

I. Order

1. The Insurance and Pension Funds Supervisory Authority (ASF) asked the National Data Protection Commission (CNPD) to comment on the draft regulatory standard that establishes the elements and information that must accompany the prior communication of the projects of acquisition, increase or decrease of a qualifying holding in an insurance or reinsurance company and in a pension fund management company and the communication of the constitution of encumbrances or charges on a qualifying holding in an insurance or reinsurance company and in a fund management company of pensions.

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.

II. Analysis

3. Pursuant to paragraph 3 of article 162 of the legal regime for accessing and exercising the insurance and reinsurance activity (RJASR), approved by Law no. 147/2015, of 9 September, and no. 1 of article 77 of the legal framework for the constitution and operation of pension funds and pension fund management entities (RJFP), approved by Law No. as a regulatory rule, the elements and information that must accompany the prior communication of projects for the acquisition, increase and decrease of qualified holdings, respectively, in an insurance or reinsurance company and in a pension fund management company.

4. In turn, paragraph 1 of article 174-A of the RJASR and paragraph 1 of article 89 of the RJFP provide that it is the

responsibility of the ASF to implement, by regulatory rule, the provisions of the chapter on qualifying holdings applicable, respectively, to insurance and reinsurance companies and pension fund management companies, namely with regard to the existence of qualifying holdings by acting in concert or through indirect holdings. The ASF may also, by means of a regulatory rule, subject to the provisions of the aforementioned chapter on qualifying holdings, the acquisition of holdings independently

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thresholds, provided that they allow the proposed acquirer to exercise significant influence over the management of the company.

5. On the other hand, ASF is also responsible for establishing, by regulatory rule, the elements and information that must accompany the communication of any legal transaction from which the constitution or the possibility of future constitution of any encumbrances or charges on voting rights or of capital constituting a qualifying holding in an insurance or reinsurance company, pursuant to Article 174(3) of the RJASR and Article 88(1) of the RJFP.

6. On 1 October 2017, the Joint Guidelines of the European Supervisory Authorities on the prudential assessment of acquisitions and increases in qualifying holdings in financial sector entities came into force, clarifying the procedural rules and criteria for the assessment prudential approach to acquisitions and increases in qualifying holdings in financial sector entities.

7. Thus, under the terms of the preamble, it is necessary to adjust the regime provided for in Regulatory Standard No. 3/2016-R, of May 12, to the provisions of the Joint Guidelines, as well as to update the set of elements and information that must accompany the prior communication of projects to acquire or increase a qualifying holding in accordance with the provisions of the aforementioned Joint Guidelines. Thus, the draft regulatory standard under analysis implements these changes and repeals Regulatory Standard no. 3/2016-R, of 12 May.

8. The regulatory rule aims, under the terms of article 1 of the project, to establish the elements and information that must accompany 'a) Prior communication of projects for the acquisition, increase and decrease of qualifying holdings in an insurance company or reinsurance and in a pension fund management company subject to the supervision of the ASF; b) The communication of any legal transaction resulting from the constitution or the possibility of future constitution of any encumbrance or charges on voting rights or capital that constitute a qualified participation in an insurance or reinsurance company and in a pension fund management company subject to the supervision of the ASF'. The project also establishes the criteria for the verification of cases of the existence of qualified holdings by acting in concert or through indirect holdings, as well as the terms of compliance with the obligation of prior communication in these cases. Finally, it defines the regime applicable to the acquisition of shares, as long as they allow the proposed acquirer to exercise significant influence over the management of the company, whether that influence is exercised or not.

9. Within the scope of communications to the ASF, prior communication of projects for the acquisition and increase of qualifying holdings must be accompanied by the general information provided for in Annex I and,

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if the proposed acquirer obtains powers to appoint members of the management body and other persons who effectively manage its activities, it must specify the elements provided for in point 1.3. of Section I of Annex II. Under the terms of paragraph 3 of article 2, the communication must also be accompanied by the declaration provided for in Annex IV, duly signed, together with the following elements: a) Simple photocopy, front and back, of the identification document (ticket identity card, citizen's card or equivalent document) of the proposed natural acquirer or of the legal representatives of the proposed legal person acquirer, or of the proposed acquirer's representative or, alternatively, qualified electronic signature or recognition of the respective signature on the declaration. The same is required when prior notification of plans to reduce qualifying holdings (cfr. subparagraph e) of article 6).

10. The CNPD expresses, once again¹, the reservations that the copy of the identification document raises regarding the value of the proof of identity, since the digitization of an identification document is easily manipulated, thus not guaranteeing the veracity of the data, in disregard of the principles of accuracy and completeness of personal data enshrined in points d) and f) of paragraph 1 of article 5 of the GDPR. It is reaffirmed that the simple copy of the identification documents constitutes a document without any probative legal value, precisely because of its ease of handling, so it is recommended to review subparagraph a) of paragraph 3 of article 2 of the Project.

11. It should be noted that the prior communication of projects for the acquisition and increase of qualifying holdings must also be accompanied by a criminal record certificate of the persons identified in point 3 of Section I-A (acquiring proposal) and in points 3.5 (information regarding each one of the members of the management body and other persons who effectively manage the activities of the legal person as well as that relating to all shareholders with a significant influence on the management) and 4. of Section I-B of Annex I, or in the case of a foreign citizen, equivalent document, pursuant to paragraphs 8 to 12 of article 68 of the RJASR or paragraphs 8 to 12 of article 113 of the RJFP. The project here follows the provisions of paragraph 8 of article 68 of the RJARS and paragraph 8 of article 113 of the RJFP regarding the obligation to present the criminal record to prove the suitability of the people who effectively manage the company or management company, supervise it or are responsible for key functions or perform key functions, so the basis for their collection lies in subparagraph c) of paragraph 1 of article 6 in conjunction with article 10. of the GDPR.

12. In turn, Annex I concerns general information about the proposed acquirer as a natural person, regarding personal information, professional experience, suitability, financial information (here including

1 See Opinion No. 31/2017, of May 17, 2017, available at https://www.cnpd.pt/bin/decisoes/Par/40_31_2017.pdf and also Opinion/2020/142, of December 3, 2020 available at

<https://www.cnpd.pt/decisoes/historico-de-decisoes/?year=2020&type=4&ent=>

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a description of the financial and non-financial interests or relationships such as family relationships of the proposed acquirer with current shareholders, persons authorized to exercise voting rights, members of the management body or senior directors of the entity object of the proposed acquisition) and when a legal person (including identification of all shareholders with significant influence on management, identification of individuals who own or control the proposed acquirer and/or on whose behalf the acquisition is carried out, identification of all directors who will manage the assets under the terms of the document of the trust, identification of all persons who are beneficial owners or constituents of the assets of the trust, identification, professional qualification and suitability of the members of the management bodies, of the other persons who effectively manage the activities of the legal person and suitability of the shareholders with significant influence on the management of the legal person, idonei data and financial information as described above. It also includes information about the acquisition and its financing. The processing of this personal data is appropriate and necessary for the exercise of ASF's supervisory powers, provided for in articles 190 and 191 of Law 27/2020, of 23 July, in compliance with the principle of data minimization enshrined in the Article 5(1)(c) of the GDPR.

13. In turn, Annex II - Additional information related to the relevance of the qualifying holding to be acquired - provides that in the case of a qualifying holding with change of control, the proposed acquirer must provide the elements relating to the impact of the acquisition on the system of governance of the entity object of the acquisition proposal, specifying for each person to be designated as a result of the acquisition, the elements foreseen in point 3. of Section I-B of Annex I, as well as a description of the financial and non-financial relationships, such as family or close to the person and their close family members with members of the management body and those responsible for key functions and also with the shareholders of the entity object of the acquisition proposal and of the respective parent company and subsidiaries, if it is part of a group. With regard to professional qualifications, supporting documents must be presented (list of reference persons, and their contacts, letters of recommendation, among others). Note also for the appointment of those responsible for key functions in the areas of accounting, auditing, internal control and compliance verification. Annex 111 regulates the information to be presented if the

acquisition or increase of an indirect qualifying holding resulting from the holding of capital rights in a company does not imply the exercise of any influence on the respective management. Thus, in relation to the data described in Annexes II and III, ASF needs this information for the exercise of its supervisory powers, so its treatment is based on lawfulness in subparagraph e) of paragraph 1 of article 6 of the GDPR

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14. As a final note, it should be noted that Annex V substantiates the data subjects' right to information, provided for in articles 13 and 14 of the GDPR. Regulatory rule no. 3/2016-R, of 12 May, which is now revoked, was silent on this matter, so the express consecration of this right is marked as very positive, contributing to the transparency of the treatment. Here, the information regarding the person responsible for the processing of personal data, the basis and purpose of the same, period of storage of the data, recipients, inexistence of automated individual decisions, rights of data subjects, contacts and form of complaint. Not questioning the information set out in Annex V, it is only important to note, in relation to subparagraph d)2, that the legal regime of professional secrecy invoked herein is not to be confused with the grounds of lawfulness of data communication, although regulated in parallel in chapter II of Law No. 27/2020. In fact, despite Articles 202 and 203. 27/2020 regulate the professional secrecy of the members of the ASF bodies and of the people who exercise or have exercised functions in it, this is only a duty of special confidentiality that falls on certain professional categories, not directly legitimizing the sharing of personal data. Therefore, it is recommended to reformulate this section, eliminating the reference to professional secrecy, in order to clarify its meaning - suggesting that the sharing of personal data be based directly on article 204 of the same legal diploma and also on the Code Penal Code and the Criminal Procedure Code.

III. Conclusion.

15. Under the terms and on the grounds set out above, the CNPD recommends:

The. The reformulation of subparagraph a) of paragraph 3 of article 2 of the draft regulatory rule in the part relating to the presentation of a simple photocopy, front and back, of the identification document of the proposed individual acquirer or of the legal representatives of the proposed individual acquirer collective agreement, or the representative of the proposed acquirer,

favoring other forms of proof of identity; and

B. Clarification of point d) of Annex V, eliminating the reference to professional secrecy, invoking only the legal regime for exchanging information applicable to the ASF.

Approved at the session of February 23, 2021

Filipa Calvão (President)

2 “The personal data collected may also be shared under the legal regime of professional secrecy and exchange of information applicable to ASF. Access to personal data by persons performing functions at ASF is limited to certain categories of professionals for whose activity they are necessary»

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