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# Intellectual Property, Media and IT

Newsletter | Portugal

4th Quarter 2019

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## I. News on data protection, TMT and advertising

### **Supervisory Alert No. 01/2019 of the Health Regulatory Authority on the processing of personal data necessary for providing healthcare services**

The Portuguese Health Regulatory Authority ("ERS") has issued a Supervisory Alert on the implementation of personal data protection legislation. However, the ERS highlights that this alert does not overrule the authority of the Data Protection Supervisory Authority to interpret and monitor compliance with Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC ("GDPR").

As "the incorrect application of personal data protection legislation in this context is likely to lead to restrictions on access to health care," the ERS warns healthcare providers of the following:

- Healthcare providers must use different lawful means of processing personal data, depending on whether they are processing the data needed to provide healthcare or other personal data.
- The processing of personal data is lawful where it is necessary for the following purposes: medical diagnosis and provision of care or therapeutic treatments, under article 9(2)(h) and (3) of the GDPR.
- Healthcare providers must seek data subjects' prior consent where the purpose of the data processing is to send marketing communications.
- Healthcare providers must ensure that health data is processed only for the purposes mentioned above and that it is done by professionals subject to the obligation of professional secrecy or the duty of confidentiality, in compliance with article 9(3) of the GDPR.
- The data controller must take appropriate measures to provide the data subject with the information required under articles 13 and 14 of the GDPR:
  - In this context, the provider can ask the user to sign a declaration to prove compliance with the duty to provide information, provided the declaration is (i) independent of any declaration of consent to the processing of personal data; and (ii) not a condition for access to healthcare.

The ERS concludes by stating that refusal to provide healthcare to beneficiaries of the national health system or public health subsystems constitutes an administrative offense, punishable by a fine of EUR 1,000.00 to EUR 3,740.98, or EUR 1,500.00 to EUR 44,891.81, depending on whether the beneficiary is a natural or legal person.



### **European Commission's contractual summary for consumers in the field of telecommunications services in the European Union ("EU")**

The European Commission has adopted an executive regulation providing a contractual summary template to be delivered to EU consumers before entering into contracts with telecom service operators.

The implementing regulation is based on Directive (EU) 2018/1972 of the European Parliament and of the Council of December 11, 2018, establishing the European Electronic Communications Code. Although this regulation does not create new obligations, it does specify how the summary should be provided to consumers.

This summary must include the main conditions of the contract (e.g., information on the price, duration, services, traffic speed, and how to renew and terminate the contract) in a concise and easy-to-read format.

This summary, which is aimed at protecting consumers while encouraging competition among suppliers, enables consumers to compare different offers, particularly their main terms, before entering into a contract.

Under the regulation, the summary must be written in a font size of at least 10, and the text must not exceed (i) one A4 page, if it is a single service; or (ii) three A4 pages, if several telecommunication services are included under the same contract.

The summary is compulsory for contracts signed from December 21, 2020, i.e., the date the European Telecommunications Code becomes applicable.

### **Recommendation of the Portuguese Directorate General for Consumer Affairs on advertising aimed at minors and the use of minors' image in advertising**

The Directorate General for Consumer Affairs (the "DGC") has adopted a recommendation on compliance with the regulations on advertising aimed at minors and on using them as main actors.

The DGC points out that the regulation of advertising aimed at minors has been a European concern in recent years, as reflected in the European Parliament Resolution of December 15, 2010, on the "Impact of advertising on consumer behavior." This resolution called on Member States to restrict television advertising targeting minors during television programs aimed at them. More recently, the European Parliament adopted the "Strategy for strengthening the rights of vulnerable consumers," highlighting the influence of advertising of food high in fat, salt and sugar, aimed at children and young people.

In the wake of this European recommendation, Act 30/2019 of April 23 came into force this year, introducing restrictions on advertising of high energy foodstuffs and beverages and



high salt, sugar, saturated fatty acids and trans fatty acids content aimed at children under 16.

The law became applicable through Order 7450-A/2019 of August 21, which came into force on October 20, 2019, defining “high energy foodstuffs and beverages, and high salt, sugar, saturated fatty acids and processed fatty acids content”.

Article 14(1) of the Advertising Code states that advertising is prohibited if it aims to “a) directly incite minors, by exploiting their inexperience or credulity, to acquire a particular good or service; b) directly encourage minors to persuade their parents or third parties to purchase those goods or services; c) contain elements likely to endanger their physical or moral integrity, as well as their health or safety, in particular through the use of pornography or incitement to violence; d) exploit the special trust minors place in their parents, guardians or teachers”.

Article 14(2) states that “minors may only be the main actors in advertising messages where there is a direct link between them and the product or service”.

The DGC also states that “article 14 of the Advertising Code lays down restrictions on advertising directed at minors (as recipients - paragraph 1) as well as on advertising that uses them as key actors (paragraph 2)”.

To enforce Decree-Law 57/2008 of March 26, which establishes the legal framework for unfair commercial practices, the DGC also highlights that “any commercial practice that is likely to materially distort the economic behavior of a single, clearly identifiable group of particularly vulnerable consumers because of (...) age or credulity (...), if the trader could reasonably have foreseen that its conduct was likely to cause such distortion,” may be considered unfair commercial practice under article 6(a).

Article 12 (e) also states that “an advertisement directly exhorting children to buy or persuading their parents or other adults to buy from them the goods or services advertised” is an aggressive commercial practice in any circumstance.

Under this framework, the DGC considers that “the use of a minor as the main actor in an advertising message - which presupposes the minor’s use in a prominent way or as a protagonist - only obeys the law if there is a direct relationship between the minor and the products or services advertised.”

According to the DGC, a direct relationship exists when the goods or services offered “fit into their universe of need, interests and activities” or, quoting Ana Luísa Geraldes, are part of “the so-called Universe and World of the Child”.

The DGC also emphasizes that issuing this recommendation does not prevent administrative proceedings in the event of “serious indications” that article 14 has been infringed, which could result in fines and ancillary sanctions being imposed, as established in the above laws.



### **Judgment of the Court of Justice of the European Union (the “CJEU”) on the use of cookies and the protection of personal data (Planet49 Judgment - Case C-673/2017)**

On the interpretation of several provisions of Directive 2002/58/EC of the European Parliament and of the Council of July 12, 2002 (the “E-Privacy Directive”), the CJEU has issued the Planet ruling<sup>49</sup> regarding:

- > consent for the installation of cookies and the legality of pre-validated options;
- > the scope of the obligation to collect users' consent before installing cookies and the relevance of whether personal data is involved in this obligation; and
- > the information that must be provided to users when collecting consent so that it can be considered clear and complete information.

According to the CJEU, and following the conclusions of the Attorney General, "it is impossible in practice to determine objectively whether a website user has given consent to the processing of personal data if they have not deselected a pre-validated option and, in any case, whether this consent was given in an informed manner. In fact, it cannot be ruled out that the users have not read the information accompanying the pre-validated option, or even that they have understood this option, before continuing their activity on the internet site they are visiting".

Therefore, the passivity of the internet user in the face of a pre-validated option cannot be considered the active behavior necessary to verify the existence of a validly obtained consent.

By virtue of the legal reference in the E-Privacy Directive, the CJEU stated that consent to cookies is subject to the same requirements as consent under the previous personal data protection directive, which must now be understood as the GDPR.

It also stated that the general obligation to provide clear and complete information could include a data period or at least the criteria for determining it.

The judgment also concludes that the obligations regarding cookies and consent must apply even if no personal data is involved, considering the scope of the E-Privacy Directive, "which is intended to protect users from any interference in their private sphere, regardless of whether they are aware that intrusion has to do with personal data."



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## **II. National law**

### **Amendment no. 45/2019**

Amendment to Law no. 92/2019 of September 4 "establishes the authorized uses of works for the benefit of the blind, transposing Directive (EU) 2017/1564 of the European Parliament and of the Council of September 13, and decriminalizing the unauthorized public performance of commercial recordings and videos (Fourteenth amendment to Decree-Law 63/85 of March 14, second amendment to Decree-Law 252/94 of October 20, third amendment to Decree-Law 332/97 of November 27, and first amendment to Decree-Law 122/2000 of July 4).

### **Decree-Law no. 150/2019**

Regulates the Electronic Clearing System for voluntary liquidation of credits.

### **Decree-Law no. 156/2019**

Regulates the creation and maintenance of a system to collect, record and analyze science and technology data.

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## **III. Case law**

### **Judgment of the Court of Justice of the European Union, of October 1, 2019, Case C-673/2017**

"Installing cookies requires the active consent of Internet users, and a pre-validated option is not sufficient."

### **Judgment of the European Court of Human Rights of 24/09/2019 - Case No. 75637/2013**

The Portuguese State must compensate a journalist and a doctor previously convicted for violating the right to freedom of expression and, in the case of the doctor, for the fact that his conviction for a crime not established in the legal system was illegal.

### **Judgment of the Lisbon Court of Appeal of June 7, 2019 - Case No. 61/16**

Marketing perfumes for a clearly low price, affirming they are similar to other major brands, already known and in vogue, constitutes misleading and comparative advertising, as well as unfair competition.

### **Judgment of the European Court of Justice of December 11, 2019 - Case No. 708/2018**

Installing video surveillance in the common areas of a residential property to ensure the safety and protection of persons and property without the consent of the persons concerned is allowed when it meets the requirements of article 7(f) of Directive 95/46/EC.



### **Judgment of the Constitutional Court of October 21, 2019 - Case No. 464/2019**

With general binding force, it declares the rule established by article 3 of Act 4/2017 of August 25 unconstitutional, insofar as it allows access by intelligence officers of the Security Intelligence Service (SIS) and the Strategic Intelligence and Defense Service (SIED) to basic data and equipment location data when they do not support a specific communication for the purpose of producing information necessary to safeguard national defense and internal security.

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## **IV. Regulations, resolutions, recommendations, opinions and others**

**Commission Decision (EU) 2019/1698** of October 9, 2019, on European product standards developed in support of Directive 2001/95/EC of the European Parliament and of the Council on general product safety.

**Council Decision (EU) 2019/1754** of October 7, 2019, on the European Union's accession of the Geneva Act of the Lisbon Agreement on designations of origin and geographical indications.

**2019/C370/07 - Summary of the opinion of the European Data Protection Supervisor** on the revision of the EU regulations on the service of documents and on obtaining evidence in civil or commercial matters.

**2019/C371/06 - Decision of the Executive Commission** establishing internal rules on limitations of certain rights of data subjects regarding the processing of personal data in the context of the operation of the European Union Agency for Fundamental Rights.

**Decision of the Governing Board of the European Union Agency for Law Enforcement Training ("CEPOL")** of August 5, 2019, establishing internal rules regarding limitations on certain rights of data subjects regarding the processing of personal data in the context of CEPOL's operation.

**2019/C 383/02 – Decision of the Court of Justice of the European Union (the "CJEU")** of October 1, 2019, establishing an internal review mechanism for the processing of personal data carried out in the context of the CJEU's judicial functions.

**The decision of the Governing Board of the European Securities and Markets Authority (the "ESMA")** adopting internal rules concerning limitations of certain rights of data subjects relating to the processing of personal data in the context of the ESMA's operation.



**The decision of the Single Resolution Board** on the internal rules on limitations of certain rights of data subjects regarding the processing of personal data in the framework of internal investigations of security incidents conducted by the Single Resolution Board (SRB/ES/2019/34).

**Commission Implementing Regulation (EU) 2019/2103** amending and correcting Implementing Regulation (EU) 2015/2450, establishing technical implementing rules regarding the format for reporting to supervisory authorities under Directive 2009/138/EC of the European Parliament and of the Council.

**Council Decision (EU) 2019/2107** on the position to be taken on behalf of the European Union within the Council of the International Civil Aviation Organization on the revision of chapter 9 of Annex 9 (Facilitation) to the Convention on International Civil Aviation, regarding the standards and recommended practices for passenger data.

**European Parliament legislative resolution (2017/0002(COD))** on the proposal for a Regulation of the European Parliament and of the Council on the protection of individuals regarding the processing of personal data by the Union's institutions, bodies, offices and agencies, as well as on the free movement of this data, repealing Regulation (EC) 45/2001 and Decision 1247/2002/EC.

**Amendments adopted by the European Parliament (2016/0280(COD))** on the proposal for a Directive of the European Parliament and of the Council on copyright in the digital single market.



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