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## PrivacyRules Country Overview: Privacy and Data Protection in Brazil

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### Expert presentation

*Luiza Sato is a partner at ASBZ Advogados in São Paulo, with recognized experience in the areas of Data Protection, Digital Law and Intellectual Property. She graduated from Largo São Francisco Law School (USP), with a postgraduate degree in Intellectual Property at GVLaw and holds a LL.M in Law and Technology from the University of California - UC Berkeley. Her team was highly recommended in the Data Protection area by the 2020 Leaders League international ranking and Luiza was the most voted lawyer, by clients and colleagues, as the rising star of the Data Protection area in Brazil. The team was also ranked in the publication Legal500 in the areas of Cybersecurity & Data Privacy in 2020.*

*Today, she works mainly in data protection adequacy projects and transactions involving data protection and consultancy in digital law and intellectual property rights.*

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[ **SCOPE:** The scope of the Country Overview template is to confirm to clients the quality and accuracy of the expertise that PrivacyRules and its Members can provide. It is an informative document, yet does not constitute advise or give direction on the design of privacy policies in each given jurisdiction ]

[ **COMPILATION:** Simple yes / no answer, brief explanation ( limited to max 5 lines per answer ) with indication of title and year of adoption when referring to laws / bills / regulations / guidelines, list the latest one first. This information will be reproduced on the PrivacyRules webpage under "The law of privacy" ]

**Q: Are privacy and data protection recognised by the Constitution / Fundamental Rights Bill?**

A: Yes. The fundamental right to privacy is included in Article 5, item X, of the Brazilian Constitution of 1988 and data protection has been recognized as a fundamental right by the Supreme Court in decisions delivered under the Direct Constitutionality Actions Nos. 6387, 6388, 6389, 6393 and 6390, all in 2020.

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**Q: Is there primary legislation on privacy, data protection, cybersecurity, cybercrime, cyberterrorism?**

A: Yes: General Data Protection Law (Law No. 13,709/2018 - "**LGPD**"), Civil Rights Framework for the Internet (Law No. 12,965/2014) and Laws Nos. 12,735/2012 and 12,737/2012 that included cybercrimes in the Criminal Code.

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**Q: What are the fields of law closely related to privacy and data protection that are regulated in the Brazilian jurisdiction? (e.g. e-commerce, telecommunications, media, intellectual property, etc.).**

A: Digital, e-commerce, telecommunications, media, intellectual property, consumer and labor.

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**Q: What are the key definitions in the field of data protection (e.g. Personal Data, Sensitive Data, Data Processing, Data Controller, Data Subject, Pseudonymised Data, Anonymised Data, Processing or any other definition)?**

A: Personal data, sensitive personal data, anonymized data, database, data subject, data controller, data processor, data protection officer, processing agents, data processing, consent, cross border data transfer, shared use of data, data protection impact assessment, supervisory authority.

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**Q: In particular, is there a distinction between identifiable, pseudonymised and anonymised data and if so, how are they regulated?**

A: Yes. Under the LGPD, information relating to an identified or identifiable individual is considered personal data and subject to all the regulatory aspects of the law. "Anonymized data" is data relating to a data subject that cannot be identified, considering the use of reasonable technical means available at the time of processing, and generally not subject to the LGPD. "Pseudonymized data" refers to data that lost the possibility of being associated, directly or indirectly, with an individual, unless by the use of additional information kept separately by the controller in a controlled and secured environment, and is generally considered personal data subject to the LGPD.

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**Q: Is there a national Data Protection Authority?**

A: Yes. The Autoridade Nacional de Proteção de Dados (ANPD), created by Law No. 13,853/2019) – its website is <https://www.gov.br/anpd/pt-br>.

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**Q: Which national judicial authorities are competent on privacy and data protection related matters?**

A: The Judiciary Branch is entirely competent to decide on privacy and data protection related matters.

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**Q: Is there a one-stop-shop mechanism in place?**



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A: No. This is not applicable for Brazil, as there is only one jurisdiction.

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**Q: What are the main enforcement measures?**

A: The main enforcement measures are the administrative sanctions set forth under the LGPD and enforceable by the ANPD. The Judiciary branch also has jurisdiction to impose penalties to data protection rules violators and guarantee compensation for material and non-material damages caused to data subjects.

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**Q: What are the actual main sanctions?**

A: Warning; fine of up to 2% (two percent) of the billing of a private company, group or conglomerate in Brazil in its previous fiscal year, excluding taxes, limited in total to R\$ 50,000,000.00 (fifty million reais); public disclosure of the infraction; blocking and elimination of personal data; and suspension or prohibition of exercising operations relating to data processing.

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**Q: Is there a supra-national applicable legal framework? If the answer is positive, is it binding and to what extent?**

A: No.

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**Q: Does any foreign authority have jurisdiction on privacy and data protection matters for citizens of Brazil? If the answer is positive, do they have executive or advisory authority?**

A: No, due to Brazilian sovereignty. What may happen is the application of foreign legislations for entities located in Brazil, such as the GDPR, due to their extraterritorial scope, but this should not be confused with a foreign authority having jurisdiction on privacy and data protection matters in Brazil.

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**Q: Are there e-discovery or disclosure duties pursuant to a request from a foreign Law Enforcement Agency?**

A: No.

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**Q: Are privacy-by-design and privacy-by-default mandatory?**

A: Not expressly, but the LGPD sets forth that security measures, both technical and administrative, suitable to protect personal data from unauthorized access and accidental or illegal destruction, loss, change, communication, or dissemination events, or any other occurrence resulting from inappropriate or illegal processing must be considered from the phase of the development of the good or service until its execution.

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**Q: Are data protection officers (DPOs) foreseen by law and if so, to what extent?**

A: Yes. Under the LGPD, all controllers must appoint a DPO and the identity and the contact information must be publicly available, in a clear and objective manner, preferably on the controller's electronic site. The activities consist of (i) receiving complaints and communication from data subjects, providing clarifications, and adopting measures; (ii) receiving information from the ANPD and adopting measures; (iii) guiding the entity's employees and contractors regarding practices to be adopted regarding the protection of personal data; and (iv) executing the other duties determined by the controller or established in complementary rules.

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**Q: Are data protection impact assessments (DPIAs) mandatory and if so, to what extent?**

A: DPIAs may be requested by the ANPD, especially if the processing involves sensitive data or relies on legitimate interests. The DPIA should be prepared when the processing of personal data generates risks to civil liberties and fundamental rights, as well as to demonstrate the measures and risk mitigation mechanisms applied during the processing by the controller.

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**Q: Is there any obligation to register databases and if so, to what extent?**

A: There is currently no database registration requirement.

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**Q: Are definitions like controller, processor, regulator clearly defined and identifiable within the Brazilian regulatory framework?**

A: Yes. The main definitions of the LGPD are set forth in article 5, including controller, processor, and regulator.

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**Q: Are there obligations to adopt reasonable technical, physical and organizational measures to protect the security of sensitive personal information and if so, to what extent?**

A: Yes, although not specifically for sensitive data, but for the broad conception of personal data. Controllers and processors must adopt security, technical and administrative measures able to protect personal data in general. In any event, the LGPD sets forth that the ANPD may provide for minimum technical standards for sensitive personal data.

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**Q: Are there security breach notification requirements and if so, to what extent?**

A: Yes. The controller must inform the ANPD and the data subject of the occurrence of security incidents that could entail relevant risk or damage to the data subjects. Such notification should include at least (i) a description of the nature of the personal data affected; (ii) information on data subjects involved; (iii) the technical and security measures used to protect the data, respecting commercial and industry secrecy; (iv) the risks related to the incident; (v) the motives for the delay, if the communication was not immediate; and (vi) the measures that were or will be adopted to reverse or mitigate the effects of the incident.

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**Q: Can authorities access large amounts of data and/or specific data without a court or prosecutor's order?**



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A: Yes. The ANPD is competent to access data without a court or prosecutor's order.

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**Q: Are there specific kinds of data covered by stronger provisions on legal protection (e.g. children data, etc.)?**

A: Yes. Minors' personal data sensitive data (personal data about racial or ethnic origin, religious belief, political opinion, union membership or organization of a religious, philosophical or political nature, data relating to health or sexual life, genetic or biometric data, when linked to a natural person) are covered by stronger provisions on legal protection.

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**Q: Is there a specific regulation for the collection of data?**

A: No.

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**Q: Is it possible to use personal data for electronic marketing purposes and if so, to what extent?**

A: Yes, if there is a lawful basis the company may rely on for such data processing, such as the data subject's consent, the performance of a contract or legitimate interests. Besides that, the entity in charge of the processing must also comply with the LGPD's principles, especially the transparency principle, by providing adequate and relevant information to the data subject, included his/her rights. There is also specific regulation for eCommerce that should be complied with (Decree No. 7962/2013).

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**Q: Is transfer of data outside the Brazilian jurisdiction regulated?**

A: Yes, but partially. The LGPD provided in its Chapter IV all the situations in which the transfer of data outside Brazil is allowed, but they are still pending further regulation by the ANPD.



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**Q: Can individuals access their data and request their correction or deletion?**

A: Yes. Article 18 of the LGPD sets forth the data subject's rights, and among them there are the possibility to access the data and also request their correction/deletion. Besides that, the Consumer Defence Code sets forth that the consumer may access his/her data and also request their correction.

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**Q: How can individuals exercise their privacy rights?**

A: There are several ways for that. First, one can write to the controller requesting one of the rights set forth in the LGPD. In case the controller does not comply/reply on time, one can file a complaint to the ANPD. In the case of a regulated sector, one can also seek the corresponding agency. Finally, one can always seek judicial protection.

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**Q: Are there associations entitled to advocate privacy and data protection rights?**

A: Yes, as the Brazilian Constitution embodies the full freedom of association. Up to this moment, there are a few associations advocating for privacy and data protection rights, such as Data Privacy Br, ITS Rio, ANPPD, ILGPD, Sigilo, ABPDados and Fórum Equidata.

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**Q: Is access to data regulated according to specific and detailed legal acts stating legal requirements to exercise the right to access, e.g. timeframe, identity and categories of legitimate applicant, templates for various forms of request, obligations of the requested entity etc.?**

A: In parts, yes. The LGPD, in its article 19, brings some details on how the right to confirmation and access should be executed. It establishes timeframe, the mandatory information the controller must provide, and the means (electronic



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or print) the data must be delivered to the data subject. Further details are still pending regulation by ANPD.

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**Miscellaneous: Any other information particularly important in the Brazilian jurisdiction [ if necessary, please explain why this additional information is provided and which is its relevance ].**

A: The development of a specific legal frame for data protection is quite new and we are expecting great challenges regarding the interpretation and application of the new rules by governmental authorities.

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