RRP Advogados

DATA PROTECTION FLASH

Portuguese GDPR Implementation Act

The new Portuguese GDPR Implementation Act has been officially implemented, under Law 58/2019, of August 8th (the "**Implementation Act**"), which ensures the implementation, in the national legal order, of Regulation (EU) 2016/679 of the Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("**GDPR**").

Among the matters regulated by the Implementation Act, we highlight the following:

	What the Implementation Act states
Processing of biometric data for attendance and access control of employees	The processing of employees' biometric data is only considered legitimate for the purposes of control of attendance and access to the employer's facilities. It should be ensured that only representations of biometric data are used and that their collection process does not allow the reversibility of such data.
Employees' consent	The Implementation Act establishes the conditions under which employees' consent is not required for the processing of personal data. Thus, and unless otherwise provided by law, employees' consent to the processing of personal data may be waived when: 1) such processing is necessary for the performance of the employment agreement or of a related contract, as well as for preparation of the execution of such agreements; and 2) a legal or economic advantage results from the processing to the employee. In all other cases, an

	alternative ground of legitimacy will have to be sought if possible.
Processing of personal data at the workplace	It is established that the processing of employees' personal data should be subject to the purposes and limits set out in the Labour Code and in specific legislation. Also, the use of recorded images and other personal data recorded through CCTV or other technological means of remote control obtained in the workplace is limited to criminal proceedings, and can only be used against the employees in disciplinary proceedings in the extent that they are used in criminal proceedings.
Data processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes	Data processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall include anonymization or pseudonymization of the data whenever the purposes of the processing can still be reached. In the case of processing for statistical purposes, the obligation to anonymize or pseudonymize the data is also required to ensure the protection of data subjects, notably the impossibility of reidentification once the statistical operation is completed. When personal data is processed for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, the rights of access, rectification, limitation of processing and opposition under Articles 15, 16, 18 and 21 of the GDPR may be restricted if those rights are likely to render impossible or seriously impair the achievement of the objectives of the processing. Consent to the processing of data for scientific research purposes may cover several research areas or may be given only for specific research domains or projects, and, in any case, the ethical standards recognized by the scientific community must be respected.
Processing of health and genetic data	The Implementation Act establishes that the processing of health data and genetic data should only be carried out by a professional who is bound by confidentiality. Access to health and genetic data should be done exclusively by electronic means, unless it is technically impossible, or if the data subject expressly states otherwise; further disclosure or transmission is prohibited. A duty of confidentiality is also imposed on all employees of the controller who have access to health data. This duty of confidentiality is extended to all employees who, in the context of monitoring, financing or supervising health care activity, also have access to the data. The Implementation Act sets out the obligation to notify the data subjects of any access to their personal data, and the duty of the controller to ensure the provision of such a traceability and notification mechanism; the technical details are to be the object of separate legislation. Finally, the Implementation Act states the possibility of organizing health-related data in centralized databases or registers based on single platforms, when processed for the purposes of the GDPR and national law, provided that the

	safety and inviolability requirements set out in the GDPR are met.
Child consent in relation to information society services	The Implementation Act sets the age of consent for children at 13 years of age. Until then, it will be up to the holders of parental responsibility to give consent on their behalf.
Preliminary authorization system	By implementing the self-accountability model introduced by the GDPR, the Implementation Act declares the termination of all legal rules providing authorizations or preliminary notifications of data processing to the Portuguese Data Protection Authority, the Comissão Nacional de Protecção de Dados Pessoais (hereinafter "CNPD"), with effect from the date of entry into force of the GDPR. However, it is established that the sound capture associated to the video surveillance is still subject to previous authorization of CNPD in the future, unless the facilities are closed to public. It is established, however, that notifications and applications for authorization already decided by the CNPD at the time of the entry into force of the Implementation Act, but not yet published, remain valid and shall be published, while applications pending in the CNPD on the same date expire with the entry into force of the diploma. Entities who hold authorizations previously issued by CNPD, as well as their processors, are exempted of performing the data protection impact assessment of the processing covered by the authorization (but still subject to the other duties imposed by the GDPR).
Deceased persons	The law extends the protection conferred by the GDPR to deceased persons in relation to the following types of personal data: 1) special categories of data, 2) intimacy of the private life, 3) image and 4) communications. It is also established that the exercise of the rights of data subjects set out in the GDPR, namely the rights of access, rectification and deletion shall in this case be exercised by whom the deceased person has designated for this purpose or, in the absence of such designation, by the heirs; however, the data subjects may also validly express the will to restrict the exercise of these rights after their death.
Scope of administrative offences	The Implementation Act states that both private and public entities are generally subject to administrative offence procedures for violation of the GDPR, but with the possibility, in the case of the latter, to request an exemption from fines from CNPD, for a period of up to three years; the request shall be reasoned and can be refused. However, the Implementation Act does not set out the criteria on which the CNPD should base its decision.
Communication of personal data between public entities and processing for different purposes	In exceptional circumstances of duly substantiated relevant public interest, the processing of personal data by public entities for purposes other than those that determined the collection is permitted, as well as their transmission between public entities for purposes other than those that determined the collection. In the latter case, this matter shall be governed by protocol.
Accreditation of certification bodies and certification	It is the responsibility of the CNPD to prepare the draft criteria for the accreditation of codes of conduct monitoring bodies and certification bodies, which should be submitted to the European

	Data Protection Board, and to ensure the subsequent publication of the criteria if approved. The competent authority for the accreditation of data protection certification bodies is IPAC, I.P., based on the criteria to be defined by the CNPD.
Delimitation of public authorities obliged to appoint a Data Protection Officer	The Implementation Act identifies the public entities that are obliged to appoint a Data Protection Officer, which are: the State; the autonomous regions; local authorities and supranational entities provided for by law; independent administrative entities and the Bank of Portugal (Banco de Portugal); public institutes; public high education institutions; companies from the state business sector and from regional and local business sectors; and public associations.
Data Portability	When the interoperability of the data is not technically possible, data subjects who exercise the right to data portability before the Public Administration shall have the right to have their personal data delivered to them in an open digital format, in accordance with the National Digital Interoperability Regulation.
Video surveillance (CCTV)	In the area of video surveillance, the Implementation Act sets out as requirement for this type of processing that the purpose is the protection of persons and assets. Also, the conditions of processing remain the same as imposed by the previous law, namely the prohibition of the capture of images in the following areas: (i) public roads or adjacent areas; (ii) cash dispenser typing zones or other ATM equipment; iii) inside areas reserved for clients or users where privacy must be respected (toilets, waiting areas and changing rooms); and iv) areas reserved for employees where privacy must be respected (cafeterias, toilets, changing rooms), in addition to the prohibition of sound capture (which is only allowed with the permission of the CNPD or when the facilities are closed).
Freedom of expression and information	The Implementation Act provides that the exercise of freedom of information, especially when revealing special categories of data and data of deceased persons, shall respect the principle of human dignity, as well as the constitutional and legally established rights of personality. It is also stating that the Processing for journalistic purposes must comply with national legislation on access and exercise of the profession of journalist, which seemingly indicates that only journalists will be able to shield themselves from freedom and information to evade the rules of protection of personal data. It is also established that the exercise of freedom of expression does not legitimize the disclosure of personal data, such as addresses and contacts, except those that are generally known.
Publication of personal data in public contracts	In the context of public contracts, it is established that personal data other than name should not be published, provided that the name is enough to guarantee the identification of both (or all, if applicable) of the parties.

Remedies, liability and penalties	The Implementation Act establishes as criteria for determining the measure of the fine, in addition to those provided for in the GDPR, the following: (a) the economic situation of the agent in the case of a natural person or the turnover and annual balance sheet in the case of a legal person; (b) the continuing character of the infringement; c) The size of the entity, considering the number of employees and the nature of the services provided. It is further stipulated that, except in case of willful misconduct, the filing of an infringement proceeding depends on the CNPD's prior warning of the agent to comply with the omitted obligation or reinstate the breached prohibition within a reasonable time. The criminal regime for the protection of personal data remains broadly unchanged. However, the omission of notification or application for authorization isn't punished anymore, due to the withdrawal of the old prior control regime.

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