

HWG Client Advisory

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Brazil Stands Up New Data Protection Authority

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Many international organizations were caught off guard when Brazil's new data protection law, the *Lei Geral de Proteção de Dados Pessoais* (LGPD), went into effect on September 18, 2020—far earlier than expected and before the regulatory agency overseeing the law was in place.

As 2020 drew to a close, the Brazilian president nominated board members for the agency, the Autoridade Nacional de Proteção de Dados (ANPD). The Brazilian Senate confirmed the ANPD board, and the ANPD appears to be gearing up efficiently. Notably, several members of the ANPD have served in various roles at either Telebras, Brazil's state-owned telecommunications service provider, or the Brazilian military. Although the ANPD does not have the ability to levy administrative fines against companies that violate the LGPD until August 1, 2021, the ANPD has already begun investigations.

Meanwhile, Brazilian consumers and civil society organizations can take advantage of the LGPD's broad private right of action. While consumer protection bodies can pursue actions under the LGPD, unlike the ANPD, they cannot impose fines for noncompliance.

With respect to LGPD compliance, entities collecting personal information from individuals in Brazil should consider matching the Brazilian government's lightning speed.

For those who have not been following the saga, here is our high-level primer on the LGPD.

Isn't GDPR compliance enough for LGPD compliance? While the LGPD has many areas of overlap with the EU's General Data Protection Regulation (GDPR), it also differs from the GDPR in significant ways. Even if your organization is already compliant with the GDPR, these important differences will require additional compliance measures.

For example, while the GDPR requires processing to be governed by a contract, the LGPD merely requires that the processing must be conducted according to instructions provided by the controller, with the controller responsible for verifying compliance with those instructions. For international transfer of personal data, however, the LGPD does require the controller to "offer[] and prove[] guarantees of compliance" with the LGPD in the form of, for example, specific contractual clauses for a given transfer, standard contractual clauses, or binding corporate rules, the content of all of which will be defined by the ANPD. Until that is done, many entities are adapting European Commission-approved Standard Contractual Clauses to cover transfers of personal data from Brazil.

Consistent with the “principle of free access,” the LGPD provides the data subject with a right to access information concerning her data processing, including information regarding any shared use of data by the data controller.

And unlike the GDPR, the LGPD lists “protection of credit” as one of the circumstances under which personal data may be processed, but does not explain what that means. Also, unlike the GDPR, which requires appointment of a data protection officer under certain circumstances, the LGPD provides that a controller “shall appoint” a data protection officer to be in charge of processing personal data, without qualification on when appointment is required.

As to security incidents, the LGPD requires controllers to communicate to Brazil’s data protection authority and to the data subject any security incident that may create risk or damage to the data subject—and such communication must be “immediate.” In February 2021, the ANPD published guidance on reporting requirements, clarifying that the security incident report to the ANPD must occur within two business days.

What can the new data protection authority do? The ANPD has authority to, among other things, issue technical opinions and recommendations on certain aspects of the LGPD, and request data protection impact assessments. Administrative sanctions for noncompliance with the LGPD include a warning, a fine of up to two percent of revenues (up to fifty million reais for each infraction), suspension of data processing activities for up to six months, and total prohibition of the sanctioned entity’s data processing activities.

What’s at stake with respect to private suits? Although the ANPD will not begin enforcing sanctions under the LGPD until August 2021, it appears that citizens of Brazil may have a private right of action for noncompliance with the LGPD, through a general provision of Brazil’s Constitution. The LGPD imposes liability on data controllers and processors who cause material, moral, individual, or collective damage by processing personal data in violation of the LGPD.

Note also that the Ministério Público, Brazil’s public prosecutor’s office, also enjoys a public right of action and filed a public civil action only three days after the LGPD came into effect.

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For more information on the *Lei Geral de Proteção de Dados Pessoais* or HWG’s data privacy, security, and governance practice, please contact Becky Burr (bburr@hwglaw.com), Adrienne Fowler (afowler@hwglaw.com), Deepika Ravi (dravi@hwglaw.com), or the HWG lawyer with whom you regularly work.

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