The new Brazilian Data Protection Law and MP869[1]

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The Brazilian data protection Law (Law 13/709/2018 or 'LGPD') was enacted in 14 August 2018 with some vetos, the most relevant of them comprising nearly all the provisions regarding the creation of a DPA and a consultative Data Protection Council. In his speech on the day of the enactment, (then) President Michel Temer justified the veto as being necessary to provide legal security, as he believed the creation of the DPA could be easily challenged in courts because it wasn't directly demanded by the Executive branch (Brazilian Constitution doesn't allow for the Legislative alone to modify the structure of bodies in the public administration). However, President Temer confirmed his opinion regarding the need for a DPA and promised his government would propose an alternative.

Following his compromise, in the last days of his government a "Medida Provisória" (a kind of executive order) was issued as MP869/2018, at 28 December 2018. A "Medida Provisória" (or "MP") is a legislative piece, enforceable immediately after its publication but that must be later analysed by the National Congress. Congress has 60 days to evaluate the MP, a period that can be extended by 60 more days, to a maximum of 120 days. Congress can approve or not an MP, entirely or partially, as well as it can also add new text to it. Counting with their extension, the final deadline for the MP be evaluated is 4 June.

The content of the MP is, however, considerably larger than just the new proposal of a DPA and Council, as in the Bill originally approved by Congress - and, even in these issues, it changed considerably from this original text.

The c**reation of the DPA and Council**

The original text of LGPD was presented in Bill 5276/2016, drafted by the Federal government. This text mentioned the DPA and named several of its powers and functions; however, due to divergent positions inside the government, the

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creation of the DPA itself, its nature and structure weren't even mentioned in this text. National Congress, when evaluating the text, considered it was necessary and lawful to change the text in order to include the creation of the DPA, which creation was included in the final text of the Bill (approved unanimously by the Senate and Chamber of Deputies). It's relevant to notice that Congress also included the creation of a consultative body (the National Council of Data Protection) as well as established a set of powers and attributions of the DPA (named National Data Protection Authority - ANPD)

The whole set of articles which created and22 shaped the DPA and the Council (including its powers and functions) were vetoed by the President. The resulting Data protection General Law (LGPD), Law 13.709/2018, has a general mention to the nature of the DPA, without mentioning its administrative structure. Its independence was mostly characterised by the definition of the DPA (Autoridade Nacional), as follows:

Art 5º, XIX - National authority: body of the ***indirect*** *public administration in charge of supervising, implementing and inspecting compliance with this Law. (*Law 13.709/2018 before MP 869/2018)

Its independent nature was even more pronounced in the original text of LGPD before the presidential veto, as the former Art. 55 (vetoed by the President) established the DPA not only to be located in the indirect public administration but also defined its legal regime as autarchic with a link to the Ministry of Justice (a format that is usual among independent agencies in Brazil).

Even with all the articles regarding the DPA vetoed (except for its definition), the ANPD nevertheless remained mentioned several dozens of times in LGPD, to the point its enforcement turned out to be nearly unfeasible without it.

MP 869/2018 was designed to fill this void, creating the DPA, the Council, mentioning the basics of their administrative structure and specifying its powers and functions.

ANPD - nature and structure

Regarding ANPD, MP869/2018 began by changing its legal nature: the new Article 5º, XIX doesn't mention that it will be placed in the indirect public administration, opening the possibility for ANPD to be a part of the direct public administration - as it further specifies. So, it becomes possible for ANPD to be indeed a government organ, hierarchically positioned within the direct public administration.

Art 5º, XIX - National authority: body of the public administration in charge of supervising, implementing and inspecting compliance with this Law.

What follows are references to articles 55-A to K, included in Law 13.709/2018 by MP869/2018 by replacing its original (and vetoed) articles 55 to 57.

Article 55-A formally creates the DPA - "Autoridade Nacional de Proteção de Dados" or ANPD - and is clear about its nature and topographic positioning within the Federal government and the public administration, characterising it as an "organ of the federal public administration, belonging to the Presidency of Republic".

Article 55-B tries to include some degree of independence to ANPD, granting it with "technical autonomy". We'll get back to this issue.

Article 55-C is the most significant indicator of the real structure of ANPD, mentioning its composition: a Directive Council, the National Data Protection Council (consultative), a revision and controlling body, an ombudsman, a dedicated legal body and finally other (not specified) administrative and technical unities necessary to enforce the Law.

In fact, MP869 provided for a minimum legal basis in order to other administrative norm (a Presidential Decree) be able to detail ANPD' structure. Even so, it has an interesting point when it mention some of its internal divisions such as the dedicated legal staff or specific controlling body and ombudsman - such bodies can be important in order to create an autonomous administrative culture and perhaps can even help ANPD to evolve to a really independent body in a future and eventual development.

There is no reference to the specific units of ANPD and the mentioned Presidential Decree will be able, as it's usually the case, to create and modify its internal structure, apart for the bodies expressed mentioned in the Law. Also, article 55-G is explicit to specify that a Presidential Decree will determine the internal norms and functioning of ANPD and that, until then, the Civil Staff of the presidency of Republic will supply the necessary technical and administrative support.

ANPD doesn't have financial or budgetary autonomy. Even if a "technical autonomy" is mentioned in article 55-B, the fact ANPD is structurally a government organ inside the Presidency of Republic makes for few, ion any, concrete guarantees that its decisions and positions wouldn't be challenged or even somehow influenced by political constrains. For that matter, it'll be also important to consider the legal design of its Directive Council.

ANPD - composition

ANPD's Directive Council is formed from 5 directors, one of them Director-President. They shall be nominated by the President of Republic among Brazilians with "unharmed reputation", they must have an university degree and be highly regarded in the field of data protection. The Directors will have a mandate of 4 years (except for the first wave of directors, with 2, 3, 4, 5 and 6 years). The mandate can only be interrupted if it's the case of renounce, removal by a court's decision or after an administrative disciplinary process started by the Chief-Minister of the Presidency of Republic. There is no specific rule on how the director-president will be chosen, making it also a choice of the President of Republic.

The mandate is an important point to foster ANPD's autonomy. The mandate can prevent ANPD's directors from being subjected to immediate removal on political grounds, for example. Still, unaccompanied by a specific body of public servants (specifically dedicated to ANPD) and without financial and budgetary autonomy, the mandate alone risks not providing the necessary grounds for independence. Indeed, it can be recalled the case of the president of the Brazilian public communication enterprise (EBC) who, even with a mandate with legal basis, was demoted in 2016 by President Temer in a move with some judicial endeavours but which finally resulted in modifications on the law and the indication of another one for the job.

Another important point to consider is the fact all directors, including the director-president, will be ranked as DAS-5 (a specific position in the Brazilian federal public service), below a State Secretary in the hierarchy, for example. In a purely bureaucratic logic, the rank of the directors in the public service can potentially make it more difficult for ANPD be able to promote and defend its views and positions inside and even outside bureaucratic ranks, what brings potential risks to its concrete autonomy and power of ANPD.

The directors appointed by the President of Republic won't be submitted to hearing by Congress. In this sense, the choice is even more an exclusive power of the President.

LGPD originally mentioned the DPA would have 3 Directors, without mentioning a director-president. The fact that MP 869/2018 changed the composition of the director's board to 5 members can theoretically amplify the risks of occupation of the DPA by persons somehow linked to groups of interest. That increased risk happens because, in theory, in a 5-member board it is easier to accommodate 'representatives' of sectors and groups, whereas with a smaller board (the original 3) the shortage of vacancies have the effect to exacerbate tensions among the different sectors interested in the implementation and enforcement of the law, so that they can opt for favouring the indication of people with no direct links or interest to none of the groups - generally specialised people

working for the public sector or academics with great expertise (this is indeed what usually happens with the Brazilian antitrust body, CADE).

ANPD - powers

Apart for several ANPD powers and attributions already present in LGPD and that remained, article 55-J of MP869 establishes a specific set of powers. Most of then are merely the copy of the vetoed text originally in Law 13.708/2018. However, in comparison with the vetoed text there are some missing parts, some of them extremely relevant, that have no correspondent in MP869/2018.

The most relevant power which was ‘taken' from the ANPD is that of auditing. While the original Law 13.709/2018 in its article 56, XVI gives ANPD the general power to conduct auditing regarding treatment of personal data or to determine the auditing to be made by thirds, whether in the private as in the public sector, there is now no equivalent. The only remaining possibility of the ANPD conduct an auditing activity is a specific one in the article 20, § 2º, only in the case of automated decisions taken when the controller failed to inform the criteria used by evoking industrial secret.

Another power which have no correspondence is the one originally in article 56, III to elaborate the National Data Protection Policy, which would be a guiding document with standards and policies to be adopted in the enforcement of LGPD.

According to MP869, thus, ANPD won’t be able anymore also to deliver its technical opinions and recommendations in the cases LGPD won’t be applied because the treatment of personal data is based on reasons regarding public security, national defense, State security or investigative activities. This can be problematic, as LGPD mentions that, in these cases, even if the Law doesn’t apply, its principles and also the notions of necessity and proportionality must be considered in the treatment of personal data. Now ANPD cannot even flag situations of lack of compliance with these standards.

ANPD also received some new attribution included by MP869/2018. Article 55-J, XV mentions that ANPD must coordinate its actions with regulators in specific sectors (financial or telecommunication, among others) in order to perform its role in those sectors. While the contact and exchange of informations can be positive, this brings also the possibility of ANPD face difficulties to exercise its power and enforce LGPD in sectors where the regulator is in a strong position (which will be the norm given the fact ANPD isn’t independent and its directors aren’t high-ranked officials as is the case with regulatory agencies in Brazil). Also, paragraph 2º of the same article specifies that ANPD and the relevant regulatory sectorial bodies must coordinate its efforts, according to specific legislation (which can be the existing

sectorial legislation as well as new legislation). This can also turn out to decrease the effective independence of ANPD and also eventually reduce the hypothesis of application and enforcement of LGPD if it is decided that sectorial legislation might apply in specific cases.

Another new attribution, in this case a potentially positive one, is of article 55-J, V, of implementing simplified electronic mechanisms for receiving and managing complains regarding the application of LGPD. This is very relevant in a country the size of Brazil and considers positive experiences in areas such as consumer protection, where experiences such as “consumidor.gov.br" are proving to be effective to empower consumers without increasing bureaucracy. However, it depends on its implementation to verify if it’d make easier to not for citizens to have their complains indeed considered by ANPD.

Another improvement is the specification in article 55-k that the fines present in Law 13.709/2018 can only be applied by ANPD, who will also have to coordinate its actions with the National Consumer Protection System and its bodies. This means that consumer offices (which are spread in Brazil, with more than 800 regional offices). won’t be able to apply the fines present in LGPD

National Data Protection Council

The National Data Protection Council (or “the Council”) is a consultative body, without powers to sanction or investigate. Its components represent diverse sectors such as governamental (executive, judiciary and legislative), technical sector, Private sector, NGOs. Its role is to provide a multistakeholder forum to debate issues regarding the enforcement of LGPD, to provide feedback to ANPD, to contribute to the National Data Protection Policy (which isn’t present in the roles of ANPD anymore, indeed), to produce studies and so on.

The presence of such a Council is a positive and maybe a welcome solution that can accommodate some groups of interest and hopefully give expression to sectorial and specific views on the enforcement of LGPD, without compromising politically the work of the ANPD directive body. It brings, without being specific on this, some of the multistakeholder experience of the Brazilian Internet Steering Committee (CGI.br)

Substantial changes to LGPD

MP869/2018 provided the correction of some technical problems that Law 13.709/2018 but also went further and innovated substantially in several aspects.

We will examine the relevant aspects of LGPD which were modified - some of them are indeed potentially problematic.

Article 4, paragraph 4º was excluded, resulting that treatment of personal data for activities of public security, national defense, State security or investigative activities can be treated by the private sector, presumably at the request of public bodies and under contract.

Article 5º, VIII was changed in order to specify that the "person in charge" (similar to the DPO) can be either a natural or a legal person (in line with GDPR).

Article 7º, paragraphs 1º and 2º were revoked, causing concrete damages to the transparency in the treatment of personal data in the public sector. The paragraphs provided a duty of inform data subjects about the treatment of their data when the controller was the public administration and when the treatment was made for compliance with a legal duty, as well as in the cases LGPD doesn't apply. Even if for the latter (situations LGPD doesn't apply) there are grounds to justify the information isn't supplied, for the other situations the modification caused a concrete reduction in transparency to data owners and must be re-considered.

Article 11 was amended in order to clarify the possibility of the treatment of sensitive health data for the purposes of the performance of health services by private bodies.

The article 20, which deals with automated decision making, was ripped from the provision that the revision of such decisions, when required by the data owner, must necessarily be performed by a natural person. By cancelling the reference to the natural person, the data owner still has the right to require the revision but not to demand that it's done by a natural person. In fact, it is at least arguable the change will have any effect at all in a purely rational view, as the other possibility would be for the revision to be performed by another automated process, which would be *in se* subjected to another revision and so on... But anyway, what the change does in practice is trying to eliminate the human factor in automated decisions, which would make the process more complicated to the data owner as well as to move away from the GDPR perspective on the matter.

Article 26 deals with the shared use of data by bodies of the public sector and includes a general prohibition for public bodies to transfer personal data to the private sector, unless one of the exceptions in paragraph 1º is observed. MP869/2018 added three new such exceptions in article 26, paragraph 1º, III, IV and V: (i) when a "person in charge" (DPO) is appointed by the new private controller; (ii) under legal or contractual grounds; and (iii) for the purposes of prevent fraud or to protect the data owner's security and integrity.

The modifications in article 26 amplify the possibility of transfer of personal data prom the public to the private sector to such an extent that it becomes

practically ‘frictionless’. Let’s consider just the first two new hypothesis: if the mere indication of a DPO by the private controller with no other requirements whatsoever, or if a mere contract firmed between the public administration and the private controller are sufficient to make possible the transfer, we can assume the legislator decided to practically gave up any substantial means of controlling the transfer of personal data from the public to the private sector, as their requirements are very lax. Also, the hypothesis in article 26, paragraph 1º, V is also very broad as it is sufficient to characterise the “protection of security or integrity of the data owner” to justify the mentioned transfer

Another modification, this time in article 27, revokes the need to communicate to the ANPD of the transfer of personal data from the public sector to the private sector.

In short, the new text makes it very easy to avoid control and transparency on the use of personal data by the public sector and also makes it much easier to transfer personal data from public to private bodies. This is a potential cause for harm and also causes a misbalance in the LGPD approach to the public sector when compared to the private sector. If MP869 text is to prevail, it’ll become impossible to argue that LGPD protects to the same extent personal data whether in the private as in the public sector.