

INFORMATIVE NOTE

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PERSONAL DATA: NEW RULES FOR ELECTRONIC COMMUNICATIONS

Law 46/2012, which transposes Directive 2009/136/EC and concerns the processing of personal data and the protection of privacy in the electronic communications sector, was published on 29 August 2012. This new law amends Law 41/2004 of 18 August and Decree-Law 7/2004 of 7 January and came into force on 30 August 2012, the day following its publication.

The new law makes significant changes to this area of the law and potentially affects all companies that provide electronic communication services. In addition to this, the rules on cookies potentially affect all companies that have sites on the Internet.

Besides the main changes that we highlight below, the law also introduces a number of smaller changes, many of which relate to terminology or to the consolidation of the rules on the processing of personal data and the protection of privacy in the electronic communications sector.

The following changes are worthy of particular attention:

- Notification obligation in the event of a personal data breach – The law requires companies that offer electronic communication services to notify the CNPD (National Personal Data Protection Commission) whenever there is a personal data breach. If there is a risk that the breach will adversely affect the personal data (for example, because it presents a risk of identity fraud), the subscriber or individual whose

data could be affected should also be informed. Companies are also under an obligation to maintain an inventory of personal data breaches.

- Rules on the use of cookies – When it comes to the possibility of storing or gaining access to information on the user's equipment, the new law establishes a requirement for prior consent on the basis of provision of clear and comprehensive information. This rule requires companies to change their privacy policies and the way in which their websites use cookies.

- The ICP-ANACOM (the communications institute – regulatory authority for electronic and postal communications) must issue best practice recommendations on the security levels for the technical and organisational measures to be implemented by companies that offer electronic communication services.

Besides the main changes that we highlight below, the law also introduces a number of smaller changes, many of which relate to terminology or to the consolidation of the rules on the processing of personal data and the protection of privacy in the electronic communications sector.

“Portuguese Law Firm of the Year”
Chambers European Excellence Awards, 2009, 2012 / Who's Who Legal Awards, 2006, 2008, 2009, 2010, 2011/The Lawyer European Awards-Shortlisted, 2010, 2011

“Best Portuguese Law Firm for Client Service”
Clients Choice Award - International Law Office, 2008, 2010

“5th Most Innovative Law Firm in Continental Europe”
Financial Times – Innovative Lawyers Awards, 2011

“Corporate Law Firm of the Year - Southern Europe”
ACQ Finance Magazine, 2009

“Best Portuguese Tax Firm of the Year”
International Tax Review - Tax Awards 2006, 2008

Mind Leaders Awards TM
Human Resources Suppliers 2007

Faced with this scenario, the lack of time between the publication of the law and its entry into force is difficult to understand.

- Lists for direct marketing purposes-companies, directly or through organisations that represent them, must maintain an up-to-date list of the people that expressly give their consent to receiving direct marketing. This list must also include customers who do not object to receiving this type of communication, when a mere absence of objection is sufficient for the processing of the data in question to be lawful. The Directorate-General of the Consumer must maintain a list of legal entities that object to receiving direct marketing and companies must consult this list on a monthly basis.

- The system of sanctions is considerably strengthened, with the creation of maximum fines of up to €5 million for breaches by companies of the obligations established in the new law.

- Compulsory financial sanctions – The CNPD and the ICP-ANACOM may impose compulsory financial sanctions on companies that are in breach, up to a maximum daily amount of €100 000.

Companies covered by the new law will have to introduce major changes to their procedures, especially in respect of (i) the new rules on personal data breaches, (ii) the need to change the way in which websites use cookies and (iii) the creation of lists recording consent/absence of objection on the part of the person to whom the data relates for the purposes of direct marketing. Faced with this scenario, the lack of time between the publication of the law and its entry into force is difficult to understand.

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