

BRAZIL'S GENERAL DATA PROTECTION LAW

Approved by the Brazilian President on August 14, 2018

GENERAL OVERVIEW

On Tuesday (14), the Brazilian President gave its assent to a General Data Protection Law, with partial vetoes. The new Law closes a legislative gap and provides legal certainty in relation to data protection in Brazil, as the issue was subject to multiple and several times conflicting sector-specific Laws and regulations.

The approved Bill is comprised of a set of 65 sections, divided in 10 different titles. The text is largely inspired by the EU General Data Protection Regulation, which entered into force on May 25, 2018.

NEXT STEPS

The text is expected to be published in the Federal Gazette in the coming days.

Once the legislation is published, it will come into effect after an 18-months *vacatio* period.

RELEVANT DEFINITIONS

PERSONAL DATA:

Any information relating to an identified or identifiable natural person.

PROCESSING:

Any operation which is performed on personal data, such as collection, production, reception, categorization, use, access, reproduction, transmission, distribution, processing, storage, structuring, elimination, evaluation or controlling of the information, modification, communication, transfer, diffusion or extraction.

SENSITIVE DATA:

Personal data relating to a data subject's racial or ethnic origin, religious beliefs, political opinions, affiliation to labor unions or religious organizations, health conditions or sexual life, and/or genetic and biometric information.

PROCESSOR:

The natural person or the legal entity (both public and private ones) which processes personal data on behalf of the controller.

CONTROLLER:

The natural person or the legal entity (both public and private ones) responsible for taking the decisions regarding a certain data treatment.



SCOPE

The provisions apply to any operation performed on personal data by a natural person or a legal entity, regardless of the means and of the place in which the processing takes place, as long as (i) it is performed within the Brazilian territory, (ii) the processing activities are related to the offering of goods or services in Brazil or the processing of data subjects who are in Brazil, or (iii) personal data to be processed abroad is gathered within the Brazilian territory.



LAWFULNESS OF PROCESSING

Processing by a private party will be lawful only if and to the extent that at least one of the following circumstances applies:

(i) the data subject has given consent to the processing of his or her personal data;

(ii) processing is necessary:

- a. for compliance with a legal obligation to which the controller is subject;
- b. for the performance of a contract to which the data subject is party or to take steps at the request of the data subject prior to entering into an agreement;
- c. for the legal exercise of rights in a judicial, arbitral or administrative proceeding;
- d. to protect the vital interests or the physical safety of the data subject and/or a third party;
- e. for health protection, in relation to proceedings performed by health professionals and entities;
- f. for the purposes of the legitimate interest pursued by the controller or by a third party, except when such interests are overridden by the interests or the fundamental rights of the data subject; or
- g. for credit purposes, as set forth in the Brazilian Consumers' Defense Code.



ANONYMIZATION

The Law does not apply in relation to anonymized personal data, i.e., data that had undergone an irreversible anonymization proceeding and that is impossible to be linked to an identified or identifiable natural person.



DATA PROCESSING

Data processing is limited to the extent of the specific purposes disclosed to data subjects and to what is necessary for such purposes.

Data processing shall cease once the purposes are reached.



CONDITIONS FOR CONSENT

In case processing is based on consent, the controller shall be able to demonstrate that the consent was given in an unequivocal manner. More than consenting with the collection/processing of its data, data subject shall consent with the purposes of the processing.

Where processing is based on consent, data subject's consent will also be requested for data exchange with other controllers, except where the law provides differently.

If data subjects have made their personal data clearly public, consent is not required for the processing.

Consent can be withdrawn at any time.

Special conditions for consent apply in relation to sensitive data and children.



DATA PROCESSORS' OBLIGATIONS

Among several other obligations, data processors shall:

- Adopt security and administrative measures to avoid unauthorized access, destruction, loss, modification, transfer or any other illicit processing operation of data subjects' personal data, according to the standards to be set forth by an enforcement authority;
- To delete gathered data once the purposes for the processing are reached, except where the law provides differently;
- To name a Data Protection Officer (the enforcement authority shall enact a regulation establishing the criteria for such a designation);
- In case of data breach, to give notice of the breach to data subjects and to the enforcement authority; and
- To adopt the principles of "privacy by design and by default".



DATA SUBJECTS' RIGHTS

Data subjects are granted with several rights, including:

- Information and access to personal data;
- Rectification and erasure;
- Anonymization;
- Restriction of the processing;
- Consents' withdrawal;
- Data portability; and
- To oppose a decision based solely on automated processing and to request its review by a natural person.



CROSS-BORDER DATA FLOW

As a rule, cross-border data exchange is allowed in relation to countries whose legal regime is deemed by the enforcement authority as capable to provide an "adequate" level of protection.

In the absence of an adequacy decision, however, transfers can take place under certain conditions set forth by Law, including

the use of standard contractual clauses or binding corporate rules (BCRs) or with a specific and highlighted consent from the data subject, authorizing the data flow to a third country.

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ENFORCEMENT AUTHORITY

The Law creates the National Data Protection Authority (ANPD), empowered, among other attributions, to supervise and impose penalties to those subject to the new legislation.

Further regulation to be enacted in the coming months will provide on the enforcement of the Law and empower an authority to supervise and impose penalties to those subject to the new legislation.

The responsible party (data controllers and processors) that causes damage, either individual or collective, to a person is liable by law to pay the relevant compensations, to be ascertained by Courts.

DATA PROTECTION COMPLIANCE PROGRAM

The Law sets forth several parameters to be considered in relation to a data protection compliance program.

Penalties include warnings, simple or daily fines, and publication of the condemnatory decision in newspapers.

Fines may reach up to 2% of the gross revenue of the company or its economic group in Brazil, limited to BRL 50 million (approx. USD 14.7 million).

LIABILITIES

Under the Law, data processors are jointly liable with data controllers in case they violate the provisions set forth by Law or had not complied with the instructions set out by the data controller.

Penalties can be mitigated in case of existence of a data protection compliance program.

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