

New Draft Bill of Law Presents Challenges for companies regarding the Protection of Personal data

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Companies commonly consider their databases as an intellectual asset. Brazilian Copyright Law recognizes that companies own the architecture of databases that can be considered works of authorship, either by the selection, organization or disposition of its contents (article 7, XIII of Federal Law n. 9.610/1998). However, some aspects must be considered when databases contain private information (usually consumer's data). Given that such data relate to natural persons' privacy, strong objections are raised in society against the unauthorized treatment and transfer of such information. Unlike other countries, only now this became an issue in Brazil and under an scrutiny of experts and the allegedly mistreatment of client's personal data by some companies that the debate about the new draft bill of law was recently introduced.

For the last thirty years, Brazilian legal framework has superficially touched the protection of personal data. Dispositions were spread in the Federal Constitution, the Consumer Protection Code, the federal laws on access to public information and on industrial property, as well as on the Civil Rights Framework for the internet. Still, the lack of a single law fully regulating the issue has led to undesired levels of legal uncertainty.

An old promise of the Ministry of Justice, the Draft Bill of Law on the Protection of Personal Data was finally disclosed last January. Long-awaited by companies, lawyers and consumer defense entities, the draft is under public consultation until April 30, 2015 and might be refined by the Ministry before its submission to the Congress. It is already possible, though, from the analysis of the document, to derive some conclusions that may guide companies with regard to the best practices to be adopted until the effective enactment of the law.

The preliminary provisions reveal a draft with principle-infused content, which aims at enlarging and strengthening individual rights connected with personal data. Article 1 underlines that the objective of the law is to "protect natural persons' rights to liberty, intimacy and privacy", evidencing a connection between the protection of personal data and three of the fundamental rights constitutionally guaranteed. Further on, article 6 lists general principles that must guide the treatment of personal data.

The remaining of the text regulates the protection of personal data in detail, starting by the general rule that any action of treatment of personal data (such as its obtainment or reproduction) depends on the free, express, specific and informed consent of its owner. Only in exceptional cases, the unconsented treatment of data is allowed under article 11.

The draft also points out a stricter regime for the treatment of personal sensitive data, defined as those that may reveal philosophical or religious convictions, political opinions or that may concern health conditions of its owner, among others. Some of the rights that the draft aims to establish are the right granted to the owner to confirm the treatment of his personal data, to access, to correct, and even to cancel it. Upon being informed that the treatment of his personal data was made beyond the scope of the parameters set forth by the draft, the owner would also have the right to oppose such treatment.

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The draft still touches the transfer of personal data between national companies or from a national to a foreign company, under the condition that the foreign company is under the laws of a country that guarantees a similar level of protection. Several dispositions in the text refer to information security requirements. Under the premise that such data belong to their owners and not to their holders, companies are expected to protect third parties' personal data under higher standards than those applied to their own information. Finally, the draft bill clarifies the different levels of liability of the agents of treatment and presents the applicable administrative sanctions.

There is a quantity of mentions in the text to a "competent organ", which will be responsible for State control and supervision operations, in case of enactment of the law. It is not clear, at this moment, if a new governmental body will be created or if the powers to the activities listed in the draft will be delegated to an existing entity.

The outcomes of the public debate will depend on the political agenda of the Ministry of Justice. Nevertheless, it is highly recommendable that companies that retain personal data of their clients begin, as soon as possible, internal proceedings to analyze and adjust its practices. Even if there is not a clear perspective on when the law will be enacted, the published draft indicates the direction of the approach to be materialized in the law. Those companies who take the necessary precautions will be in position to smoothly transition from their current practices to the new model, avoiding the mishaps of a rushed modification.

Kasznar Leonardos has set up a team of collaborators to critically follow the developments of the debate. We are at your service to provide any further information or assistance on this matter. Please feel free to contact us through your regular person of contact or by e-mail to Claudio.Barbosa@kasznarleonardos.com or Pedro.Vilhena@kasznarleonados.com

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