

## **Brazilian Data Protection Authority created by provisional measure** **The Provisional Measure that created the Brazilian Data Protection Authority also postponed for six months the deadline to comply with the Brazilian General Data Protection Law, which will come into force in August 2020**

By Pedro Vilhena and Larissa Martins

The Presidency of Republic complemented, through a Provisional Measure, the Brazilian General Data Protection Law (Law n. 13.709/18, in Portuguese “LGPD”), enacted last August. The Provisional Measure n. 869/18 creates the Brazilian Data Protection Authority (in Portuguese “ANPD”), modifies the terms of data sharing between the Public Administration and the private sector and increases the adaption period to the terms of the law. Please see below our considerations.

### **Entry into force and application**

The articles regarding the creation of ANPD and the Brazilian Advisory Board on Privacy and Data Protection came into force on December 28, 2018. However, the Provisional Measure postpones the application of the remaining articles of LGPD to August 15, 2020. Therefore, entities will have additional six months to lead its adaptation processes, benefitting from already under the guidance of ANPD.

### **Brazilian Data Protection Authority**

The Provisional Measure n. 869/18 creates the ANPD, but significantly changes its nature, legal framework and part of its functions, as listed below:

- ANPD will be a body directly linked to the Presidency of the Republic, instead of a special agency related to the Ministry of Justice;
- ANPD will be created with no increase of expenses and no projection of revenue;
- ANPD will have technical autonomy;
- The internal structure of ANPD will be determined by an act of the President of the Republic;
- ANPD will not be able to audit controllers and processors, but only request information through administrative proceedings.

The regime adopted does not predict administrative independency, financial autonomy and absence of hierarchical subordination (contemplated in the previous text of LGPD). Also, the stability of the ANPD's Directors is damaged, since they can be fired through an administrative proceeding, to be ruled by the President of the Republic (article 55-E). Therefore, the choice of ANPD's subordination to the Presidency of Republic as a body of the direct Public Administration inspires special attention of the society.

### **Regime of data sharing between governments and companies**

The Provisional Measure n. 869/18 also modified the regulation of data sharing between the Public Administration and companies. The prohibition of processing of bases of personal data related to public safety and national security by private companies was revoked. The new text allows the data processing by companies controlled by the Public Authority. ANPD's duty of requiring data protection impact assessment in cases when the data processing has the purpose of national security was also revoked.

## Remaining issues

The Provisional Measure has some additional noteworthy issues:

- The right of review decisions based solely in automated processing was mitigated. If required by the data subject, such review can be done again by automated processing, according to the new version of article 20.
- The definition of data protection officer was rewritten (article 5, item VIII), allowing that the role of the data protection officer be performed not only by natural persons, but also by legal entities or working groups, including by outsourcing.
- The sharing of health data with the purpose of obtaining economic advantage became permitted to enable the services of supplementary health.
- The obligation to provide information to the data subject was mitigated in the cases of data processing with the purposes of compliance with controller's legal or regulatory obligation and the execution of public policies.

## Preliminary considerations

The immediate creation of the ANPD will permit that the body execute its educational and preparatory roles, with special attention to the regulation of the progressive adjustment of the databases constituted before the entry into force of the LGPD. This regulation will guide and facilitate many companies' compliance efforts.

On the regulatory perspective, the ANPD is expected to list the cases in which the indication of a data protection officer will be waived (article 41), to determine minimum technical standards of security (article 46) and to discipline how controllers shall comply with data subjects' rights. In this specific case, we highlight the need of establishing terms and deadlines for the answer to data subjects' requirements (article 18) and the regulation of the rights to access and confirmation of data processing (article 19). The ANPD still has a key role on the regulation of international data transfers, to the extent that it must evaluate the level of data protection in other jurisdictions (article 34), define standard clauses and appoint certification bodies (article 35).

Despite the unexpected modification of the legal nature of the ANPD, its immediate creation will generate a regulatory environment that will guide both public and private sectors in their efforts to comply with the new law, ensuring a reasonable level of legal certainty.

## Next steps

We will monitor the vote of the provisional measures by the National Congress, an essential step to the incorporation of the dispositions related above to the text of the LGPD. Our Digital Law Team is ready to assist your company. If you want to obtain a copy of the modified text or receive additional information on the matter, please contact us at [digital@kasznarleonardos.com](mailto:digital@kasznarleonardos.com).