

Na Mídia

RECHT & STEUERN

The importance of a general personal data protection law in Brazil to deal with the massive processing of personal data during the state of emergency of Covid-19 (Novel Coronavirus)



Tatiana Campello | Vanessa Ferro

The unprecedented crisis caused by the Novel Coronavirus pandemic has been producing multiple impacts worldwide that transcends the more obvious (and serious) concern about public health and peoples' lives. As a result, multiple governmental and legislative measures¹ have been adopted in Brazil to deal with such a challenging environment. This is no different under the privacy and data protection scenario.

It is important to underline that individuals' intimacy, private life, honor and image are guaranteed by the Brazilian Federal Constitution.

In this context, one important discussion in Brazil concerns the decision rendered by the Brazilian Supreme Court (STF) suspending the effectiveness of Provisional Measure 954/2020², which provided for the mandatory delivery, by telecommunications service providers, of their consumers' names, phone numbers and addresses, to the Brazilian Institute of Geography and Statistics (IBGE). The purpose of such measure was the production of statistical data, during the public health emergency of the Covid-19 pandemic. Direct Unconstitutionality Actions filed by political parties and the Federal Council of the Brazilian Bar Association (OAB) attacked the Provisional Measure. In the preliminary analysis of the lawsuits, the STF highlighted that:

(a) the information dealt with in the Provisional Measure is within the scope of constitutional protection (article 5) that supports the right to privacy, intimacy, honor and image of individuals;

(b) the Provisional Measures does not establish any requirement for mechanisms and procedures to ensure the confidentiality and anonymity of the shared data (and it violates protection of fundamental rights of individuals foreseen in the Brazilian Constitution);

(c) there is no legitimate public interest in sharing the personal data of users of telephone services and that the standard does not provide conditions for assessing their suitability and need, as it does not define the form and purpose of using the personal data collected, in apparent violation of the due legal process guarantee; and

(d) combating the pandemic cannot legitimize overcoming fundamental rights established in the Constitution.

Apart from the cancelled Provisional Measure 954/2020, on February 6, 2020, Brazilian Law No. 13,979/2020 (the “National Quarantine Law”) was published to establish measures to deal with the public health emergency of the Novel Coronavirus. The estate of emergency will last according to the determination of the Brazilian Minister of State of Health and declaration of the World Health Organization (WHO). The National Quarantine Law established several measures such as³:

(i) compulsory medical examinations, laboratory tests, collection of clinical samples, vaccination and other prophylactic measures, or even other specific medical treatments;

(ii) immediate communication to health authorities about possible contacts with the Novel Coronavirus infectious agents and circulation in areas considered to be regions contaminated by the virus;

(iii) mandatory sharing between government agencies and entities of Public Administration of essential data for the identification of persons infected or suspected of being infected with Coronavirus, solely for the purpose of preventing its spread (this measure extends to private companies when data are requested by a health authority); and

(iv) maintenance, by the Ministry of Health, of public and updated data about confirmed, suspected and under investigation cases related to the public health estate of emergency, safeguarding the right to the confidentiality of personal information.

It is important to underline that all these multiple initiatives involving the processing of personal data in large scale in the pandemic environment has been occurring while the Brazilian General Personal Data Protection Law (Law No. 13,709/2018) (the “LGPD”) has not entered into force yet. The LGPD defines health data as sensitive personal data, subject to restricted legal basis for processing, such as (a) by data subjects’ consent and (b) conducting studies by a research body, guaranteeing, preferably in an anonymized form; (c) health tutelage, exclusively, in a procedure performed by health professionals, health services or health authority; and (d) protection of the life or physical safety of the data subject or third party.

The LGPD was sanctioned to enter into force in August, 2020, but Provisional Measure 959/2020 (“MP 959/2020”)⁴ was approved extending the entry into force of the LGPD to May 3, 2021. The initial term of validity of the Provisional Measure is 60 days, automatically extended for an equal period, if the Brazilian Congress do not complete the voting process. The Provisional Measure may be enacted and converted into an ordinary law or rejected and, therefore, shelved.

It is worth mentioning that before the issuance of MP 959/2020, the Brazilian Senate approved Draft Bill No. 1179/2020 proposing the postponement of the LGPD to January, 2021 and its sanctions to August, 2021⁵.

Such draft bill is currently under discussion in the Chamber of Deputies with urgent request for analysis. If MP 959/2000 is shelved at the Congress, the discussion about the extension of the initial term of the LGPD as proposed under Draft Bill No. 1179/2020 will continue.

Even though the efforts for complying with all the LGPD requirements will sum up to the manifold challenging situations that companies are struggling to handle with simultaneously, the postponement of the LGPD under the present context may lead to irreparable harm to individuals because the National Quarantine Law and other norms currently in force in Brazil do not establish clear limitations to the sharing of health information. This aspect may influence the analysis of the Congress about both MP 959/2020 and Draft Bill No. 1179/2020. In this context, companies shall keep moving forward with the steps required to be compliant with the LGPD as soon as possible, since the extension of the law enforceability can still change.