also amends paragraph 1 of article 87-A, with the following wording: "Management entities

adopt specific, independent and autonomous means and procedures for their employees or collaborators to communicate at (emphasis added) facts, evidence or information relating to infractions or irregularities provided for in this general regime, and organize the treatment and conservation of the elements received». It should be noted that the current paragraph 3 of the aforementioned article remains in force, establishing that these means and procedures mentioned guarantee the confidentiality of the information received and the protection of the personal data of the complainant and the person denounced for the practice of possible infractions under the terms of Law No. 67/98, of October 26, Personal Data Protection Law (LPDP).

c) On the other hand, it should be noted that article 88 sets a minimum period of 5 years for the storage of all documents and records relating to UCITS managed by the respective management entities, without prejudice to stricter legal or regulatory requirements . We understand that the rule should define the maximum period of storage of personal data so that they are kept in terms of allowing the identification of their holders only for the period necessary for the purpose of collection under the terms of subparagraph e) of article 5. ° of the LPDP. It should be noted that paragraph 3 of article 88 requires the managing entities of OIA to comply with the provisions of article 66 of Delegated Regulation 231/2013, which in turn also provides that the records are conserved for a period of at least 5 years, without mentioning a maximum period of conservation.

However, taking into account that the data should only be kept as long as they are necessary for the pursuit of the intended purpose (cf. Article 5(1)(e) of the LPDP), and that the European legislator considered that its essential conservation for 5 years, but assuming that national legislation may set a longer period, it will be up to the Portuguese legislator to define the exact period of conservation. As there are no reasons for extending the retention of data beyond the period of 5 years, the CNPD recommends that in this article the period of 5 years is set as the exact period in which such retention is legitimate.

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d) In turn, and considering only the matter relating to the processing of personal data, articles 74-A and 79-0 are added to the General Regime for Collective Investment Undertakings, pursuant to article 5 of the Diploma in exam. Article 74-A, on the

information obligations relating to the execution of subscription and redemption orders, lists in its paragraph 3 the information that the management entities of UCITS must communicate to the participant to confirm the execution of each order subscription or redemption, including personal data relating to the participant. Article 79-0, relating to personal operations, stipulates in subparagraph b) of paragraph 2 that the management entity is promptly informed of any personal transaction carried out by a relevant person, requiring subparagraph c) of the same number to maintain a record of each personal transaction notified to the managing entity or identified by it; in addition, subparagraph d) extends the obligation to keep a record of personal transactions in which any relevant persons have participated to third parties who carry out certain activities on behalf of the management entity.

The amendments listed above result in the processing of personal data under the terms defined by article 3, paragraphs a) and b), of the LPDP. However, there is no direct reference to the legal regime for the protection of personal data, nor are the aspects that are required to respect this fundamental right (which are indicated in article 30 of the LPDP) regulated.

Therefore, it is recommended to insert an article that expressly refers to the legal regime for the protection of personal data, taking into account that Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, concerning the protection of individuals with regard to the processing of personal data and the free movement of such data (General Regulation on Data Protection - RGPD), is in force since May 25, 2016 and will apply from the day May 25, 2018.

III. Conclusion

In the draft Decree-Law proposal, various processing of personal data are foreseen without any specific regulation of their essential aspects, so the CNPD recommends the insertion of a rule that expressly refers to the legal regime of the protection of personal data, having note that the General Protection Regulation

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of Data is effective from May 25, 2016 and will be applicable from May 25, 2018.

The CNPD also recommends setting a maximum period for the retention of personal data in article 88, in accordance with the provisions of article 5, paragraph 1, e), of the LPDP (and article 5). 1(e) GDPR), suggesting that, in the absence of specific and identified reasons to a greater extent, it coincides with the period of 5 years.

Lisbon, March 6, 2018

Filipa Calvão (President)

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