

Data Protection Law in Brazil: an overview



The issue of privacy and data protection is fundamental in all developed countries, although a comparative analysis of the existing legislations worldwide reveals differences among the approaches taken by lawmakers.

The legislation of Brazil recognizes the central value of the protection of the privacy of individuals (i.e. the private and intimate sphere that characterizes every human being), as contemplated by the Federal Constitution (article 5, X) that states that the human intimacy and privacy cannot be violated and, if this happens, the victim has the right to be compensated for the moral and material damages he/she suffered.

The provision of article 5, X, of the Federal Constitution is reflected in the Civil Code under article 21, that specifies the inviolability of the private life of individuals, with the important specification that the judiciary has the power to take measures to prevent or terminate any violation of the plaintiff's privacy.

The combined application of the abovementioned rules implies thus that

the alleged victim of a privacy violation can ask the court to adopt substantive measure aimed to prevent and, more realistically, to terminate such violation and to assign compensation.

As regards data protection, i.e. the protection granted by the law to personal information referred to a right holder, the data subject, the Brazilian legislative approach is characterized by the fact that data protection rules and principles are contained in the legislation devoted to consumers' protection, i.e. the Consumers Code (*Código de Defesa do Consumidor*, law no. 8.078 of 1990).

The Code differs considerably from the data protection legislation applicable in the European Union (Directive 95/43 EC, the so-called Data Protection Directive, as implemented in all EU Member States) mainly as regards the consent of the data subject to the processing of personal data relating to him/her, provided that such a consent, as a basic rule, is necessary in the European Union while it is not requested according to the Brazilian legislation. Furthermore, the applicability of data protection in Brazil is limited to the relations between a provider of goods or services and a consumer (defined as the natural or legal person that acquires or uses a product or service as final consumer), while data protection in the EU is definitely wider and applies regardless of the commercial nature of the relationship between the data

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controller (i.e. the person that defines purposes and means of the data processing) and the data subject.

The main principles stated in the Consumers Code are:

- The consumer has the right of access to all personal information regarding him/her (as well as the respective sources) that are contained in registries, databases etc. (article 43). According to article 72 of the Code, the fact to impede or prevent consumers from accessing to their personal information processed in a registry or database can be punished with the criminal sanction of imprisonment from six month to one year or with a fine;
- The registries and databases shall be objective, clear, not-misleading, truthful, understandable e shall not contain information detrimental for the consumer for a period longer than five years (article 43, § 1);
- The consumer has the right to be informed about the processing of data relating to him/her, i.e. the inclusion of personal data in a registry or the opening of an entry with personal information in a database shall be

communicated in a written form to the consumer, unless the consumer himself has required that the processing of his/her data takes place (article 43, § 2);

- If the processed personal information regarding a consumer are incorrect, the data subject has the right of immediate rectification and amendment of the personal information (article 43, § 3). The person in charge with the processing of personal information has the obligation to communicate the amendment of the personal data to the recipients of the incorrect information, if any, within five days. If the amendment requested by the data subject is not done, the data controller can be punished with the criminal sanction of imprisonment from six month to one year or with a fine (article 73).

This overview reveals that foreign investors in Brazil shall take into due account data protection rules and that they need to set up an adequate data protection policy based on the activities performed. Furthermore such a data protection policy shall be consistent with the EU data protection legislation in case a transfer of persona data from the territory of the EU to Brazil takes place.

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Additionally to the correct overview about the Brazilian juridical framework on Privacy, that was given by Davide, I remember: the correct and secure storage of data, as well as the policy of treatment of data of third party (be a consumer or a company in its productive process), are necessities of the Contemporaneous World.

For example, without a secure treatment of data it is impossible guarantee the privacy of citizenship (considering that the Brazilian Federal Revenue has tax data of all taxpayers), as well as it is impossible guarantee the secrecy of a new business, aiming its success, or even guarantee the non use of personal financial information by Financial Institutions, in an unfair way.

Among other Privacy rights, tax & financial confidentiality are rights, of persons and legal entities, that are essential to the economical development of a country.

This is why, even before the Internet, Brazilian Federal Constitution and the Brazilian Civil Codex already had established legal elements which can protect the private sphere – e.g., against the State, we have Habeas Data, by which a human being has the right to

obtain of Brazilian State information about himself; another example: we have the civil protection, against privacy damage, given by the necessity of good faith in any contractual relationship, according the Article 422 of the Brazilian Civil Codex (good faith, in this meaning, has relation to the correct and fair use of information).

Recently, Facebook suffered lawsuit by do not erase, in fact, data of a user that had requested to erase his data. If this lawsuit had taken place in Brazil, one of the legal elements against Facebook, among others, would be the disregard of the principle of good faith in contractual relations.

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**For more information on Digital Law
please contact:**

***Davide M. Parrilli* – lawyer, Brussels:
davide.parrilli@parrillilegal.net**

***Rafael De Conti* – lawyer, São Paulo:
rdc@decontilaw.com**