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GENERAL DATA PROTECTION ACT PUBLISHED

BY:

Federal Law No. 13,709/2018, already known as the General Data Protection Act ("GDPA"), was published in the Federal Official Gazette on August 15, 2018, and will take effect after 18 months.

The GDPA brings about deep changes in the conditions for processing of personal data, laying down a set of rules to be observed in activities such as collection, production, storage, use, transfer and erasure of information concerning identified or identifiable natural persons. Taking into account its broad scope of application, the GDPA will interfere in the activities of Brazilian and foreign companies, with an impact on processing of personal data not only within the context of supply of products and services, but also in other spheres, such as labor relations.

The sanction of the GDPA took place along with a presidential veto on the creation of a National Authority on Data Protection, which was contemplated in the text of the Bill approved by Brazilian Congress as a governmental entity in charge of monitoring compliance with the Act and imposing sanctions for noncompliance. This veto does not mean that the GDPA has become moot, once a supervisory authority may be created during the vacatio legis period of 18 months, even by means of a rule with the force of law termed medida provisória (provisional measure). Until then, legal and natural persons that perform personal data processing operations will have to bring themselves into line with the new regulatory landscape established by the innovations introduced in the Brazilian legal system by the GDPA.

Scope

The GDPA applies to any data processing operation performed by individuals or by private or public entities, regardless of the country where they are headquartered or where data are hosted, as long as the processing operation takes place within the Brazilian territory; the processing activity is intended to offer or supply goods or services or to process data of individuals located in the Brazilian territory; or the personal data being processed have been collected within the Brazilian territory. The application of the GDPA is not restricted to data processing activities performed through digital media and/or on the Internet.

Conversely, the GDPA does not apply to processing of personal data by an individual solely for private and noneconomic purposes; solely for journalistic, artistic or academic purposes; solely intended for public security, national defense, national security, or investigation and prevention of criminal offenses. Also falling outside the scope of the GDPA is processing of personal data originating from outside Brazil and which are not intended for communication, for data sharing with Brazilian processing agents, or for cross-border transfer with a third country other than the country of origin, provided that the country of origin offers a level of protection for personal data in keeping with the GDPA.

Requirements for processing

As a rule, the GDPA establishes that processing of personal data will only be permitted in the following events: upon consent of the data subject; for fulfilment of an obligation by the controller pursuant to law or regulation; by the public administration, for processing and sharing of data as required for enforcement of public policies under laws, regulations or pursuant to contracts, conventions or similar instruments; for conduction of studies by a research body; if necessary for execution of a contract or preliminary procedures relating to a contract to which the data subject is a party, on request of the data subject; for regular exercise of rights in the course of judicial, administrative or arbitral proceedings; for protection of the life or physical integrity of the data subject or of a third party; for health protection via procedures carried out by healthcare professionals or by public health entities; when so required to meet legitimate interests of the controller or of a third party, except if the data subject's fundamental freedoms and rights that require personal data protection prevail; or for credit protection purposes, also with due regard for applicable law.

The GDPA sets out more stringent requirements for processing of sensitive data, for processing of personal data of minors, and for cross-border transfer of data. The GDPA, however, affords a lower level of protection to anonymized data and to data made manifestly public by the data subject.

Data Subjects' Rights

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Under the GDPA, all data subjects are entitled to obtain confirmation as to the existence of personal data processing; access to his or her own personal data; correction of incomplete, inaccurate or outdated data; anonymization, blocking or removal of unnecessary, excessive or noncompliant data; portability of such personal data to another service or product vendor; deletion of personal data processed under the data subject's consent; receipt of information on third parties with which his or her data have been shared; information about the possibility to refuse providing personal data and the respective consequences; cancellation of his or her consent; easily accessible information on the processing of his or her data; and reconsideration, per individual, of the decisions made solely in reliance on automated processing of personal data affecting his or her interests.

Data processing agents' duties

Data processing agents in charge of processing personal data must not only respect the data subjects' rights but also comply with a number of obligations set out in the GDPA, starting with observance of principles, such as purpose [finalidade]: personal data shall be processed for legitimate, specific and express purposes informed to the data subject, without any subsequent processing in a manner incompatible with such purposes; adequacy [adequação]: personal data shall be processed in a manner consistent with the purposes informed to the data subject, also taking the context of such processing into consideration; and necessity [necessidade]: personal data shall be processed to the minimum extent necessary for achievement of the respective data processing purposes and using pertinent, proportional and non-excessive data only.

The GDPA also requires that data processing agents keep the records of the personal data processing, particularly when based on the lawful interest; and adopt technical and administrative security measures to protect personal data from unauthorized access and from accidental events or unlawful destruction, loss, modification, communication, dissemination or any other occurrence arising from improper or unlawful processing. Particularly, the controller (agent responsible for making decisions on processing of personal data) is also required to communicate to the national authority and to the data subject the occurrence of a data breach that may cause relevant risk or damage to the data subjects; appoint a data protection officer to accept complaints and notices from data subjects and national authority, provide clarifications and take measures, as well as advise the entity's employees and contractors on practices to be taken in relation to the protection of personal data processing; and prepare, at the request of the national authority, a personal data protection impact assessment report relating to its personal data processing.

Liability and Sanctions

In addition to civil liability for moral and property damage (individual or collective), arising from violation against the GDPA, data processing agents will be subject to the following administrative sanctions: warning, with indication of a deadline for adoption of corrective actions; an one-off fine of up to two percent (2%) of the revenues earned by the legal person, group or conglomerate in Brazil in the preceding year, net of taxes, capped at fifty million Brazilian Reais (R$ 50,000,000.00) per offense; a daily fine, subject to the cap referred to above; disclosure of the offense after the occurrence thereof having being duly investigated and confirmed; blocking of the personal data to which the offense refers, until the processing activity is regularized; and erasure of the personal data to which the offense refers. Because of a mistake in the text published in the Federal Official Gazette, the following sanctions – that should have been vetoed according to the reasons for veto – were retained in the GDPA: partial or total suspension of operation of the database to which the offense refers for up to six (6) months, extendable for an equal period until regularization of the data processing activity by the controller; suspension of the processing of the personal data to which the offense refers for up to six (6) months, extendable for an equal period; and partial or total prohibition against engaging in data processing activities.