



# Data Protection Law

## APPROVAL OF REPLACEMENT TEXT OF DRAFT LAW NO. 120/XIII/3.<sup>a</sup>

### **I – Brief framework**

On the 14<sup>th</sup> June 2019, **it was approved the replacement text submitted by the Committee on the Constitutional Affairs, Rights, Freedoms concerning the Draft Law no. 120/XIII/3.<sup>a</sup>**, which has as its principal object ensure the **implementation**, into national legal systems, of the **Regulation (EU) 2016/679** of the European Parliament and of the Council, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.<sup>1</sup>

The General Data Protection Regulation (hereinafter referred to as "GDPR") is in place since 25<sup>th</sup> May 2018. However, even though GDPR constitutes a binding legislative instrument, directly applicable to all Member States of the European Union, the Member States may specify some matters by law. In

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<sup>1</sup> *Vide* article 1 of the replacement text of Draft Law no. 120 / XIII / 3<sup>a</sup>.  
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order to proceed with its specification and implementation, the above-mentioned replacement text was approved, still requiring the approval by the President of the Republic and the publication in the Portuguese Official Gazette.

With the approval of the replacement text of the Draft Law, Law 67/98 of October 26<sup>2</sup> and articles 15 (3) and 17 (2) of Law no. 43/2004<sup>3</sup>, of August 18, as amended by Law no. 55-A / 2010, of December 31 were repealed.

## II – The legal framework and the main innovations

The replacement text on Draft Law no. 120 / XIII / 3<sup>a</sup> approved on 14<sup>th</sup> June 2019, has closed some matters that had to be developed by the Member States, such as the identification of the control authority<sup>4</sup>, minors consent under article 8 of the GDPR and the possibility of an additional period for adaptation to this new reality.

Under GDPR each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation. Accordingly, the approved text identifies as a supervisory authority the **Comissão Nacional de Proteção de Dados** (CNPd)<sup>5</sup>, which, among the various powers and duties, is responsible for controlling and supervising compliance with the GDPR, as well as other legal and regulatory provisions in force in Portugal concerning to data protection in order to protect the rights, freedoms and guarantees of natural persons in the processing of personal data.<sup>6</sup>

In order to complement the provisions of GDPR regarding the **data protection officer**, this law states that the same:

- does not require professional certification for this purpose, and its function must be exercised with technical autonomy before the controller or processor; and



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<sup>2</sup> Data Protection Law, that transfers into the Portuguese legal system Directive no. 95/46/A of 24 October 1995 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

<sup>3</sup> Law no. 43/2004 of 18 August – Law of organization and function of the Portuguese Supervisory Authority (*Comissão Nacional de Proteção de Dados*).

<sup>4</sup> *Vide* articles 4 (21), 51 *et seq.* of General Data Protection Regulation.

<sup>5</sup> *Vide* article 3 of the replacement text of Draft Law no. 120 / XIII / 3<sup>a</sup>.

<sup>6</sup> *Vide* articles 4 *et seq.* of the replacement text of Draft Law no. 120 / XIII / 3<sup>a</sup>.

- has the functions, in addition to those established under the GDPR, **to ensure the audits performance, to make users aware of the importance of timely detection of security incidents and the need to inform immediately the safety authority** and to ensure relations with data subjects in matters covered by the GDPR and national data protection legislation.

As regards the **child's consent in relation to the directly offer of information society services**, defines the age of 16 years as the minimum age for consent to be considered lawful, in accordance with article 6 no. (1) (a) of the GDPR. Nonetheless, Member States can establish a lower age, provided they were not less than 13 years. In this respect, the approved legislation granted the **age of 13** as the minimum age for consent in the cases mentioned, so that if the consent of a child under the age of consent is required, the legal representative of this must provide it.

It should be noted that, with regard to right to data portability, in accordance with article 20 of GDPR, this law clarified the scope and format of the portability. To that end, it has provided that its right covers **only the data provided by the respective data subject** and that it must take place in an **open format**.<sup>7</sup>

The replacement text of Draft Law also regulates some specific situations of processing personal data, such as freedom of expression and information (article 24), publication in an official gazette (article 25), access to administrative documents (article 26), publication of data in the context of public procurement (article 27), labor relations (article 28), processing of health data and genetic data (article 29), databases or centralized health records (article 30) and processing for archival purposes in the public interest and for purposes of scientific or historical research or for statistical purposes (article 31).

With particular relevance, it should be noted that, related to labor relations<sup>8</sup>, the approved text clarifies that the employer may process the personal data of his employees for the purposes and with the defined limits of the Labor Code and its complementary legislation or other sectoral schemes, and the consent of the employee is not required in cases where:

- i. the processing provides a legal or economic advantage for the employee; or



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<sup>7</sup> *Vide* article 18 of the replacement text of Draft Law no. 120 / XIII / 3<sup>a</sup>.

<sup>8</sup> *Vide* article 28 of the replacement text of Draft Law no. 120 / XIII / 3<sup>a</sup>.

- ii. the processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.

Regarding the **legal framework administrative offences**, the fines vary depending on whether they are of a very serious or serious nature. In the case of very serious offence, fines may amount to € 20 million or 4% of annual turnover, worldwide, whichever is the highest. In an innovative way, minimum limits were also established for very serious and serious offences, depending on whether they are large companies, SMEs or natural persons in the amounts, respectively € 5.000 / € 2.500, € 2.000 / € 1.000 and € 1.000 / € 500,00. The amount of the fines imposed reverts 60% to the State and 40% to the CNPD.<sup>9</sup>

Lastly, with respect to the amounts of the fines abovementioned, this law allows, by means of a duly reasoned opinion, public entities may request to supervisory authority (*Comissão Nacional de Proteção de Dados*) the exemption from the imposition of fines for a period of three years from the date of force of this law.<sup>10</sup>

To access the full version of the replacement text of Draft Law no. 120 / XIII / 3.<sup>a</sup>, please go to:  
<http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c324679626d56304c334e706447567a4c31684a53556c4d5a5763765130394e4c7a464451554e45544563765247396a6457316c626e527663306c7561574e7059585270646d46446232317063334e686279396959575268595449324e43316a5a5745324c54526c4e4441744f475a6b4e5331684e445a6859324535593255334e6a51756347526d&fich=badaa264-cea6-4e40-8fd5-a46aca9ce764.pdf&Inline=true>



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<sup>9</sup> Vide article 37 *et seq.* of the replacement text of Draft Law no. 120 / XIII / 3<sup>a</sup>.

<sup>10</sup> Vide articles 44 (2) and 59 of the replacement text of Draft Law no. 120 / XIII / 3<sup>a</sup>.

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