

NATIONAL DATA PROTECTION COMMISSION

OPINION/2020/3

I. Order

The Securities Market Commission (hereinafter referred to as CMVM) asked the National Data Protection Commission (CNPd) to comment on the draft regulation that “seeks to implement the regulation of Specialized Alternative Investment Undertakings for credits created by Decree-Law 144/2019, of 23 September, as well as the content of the instructional elements regarding the authorization of venture capital management companies and venture capital investment companies.”

The request made and the present opinion fall within the attributions and powers of the CNPD, as the national authority for the control of the processing of personal data, in accordance with the provisions of subparagraph c) of paragraph 1 of article 57 and n. 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. , in Article 4(2) and Article 6(1)(a), all of Law No. 58/2019, of August 8 (which aims to ensure the execution , in the domestic legal order, of the GDPR).

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

II. appreciation

The CMVM is the authority responsible for supervising and regulating the markets for financial instruments, as well as the agents that operate in them, promoting investor protection.

Under the terms of the CMVM Public Consultation Document No. 8/2019, the "Project to amend the CMVM Regulation No. 3/2015, of 3 November on Venture Capital, Social Entrepreneurship and Specialized Alternative Investment" has , in short, the following framework:

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Process PAR/2019/75 1v.

"With Deere to-Law n.0 144/2019, of September 23, the figure of credit funds ("credit funds" or "OAiE of credits") was created, with a view to stimulating the capital market and the diversification of sources of financing for companies. The objective was to improve the financing of the economy, directly, through the granting of credit to companies, and indirectly, through the acquisition of credits, including non-performing loans, allowing address market failures in the demand and supply of financing

and improve complementarity with the banking sector and the risk capital and credit securitization sectors.

(...) This consultation document presents and justifies the first amendment to CMVM Regulation no. 3/2015, of 3 November (CMVM Regulation No. 3/2015) on Venture Capital, Social Entrepreneurship and Specialized Alternative Investment (draft regulation), with a view to implementing the legal framework applicable to OiAE credits [Undertakings for Specialized Alternative Investment in Credit], following the legal provision of this figure.

(...) The transversal review of the matter relating to the reporting of information to the CMVM is underway (...), namely the rules provided for in CMVM Regulation No. 3/2015.”

The draft regulation under analysis provides, on the one hand, for the processing of personal data relating to “members of the management and supervisory bodies and holders of qualified holdings” and, on the other hand, the processing of personal data of debtors, borrowers or others.

As for the former, the draft regulation adds Article 1a, which determines that requests for authorization from a venture capital fund management company and a venture capital investment company must be accompanied by the information contained of Annex I, among which the following stands out: «d) Regarding information on human, technical and material resources:

(i) Full name of the members of the governing bodies and information on the distribution of areas of responsibility, exclusivity, availability and discrimination between executive and non-executive members and between residents and non-residents in Portugal;

(ii) Full name of the persons responsible for investment management, internal control, risk management, internal audit, prevention of money laundering and terrorist financing, independent valuation of assets, and information, for each of them, on exclusivity, availability and information that allows

Process PAR/2019/75 2

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Ê NATIONAL DATA PROTECTION COMMISSION

demonstrate their experience, qualifications and competence for the performance of the function;»

In this regard, it is important to note that, under the terms of the GDPR, the processing of data in question will be lawful, among others, if the processing is necessary for the fulfillment of a legal obligation to which the data controller is subject (cf. article 6 .°, no. 1, point c), of the GDPR) or the exercise of the public authority vested in the controller (cf. point e) n.º 1 of the

same article).

According to the information provided by the CMVM, the processing of those personal data results from the legal obligation contained in article 67 of the Venture Capital Legal Regime (approved by Law No. by Decree-Law no. 144/2019, of 23 September), a rule that provides for the assessment of the suitability of members of the management and supervisory bodies and holders of qualifying holdings for the exercise of functions; hence, the processing of personal data relating to the holders of the governing bodies is legitimized insofar as it seeks to comply with the legal obligation arising from that rule, under the terms of subparagraph c) of paragraph 1 of article 6 of the RGPD.

With regard to the « Full name of persons responsible for investment management, internal control, risk management, internal audit, prevention of money laundering and terrorist financing, independent asset valuation, and information, for each of/ as, on exclusivity, availability and information that allows demonstrating its experience, qualification and competence to perform the function", the CMVM needs this information to verify compliance with the organizational requirements to which companies are bound under the terms of the Article 57 of the Venture Capital Legal Regime, so its treatment is based on lawfulness in paragraph e) n.º 1 of article 6 of the RGPD.

Furthermore, under the terms of subparagraph a) of paragraph 2 of article 5-C of the Legal Framework for Venture Capital, the granting of credits to persons

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Process PAR/2019/75 2v.

individuals, so the provision in paragraph 2 of article 9-D of the project, on the analysis of credit risk, will not include processing of personal data.

However, it is always pointed out that, if that regulatory provision still intends to cover natural persons, then the possibility of establishing automated profiles for the analysis of risk in the context of granting credit, by using an algorithm that determines eligibility, will constitute a processing of personal data subject to a special protection regime in the RGPD. In fact, the holders of personal data have the right not to be subject to decisions taken exclusively on the basis of automated processing, including the definition of profiles, which produce effects in their legal sphere (cf. GDPR). In cases where such decisions are taken within the scope of the conclusion of a contract, it would be necessary for the project to provide for measures to be adopted by those responsible for processing appropriate to safeguard the rights and freedoms and legitimate interests of the data subject (cf. a)

of Article 22(2) and 22(3) of the GDPR).

Even in the case of exclusively automated decisions that produce legal effects in the sphere of the data subject, the data controller is obliged to inform him of the existence of automaticity in the decisions, the establishment of profiles, underlying logic, as well as the importance and foreseen consequences. of such processing for the data subject (cf. point g) of paragraph 2 of article 14 of the GDPR).

Now considering other aspects of the regime, it is important to mention the need to establish in the regulation a specific maximum period of data retention, and the CMVM should not limit itself to reproducing the principle of limitation of retention provided for in subparagraph e) of no. of article 5 of the GDPR. Also because the information regarding the maximum period for the retention of personal data must be provided to the respective holder (cf. point a) of paragraph 2 and paragraph a) of paragraph 3 of article 14 of the GDPR).

Likewise, with regard to transfers to third countries or international organisations, it would be important for the regulation to establish under what terms and on what grounds of legitimacy they will be admissible.

Process PAR/2019/75 3

/ NATIONAL DATA PROTECTION COMMISSION

Finally, the CNPD considers it convenient that the draft regulation in question makes reference to the RGPD, highlighting some of the main obligations arising from it, namely regarding the adoption of security measures and the provision of information on the processing of data. personal.

III. Conclusion

Based on the above grounds, the CNPD recommends that the Project provide for:

- a) The maximum period of storage of personal data, suitable for the pursuit of the intended purposes;
- b) The conditions that legitimize the transfer of personal data to third countries or international organizations;
- c) A reference to the legal data protection regime, in particular with regard to the duty of information and security measures.

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