DATA PROTECTION IN BRAZIL: CRITICAL ANALYSIS OF THE BRAZILIAN LEGISLATION

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CRITICAL ANALYSIS OF THE BRAZILIAN LEGISLATION

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I. Introduction:

The objective of this analysis is to indicate the strengths and weaknesses of the Brazilian data protection legal framework in relation to international standards as well as to discuss contextual/national disputes regarding existing proposals to alter it. As the previous parts of the report have already mentioned, in the absence of a national legislation laying down specific rules for the protection of privacy in Brazil**,** the legal framework consists of sectoral privacy laws and general principles such as the right to privacy and intimacy, assured by the Federal Constitution.

In contrast, around the world, more than 100 countries already have special legislation in this regard, drawing inspiration from a regulatory model that started in Europe. Brazil's delay, however, does not mean that the agenda has been forgotten. Since 2007, the Brazilian Ministry of Justice is discussing proposals to regulate data protection in the country. These discussions intensified after Edward Snowden' allegations of mass surveillance, that also concerned Brazil, and which led the Federal Administration to boldly engage to approve the "*Marco Civil da Internet*" (Brazilian Internet Civil Rights Framework) and to promote two public consultations on the matter, gaining broad participation of key stakeholders involved.

From 28 January to 05 July 2015, the National Consumer Secretariat (SENACON) together with the Secretariat of Legislative Affairs (SAL) of the Ministry of Justice conducted the most recent round of public consultation process around a Data Protection Draft Bill, in an online platform. The aim was to receive contributions from different stakeholders to develop a general law for data protection in Brazil.

In May 2016, on the eve of President Dilma's removal from office, she decided to submit to Congress with urgency the draft text prepared by the Ministry of Justice, which is now being processed in the House of Representatives ("*Câmara dos Deputados*") as Bill No. 5276/2016. The details of this project were already discussed in detail item III of the previous section of this report. Here, however, it is important to discuss the political context in which the project was received by the Brazilian Congress.

This bill, however, it is not the only that address data protection issues in Congress. While this data protection draft bill was being discussed within the Ministry of Justice, other proposals arose in the Brazilian Congress and sparked the debate among parliamentarians. Two of them are also worthy further discussion: Bill No. 4060/2012, authored by Representative Milton Monti, and Bill No. 181/2014, authored by Senator Vital do Rego.

In July 2016, due to a proposal of Representative Alexandre Leite, Bill 5276/2016 was attached to Bill 4060/2012, which contributed to restoring the uncertainty regarding the approval of the legislation. In October 26, 2016, a Data Protection Special Commission was established in the House of Representatives to especifically discuss these two projects. The debates of this Commission will be very

relevant, because even though the similarities and differences between the projects may often seem subtle, the interests behind them are quite distinct.

This legislative context is relevant here because Bill 5276/2016 is the closest we have to the EU General Data Protection Regulation and the most comprehensive text regarding the regulation of personal data. In this sense, in many aspects, Bill 5276/2016 is the best reference for benchmarking the Brazilian framework against international standards. Bill 4060/2012, in its turn, is aligned with the interests of big digital marketing companies, aiming at accessing consumers' data to marketing purposes. Finally, Bill 181/2014 meets the other two halfway, as it is neither as comprehensive as Bill 5276/2016 or as restrictive as Bill 4060/2012.

II. Critical analysis on key aspects of the Brazilian data protection framework

Regulating the use of personal data means to equate the interests of those who see unique opportunities to promote innovation and enjoy the benefits of big data in the collection and processing of data with the interests of those who advocate for limits to these capabilities as a condition for the protection of privacy. Different stakeholders competed - and continue competing - around multiple sensitive points in this debate as we will further discuss below.

II.1. Definition of personal data

One crucial discussion around the approval of a data protection law concerns the definition of ***personal data***. When it comes to establishing a law for the protection of such information, it is crucial to find a balanced description and to define exactly what it means. From that it will be possible to determine over which different types of data rules will apply or not.

The present definition of personal data established by the European General Data Protection Regulation (GDPR) is "*information relating to an identified or identifiable natural person", in which "an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person*".

In Brazil, however, in the absence of general data protection law, there was also no definition of ***personal data*** established by law, but only pieces of legislations making references to this concept until very recently. *Marco Civil da Internet* refers to "personal data" and "treatment of data" in its article 7,

without however defining those terms. For this reason, one of the issues addressed during the public consultation debate around the regulatory decree of the *Marco Civil* was precisely whether the text should establish definitions for these concepts or not. In this regard, many participants of the public consultation believed that this matter should be addressed by a future personal data protection law, which was also under debate, and not by the decree.

Nonetheless, as pointed out in item II.2.1 of this report, the approved text of *Marco Civil*'s Regulatory Decree (Decree No. 8771 of 2016) defined in its article 14, I, **personal data** as "*data related to an identified or identifiable natural person, including identifying numbers, location data or electronic identifiers, when these are related to a person*" and also **processing of personal data** as "*any operation carried out with personal data, such as: collection, production, reception, classification, use, access, reproduction, transmission, distribution, processing, archiving, storage, disposal, evaluation or control of information, communication, modification, transfer, dissemination or extraction*". Identical definitions of both personal data and processing of personal data is in Bill 5276/2016, still subject to approval.

This definition of personal data was praised and criticized during the public debate around the data protection draft bill, both in the sense that the definitions were too broad or too narrow. On the one hand, experts interviewed by InternetLab argued that the concept of Bill 5276/201 is in accordance with international legislations, such as the European General Data Protection Regulation.

On the other hand, representatives of companies believe that this broad concept also encompasses data that not necessarily identify a natural person, but are merely "related" to an individual. According to them, the concept should leave out all data that is not effectively capable of reasonably identifying an individual, as well as all the data subjected to anonymization processes.

To some stakeholders, the definition in Bill 4060/2012 would be more adequate, as it defines personal data as "*any information that allows accurate and precise identification of a particular person*" (article 7, I) - which is a far less comprehensive definition. Bill 181/2014, in its turn, defines personal data as "*any information about identifiable or identified natural person*" (article 3, I), which encompasses data subject to anonymization but not does not mention data related to an individual.

II.2. Sensitive data

Another relevant discussion in the Brazilian scenario is about ***sensitive data***, understood as information that can be used in discriminatory ways and, therefore, need special protection. A mentioned in item II.2.3 of the report, the first law in Brazil that introduced the term "sensitive" regarding information was the Financial Records Act (*Lei do Cadastro Positivo* - Law No. 12414/2011), which defined "sensitive data" as "*information connected to the social and ethnical origins of the users, and any*

other information regarding health; sexual orientation; political, religious and philosophical convictions" (article 3, §3º, II).

Apart from that, Bill 5276/2016 also brings a definition of sensitive data in its art. 5º, III, as follows: "*personal data about racial or ethnic origin, political opinions, religious convictions, trade union membership or membership to religious, philosophical or political organizations, data about one's health or sexual life, and genetic or biometric data".* Such establishment of a special regime for sensitive data by the bill is in line with data protection legislation of most european countries and both the European Directive 95/46/CE and the new European General Data Protection Regulation (article 9).

In contrast, in both Bill 4060/2012 and 181/2014 there is no reference to sensitive data.

II.3. Enforcement authority

Internationally, many countries that have enacted general laws for personal data protection have also created a specific, independent and exclusive national entity, usually called "data protection authority" - or DPA. The importance of independent administrative entities to the implementation of data protection legislation is also recognized by the Charter of Fundamental Rights of the European Union, which prescribes the need for a supervisory authority to exercise control of data processing activities (article 8).

One central difference between the bills regarding the protection of personal data in Brazil is related to the enforcement of the future law. In Brazil, the bill submitted by the President is the only one able to create a competent authority to enforce the law, as according to the Brazilian Constitution the head of the Executive Branch has the exclusive initiative to propose laws about the establishment and structuring of government bodies (article 61, § 1, II, CF). Therefore, the creation of an enforcement authority is not foreseen in either Bill 4060/2012 or Bill 181/2014.

During the public consultation around what later became Bill 5276/2016 many different aspects of this competent authority were debated. Participants disagreed about whether it would involve an existing institution or it would be necessary to create a new authority to exclusively care for the implementation of the data protection law - and in that case which would be the characteristics of this body.

The final text of the Bill 5276/2016 established in its article 53 the competences of a body responsible for overseeing the implementation and enforcement of the law. This entity should be responsible for, among other things, developing the guidelines for a National Data and Privacy Protection Policy and to promote studies on data protection and privacy. However, the bill does not indicate what

would this organ be like and how it should work. Thus, even if the bill is approved, the question around which institutional design will be adopted to ensure compliance with the law by is still open. Currently, as the report mentioned, the enforcement is carried out by National Consumer Secretariat (SENACON) of the Ministry of Justice.

II.4. Data retention

As mentioned in item II.2.1 of the report, the MCI establishes mandatory data retention of user data and metadata, for both Internet Service Providers (ISPs) services and Internet Application Providers services, regardless of whether a user is part of an ongoing investigation or not (article 13 and 15). These obligations, however, required further regulation, and were broadly discussed during the public consultation debate around the *Marco Civil's* regulatory decree.

The decision of the Court of Justice of the European Union (CJEU) of April 2014, which invalidated the European Data Retention Directive under the argument that restrictions to basic rights imposed by the Directive were disproportionate, had repercussions also in Brazil and were reflected in the debate over the regulatory decree.

While law enforcement agencies in Brazil argued these predictions are necessary to ensure user's liability for offenses committed using telecommunications means and to assist prevention and punishment of other offenses, many participants raised concerns around the growth of State's surveillance over citizens. Questions were also raised regarding the constitutionality of such measures, as the information retained could offer portraits of user's personality, habits, interests, social contacts and location that are directly related to such user's privacy and affect secrecy of communications.

Regarding data retention, apart from the MCI and its Decree, two others existing laws refer to data retention in Brazil: Anatel's resolutions (426/05; 477/07 and 614/13) and Criminal Organizations Law (both analyzed in the item II.2.1). These laws also give rise to controversies, as they establish that telephone records and personal data must be retained for 5 years and Internet connection logs must be retained for 1 year.

The lack of a valid Data Retention Directive in Europe, however, makes it harder to draw a comparison with the Brazilian framework, as each Member States may provide for its own a data retention regulation. Even though, it's noteworthy that european data retention schemes must comply with the rules regarding the rights to privacy and personal data protection set out in Article 15 of the ePrivacy Directive, the EU Charter of Fundamental Rights and also the CJEU ruling regarding Data Retention itself.

II.5. Legitimate interest

Another basic rule to be considered in the present analysis concerns what can authorize the processing of personal data. Bill 181/2014 establishes that "c*ollection, storage and processing in a lawful manner, in accordance with principle of good faith and assigned to certain purposes, prohibited the further use incompatible with those purposes*". In contrast, Bill 4060/2012 establishes that "*personal data will be treated fairly and in good faith in order to meet the legitimate interests of the owners*" (article 9). The most detailed definition is in Bill 5276/2016, which establishes that the treatment of personal data may occur *"upon freely given, informed and unequivocal consent of the data subject"* (article 7). This bill proposed by the President also establishes the ***legitimate interest*** of those responsible for processing the data (art. 7, IX) as one hypothesis to authorize the processing of personal data. The addition of this exception occurred in 2015, during the online public consultation.

This concept was included in the text to authorize certain situations in which the explicit consent would not be necessary, and is also present in the European laws for data protection. It is worth mentioning that in both the European Directive 95/46/CE and the new General Data Protection Regulation (GDPR) the unequivocal consent from the owner of the data is just one of the modalities that authorize the processing of personal data.

In Brazil, however, the provision of the legitimate interest was a source of concern from different stakeholders. Experts argue that it is relevant as it recognizes that other parties - apart from the owner themselves - may have legally protected interests in the processing, use or transfer of certain information. It also copes with circumstances in which the exercise of rights or the prevention of damage depend on the processing in situations when it is not possible to obtain the consent from the owner.

Nonetheless, some argue that the legitimate interest might be interpreted as an exception that could imply a general authorization for all types of processing, with many different purposes, without any control or knowledge from the owner of the data. Thus, for the provision to establish the necessary balance between protection of privacy and intimacy and the economic development and innovation, it should be accompanied by fundamental limits to its application, reducing the risks of abuse.

Moreover, as discussed in item II.2.1, apart from Bill 5276/2016, some existing laws in Brazil also bring the notion of *explicit* user consent: The General Telecommunication Law (Law No. 9472/1997), the Consumer Protection Code (Law No. 8078/1990) and the *Marco Civil da Internet* (Law No. 12.965/2014). Both aim to give the user better control over his or her information, where the disclosure of individual information will depend on the specific consent of the user.

II.6. Big data

Finally, it is noteworthy to discuss the provisions of the Bill 5276/2016 regarding big data. Nowadays, many of features and services are available thanks to the ability to store, process and analyze massive amounts of data in innovative ways. The development of tools to perform these operations appears increasingly essential to much of the information technology sector and the automated processing of data performed by *algorithms* is a key piece in this puzzle. This issue was intensely debated in the public consultation about the approval of a data protection law.

To deal with this matter, Bill 5276/2016 sets forth in its article 20 that the data owners may request a review of automated decisions when these affect their interests. It also establishes an obligation to the controller of such data to provide, if requested, clear and relevant information on the criteria and procedures used for the automated decision. A similar rule can be found on the European Directive 95/46/CE of data protection, in its article 15, which states the "*right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc.*".

In the Brazilian legal framework there is already a similar provision in force, in Financial Records Act (Lei do Cadastro Positivo - Law No. 12414/2011), which establishes in its article 5, IV, the right for the owner of the data to request "*the review of the decision made exclusively by automated means*". This norm is of core importance when applied to risk assessment system (credit scoring), as it allows the consumer to the review of an inappropriate "note" or a "value", which was assigned to them based on erroneous and outdated data, or data that could not have been stored.

III. Context-related remarks

It is important to analyze these regulations in light of the delicate political moment Brazil is going through. A new government is in place and president Michel Temer has already made significant changes in the Federal Administration structure, merging offices and appointing new ministers. Moreover, the current composition of the National Congress is the most conservative since Brazil's re-democratization (1988, with the current Federal Constitution), and the federal government has shown signs that it is committed with less progressive agenda.

Regardless of the disputes going on the Legislative and Executive branches the interpretation of the rules in force is also in dispute in the Judiciary. In this scenario, courts, prosecution offices,

competition and consumer authorities might have surprising roles. At this point it is noteworthy that in the absence of a specific framework in Brazil to regulate personal data, local courts have few parameters to decide cases related to such issues. In this context, courts have been coming to conflicting decisions, that bring legal uncertainty to the Brazilian landscape.

For instance, in a recent decision regarding the website *Tudo sobre tudos*, that sold personal data online, the judge from the 1st Federal Court of Rio Grande do Norte decided that selling personal data such as social security number, address, date of birth, telephone etc without the *express* consent of the citizen **is unlawful**. In contrast, in a similar case judged by the Rio Grande do Sul Court of Appeals regarding the bureau *Procob*, the decision was in the opposite direction: **it is not against the law to sell such personal data**. Both decisions are an example of how the absence of a comprehensive framework to protect personal data can generate an environment of legal uncertainty.

IV. References

BIONI, B. R. (2016). Xeque-Mate: o tripé de proteção de dados pessoais no xadrez das iniciativas legislativas no Brasi. Available in: https://gpopai.usp.br/wordpress/wp-content/uploads/2016/07/XEQUE_MATE_INTERATIVO2.pdf

INTERNETLAB. (2016). Data protection special. Available in: http://www.internetlab.org.br/en/data-protection-special/

INTERNETLAB. (2015a). *O que está em jogo na regulamentação de Dados Pessoais no Brasil? Relatório final sobre o debate público promovido pelo Ministério da Justiça sobre o Anteprojeto de Lei de Proteção de Dados Pessoais*. Available in: http://www.internetlab.org.br/wp-content/uploads/2016/05/reporta_apl_dados_pessoais_final.pdf

INTERNETLAB. (2015b). *What is at stake in the regulation of the Marco Civil da Internet? Final report on the public debate sponsored by Ministry of Justice on Regulation of Law 12965/2015*. Available in: http://www.internetlab.org.br/wp-content/uploads/2015/08/Report-MCI-v2-eng.pdf

ROSSINI, C., BRITO CRUZ, F., & DONEDA, D. (2015). *The Strengths and Weaknesses of the Brazilian Internet Bill of Rights: Examining a Human Rights Framework for the Internet*. Available in: https://www.ourinternet.org/sites/default/files/publications/no19.pdf