
Intellectual Property, Media and IT

Legal Flash | Portugal

August 9, 2019



Law no. 58/2019 approved, ensuring the implementation of the GDPR in the Portuguese legal system



Law no. 58/2019 approved, ensuring the implementation of the GDPR in the Portuguese legal system

Yesterday, August 8, 2019, Law no. 58/2019 was approved, ensuring the implementation of Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, on the protection of natural persons with regard to the processing of personal data and the free movement of such data (“GDPR”).

We will point out the main aspects of Law no. 58/2019, which enters into force today.

- **Territorial scope**

It is applicable to the processing of personal data carried out in the national territory, irrespective of the public or private nature of the controller or processor, even if the processing is carried out in compliance with legal obligations or in the scope of the pursuit of public interest missions, being also applicable to the processing of personal data carried out outside the national territory when:

- i) The processing is carried out within the scope of the activity of a business placed in the national territory,
- ii) The processing affects data subjects which are in the national territory, when the processing activities take place in accordance with article 3 (2) of the GDPR; or
- iii) The processing affects data that is registered in consular posts, whose data subjects are Portuguese persons residing abroad.

- **Data Protection Officer**

Article 37 (5) of the GDPR establishes the terms under which the Data Protection Officer (DPO) is appointed, stating that no professional certification is required for this purpose, and that it exercises its duties with technical autonomy before the controller or the processor.

Bearing the above, it is important to highlight articles 11 and 12 of Law no. 58/2019 which regulate the duties of the DPO in public entities, providing for the mandatory appointment thereof, namely, for the State, autonomous regions, local authorities, etc..

The appointment of a DPO in private entities follows the provisions of article 13 of Law no. 58/2019, which follows the GDPR: the controller and the processor shall designate a DPO in any case where the main activity involves:

- i) Processing operations which, due to their nature, scope and/or purpose, require a regular and systematic monitoring of data subjects on a large scale, or
- ii) Large-scale processing operations of special data categories in accordance with article 9 of the GDPR, or of personal data relating to criminal convictions and offenses in accordance with article 10 of the GDPR.



- **Personal data of deceased persons**

Concerning the personal data of deceased persons, article 17 foresees that such data is protected under the terms of the GDPR and of Law no. 58/2019. If this data is integrated in special categories of personal data, or when if it concerns the private life, the image or data related to communications, except for the cases provided for in article 9 (2) of the GDPR. The data subject rights, in particular the rights of access, rectification and erasure, shall be exercised by whom the deceased person has designated for that purpose or, failing that, by their respective heirs.

- **Retention period of personal data**

Article 21 provides, like the GDPR, that the retention period of personal data is the one established by a legal or regulatory norm or, failing this, the one necessary for the pursuit of the purpose.

However, paragraph 3 of this article has a particular interest, since it provides that when personal data is necessary for the controller, or the processor, to prove the compliance with contractual or other obligations (e.g. legal obligations), it may be retained until the expiration period of the correlative rights has elapsed. In addition, paragraph 6 of this article is also relevant, as it provides that data on contributive declarations for retirement purposes may be retained without deadline, in order to assist the data subject in the reconstruction of its contributory career, provided that appropriate technical and organizational measures are adopted to ensure the rights of the data subject.

- **Processing of data by public entities**

Article 23 regulates the processing of personal data by public entities for purposes other than data collection, establishing that the transmission of personal data between public entities for purposes other than those determined by the collection shall not be ordinary and should be duly justified to ensure the pursuit of the public interest.

- **Labor relations**

Another relevant provision is the one included in article 28, which specifically regulates work relations, providing in its paragraph 3 that, unless legally foreseen, the consent of the worker does not constitute a lawful basis for the processing of its personal data. In addition, paragraphs 4 and 5, establish the regime for the use of video systems or other technological means of remote surveillance, providing that the captured images may only be used in the scope of criminal proceedings, and that in such cases they may also be used for the purposes of disciplinary liability.

- **Health and genetic data**

Concerning health and genetic data, article 29 provides for its processing regime. Predictably, the content of paragraph 6 of this article will raise interpretation doubts, as it



establishes that the data subject should be notified of any access to its personal data, and that the controller shall be responsible for ensuring the availability of such traceability and notification mechanism. Paragraph 7 of this article also establishes that the minimum safety measures and technical requirements inherent to the processing of these data shall be approved by decree of the government members responsible for the areas of health and justice.

- **Administrative protection**

Without prejudice to the right to submit a complaint to the Portuguese National Data Protection Commission (“CNPD”), Law no. 58/2019 reinforces that any person may use administrative protection means to ensure compliance with the legal provisions concerning the protection of personal data, as provided in the Portuguese Administrative Procedures Code.

- **Liability**

In terms of liability, any person who has suffered damages due to the illegal processing of data or to any other act that infringes the provisions of the GDPR or of the national law on the protection of personal data, has the right to obtain a compensation from the controller or the processor for the damages suffered. Regarding the liability of the State and of other public entities, the regime provided for in Law no. 67/2007, of December 31 (law on the non-contractual civil liability of the State and other public entities) is applicable in its current wording.

- **Judicial protection**

In addition to this possibility, any person may challenge the decisions, namely administrative offenses, and omissions of the CNPD, as well as file claims of civil liability for the damages that such acts or omissions may have caused, and such claims shall be decided by the administrative courts.

- **Representation of data subjects**

Without prejudice to the rules concerning legal sponsorship, the data subject shall have the right to constitute a representation mandate to an organization or a non-profit association constituted in accordance with national law, whose statutory purposes have public interest and whose activities cover the protection of the rights, freedoms and guarantees of the data subject in respect of the safeguarding of personal data to, on his behalf, exercise the rights provided for in articles 77, 78, 79 and 82 of the GDPR (similarly, the right to present a complaint before a supervisory authority, the right to a judicial claim against a supervisory authority, the right to a judicial claim against a controller or a processor, and the right to indemnification and liability).



- **Determination of the amount of the fine**

In relation to the fines that the CNPD may apply, it shall take into account, in addition to the criteria laid down in article 83 of the GDPR:

- i) 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,
- ii) The continued repetition of the infringement, and
- iii) The size of the entity, taking into account the number of workers and the nature of the services rendered. The fines provided for in the GDPR and in Law no. 58/2019 apply equally to public and private entities. However, public entities, upon a duly substantiated request, may request to the CNPD to waive the application of fines for a period of three years after the entry into force of Law no. 58/2019.

- **Renewal of consent**

Another important highlight is the renewal of the consent of the data subjects. Article 61 provides that when the processing of personal data in progress at the date of entry into force of Law no 58/2019 is based on the consent of the data subject, it is not necessary to obtain a new consent if the former has observed the requirements of the GDPR . In paragraph 2 it is established that if the expiry of the consent is a cause for the termination of the contract in which the data subject is a party, the processing of data shall be lawful until it occurs.

This article has particular importance regarding insurance which lawful basis is the consent of the data subject, as will be the health insurance. However, it should be remembered that article 9 (4) of the GDPR allows, in relation to the processing of special categories of data, Member States to "maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health" and to, in particular, impose a new lawful basis for the processing of these data by insurance companies, so that they can cease to be dependent on the consent of the respective data subjects.

Finally, we highlight some issues which, despite having a provision in Law no. 58/2019, are still open questions:

- i) The caveat made in article 44, allowing public authorities, upon duly substantiated request, to request the CNPD to exempt the application of fines during the period of three years after the entry into force of the law.
- ii) The provision, in article 29, concerning the right of the data subject to be notified of any access to his/her health and genetic data, and the responsibility of the controller to ensure the availability of a traceability and notification mechanism.
- iii) At a labor level, the provision in article 21, pursuant to which the data relating to contributive declarations for retirement purposes may be retained without a deadline, in order to assist the data subject in the reconstructing of its contributory



career, provided that appropriate technical and organizational measures are adopted to ensure the rights of the data subject.

- iv) Finally, on the issue of insurance companies, article 61 (2), which provides, concerning insurance whoses lawful basis is the consent of the data subject, that if the expiry of the consent is a cause for the termination of the contract in which the data subject is a party, the processing of data shall be lawful until it occurs.



Contact

Cuatrecasas, Gonçalves Pereira & Associados,
Sociedade de Advogados, SP, RL
Sociedade profissional de responsabilidade limitada

Lisboa

Praça Marquês de Pombal, 2 (e 1-8º)
1250-160 Lisboa I Portugal
Tel. (351) 21 355 3800 I Fax (351) 21 353 2362
cuatrecasasportugal@cuatrecasas.com I www.cuatrecasas.com

Porto

Avenida da Boavista, 3265 - 5.1
4100-137 Porto I Portugal
Tel. (351) 22 616 6920 I Fax (351) 22 616 6949
cuatrecasasporto@cuatrecasas.com I www.cuatrecasas.com

For additional information on the contents of this document, please contact Cuatrecasas.

© Cuatrecasas, Gonçalves Pereira & Associados, Sociedade de Advogados, SP, RL 2019.
The total or partial reproduction is forbidden. All rights reserved. This communication is a selection of the news and legislation considered to be relevant on reference topics and it is not intended to be an exhaustive compilation of all the news of the reporting period. The information contained on this page does not constitute legal advice in any field of our professional activity.

Information about the processing of your personal data

Data Controller: Cuatrecasas, Gonçalves Pereira & Associados, Sociedade de Advogados, SP, RL ("Cuatrecasas Portugal").

Purposes: management of the use of the website, of the applications and/or of your relationship with Cuatrecasas Portugal, including the sending of information on legislative news and events promoted by Cuatrecasas Portugal.

Legitimacy: the legitimate interest of Cuatrecasas Portugal and/or, where applicable, the consent of the data subject.

Recipients: third parties to whom Cuatrecasas Portugal is contractually or legally obliged to communicate data, as well as to companies in its group.

Rights: access, rectify, erase, oppose, request the portability of your data and/or limit its processing, as described in the additional information.

For more detailed information on how we treat your data, please go to our [data protection policy](#).

If you have any questions about how we treat your data, or if you do not wish to continue to receive communications from Cuatrecasas Portugal, we kindly ask you to inform us by sending a message to the following email address: Data.Protection.Officer@cuatrecasas.com.