Fines for data protection breaches to increase

Courts imposing lower fines on companies with compliance programmes

Data protection is currently one of the biggest issues facing companies in Portugal, as well as one of the hottest topics in the EU legislative panorama. The European Union is currently discussing new regulations that are likely to mean that companies that breach data protection regulations are to face financial sanctions equivalent to five percent of their worldwide turnover or €100m – whichever is greater. "Companies are currently preparing for this regulation," says Magda Cocco, partner at VdA.

When implemented, these new regulations will replace existing laws in Portugal (as well as in other European countries), which impose different fines on different industry sectors – for example, banks face penalties of up to €30,000, while companies in the telecoms industry face fines of up to €5 million. Because of the proposed regulations, companies are implementing privacy and cyber security compliance programmes. "Companies are getting up to speed with these possible obligations and are asking for advice on establishing data protection compliance programmes in order to stay not just on trend, but also on point, with regard to data protection and privacy compliance," Cocco says.

"This process involves, inter alia, checking their current procedures and providing training for employees."

Cocco says that data protection legislation is evolving in a direction that is not completely aligned with the business flow and interests of the market. Companies benefit from flexibility in the way they process information regarding their costumers or potential customers – this helps business innovation and market competitiveness and enables a fluid, easily manageable customer relationship. However, the European legislator and data protection authorities in most European countries are moving towards a legal/regulatory framework with rigid boundaries.

Sofia Ribeiro Branco, a partner in VdA´s litigation department, says: "In some recent cases – relating to telecommunication and banking – the courts punished companies with lower fines when they provided evidence of having compliance programmes in place."

Magda Cocco

Traditional due diligence needs updating

Due to the incremental liabilities companies now face, the traditional method for reviewing, negotiating and protecting a purchaser in an M&A transaction has needed to be updated, according to Cecilia Pastor, partner at Baker & McKenzie Madrid and head of the corporate compliance department. These potential liabilities include fines, enforcement actions, the cost of clean-up actions, the risk of substantial loss of turnover and the ensuing loss of reputation.

"The traditional system of due diligence based on documents, and their subsequent review, is not enough from a compliance standpoint," says Pastor. "A review of documents is not likely to identify criminal or irregular behaviour – traditional due diligence checklists are geared towards the detection of legal issues and not towards the detection of irregular business practices."

Pastor adds that compliance risks should be addressed through a risk assessment exercise that should take into consideration issues including: the target's industry and nature of business; the geographic areas of operation, for example whether the target operates in high risk markets; the way the target conducts business, that is whether it uses agents or intermediaries; whether the target´s customers include government entities; whether there is a reliance on critical permits or licences; and whether major suppliers or customers are owned by government officials.

"The answers to these questions should then enable the purchasing company to establish how far the compliance due diligence should extend and the right level of review," Pastor says. "This will usually go beyond document review and may include management interviews, employee interviews, cash flow analysis and even an internal investigation."

What should a savvy purchaser be worried about? Pastor says: "Concerns should include the applicability of ´successor liability´, the existence of tainted assets,and the adverse reputational impact that may bring the price of the purchasing company down."

Cecilia Pastor