

Data Protected.

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Brazil

Contributed by Lefosse Advogados

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General | Data Protection Laws

National Legislation

General data protection laws

There is no general data protection law in Brazil. However, there a number of specific laws that address various privacy and data protection issues. The most important of these laws are summarised below.

The Federal Constitution provides that “privacy, honor and image” of a person are fundamental rights of any individual and are inviolable. These fundamental rights are reinforced by the Civil Code which provides that the private life of an individual is inviolable.

The Internet Bill of Rights Law (*Marco Civil da Internet*) was introduced to, amongst other things, restrict use of or access to information about private internet usage.

The Consumer Protection Code (*Código de Defesa do Consumidor* or “**CDC**”) contains specific provisions to protect the personal data of consumers and balance the relationship between consumers and businesses.

Added to this are a number of specific sectorial laws which include: (i) Federal Law No. 8,069/1990, which regulates personal data of minors; (ii) Federal Law No. 9,296/1996, which regulates wiretapping; (iii) Telecommunications Act (1997), which lays out privacy rights in the telecom sector; (iv) Financial Institution Secrecy Law (2001), which addresses financial data; (v) Access to Information Law (Law No. 12,527/2011), which regulates the treatment and safeguarding of documents and information handled by governmental entities; (vi) National Tax Code (Law No. 5,172/1966), which establishes the confidentiality of any financial, economic or commercial information obtained by public agents from the Internal Revenue Service; and (vii) Complementary Law No. 105/2001, which establishes financial institutions' duty of confidentiality in relation to transactions, services and operations.

Finally, there is a draft data protection bill under discussion in the Brazilian Congress. It contains specific provisions regarding the creation of a data protection regulator and the obtaining of consent to processing personal data.

Entry into force

Various.

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National Regulatory Authority

None

National Legislation

[The Brazilian Federal Constitution](#)

[Civil Code](#)

[Consumer Protection Code](#)

[Marco Civil da Internet](#)

(Please note these links are provided for information only. Any translations may not be accurate and the text may not include amendments to that legislation).

National Regulatory Authority

Details of the competent national regulatory authority

There is no specific data protection regulator in Brazil.

Notification or registration scheme and timing

There is no notification or registration scheme.

Exemptions

Not applicable.

Appointment of a data protection officer

There is no obligation to appoint a data protection officer.

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Personal Data

What is personal data?

Some of the laws currently in force deal with a concept of personal data that is similar to the *standard definition of personal data*, which includes name, ID, tax registration number, personal address, credit card number, income, bank account and any private communications.

Is information about legal entities personal data?

Yes. This is confirmed not only by certain provisions in the law, but also case law and academic consensus.

What are the rules for processing personal data?

If a person is identifiable in the personal data, consent is needed to use that personal data. Consent may be obtained after the collection of the personal data. Where personal data will be disclosed to or used by third parties, the person should be informed of that fact at the time consent is obtained. Moreover, any agreements on personal data are interpreted strictly.

Under the *Marco Civil da Internet*, personal data about internet usage (including connection records and information about access to applications) may not be communicated to third parties without free, express and informed consent of the individual. There is an exception in case of a valid Court order imposing the disclosure of such personal data. Please note the need for informed consent means that so-called adhesion contracts (i.e. standard form contracts purporting to provide an automatic consent) are not sufficient.

Under the Federal Constitution an individual's mail, data and telephone communications are protected, although access may be obtained for evidentiary purposes by means of court orders, such as those issued in the context of criminal investigations or proceedings. However, in relation to the obligations under the Civil Code, a recent decision of the Higher Labour Court indicates that employers can legally monitor employees within the work environment. Therefore, the privacy of an employee within such environment is limited.

Are there any formalities to obtain consent to process personal data?

Consent can be inferred or implied, but its validity will always depend on the specific circumstances of the case. In addition, it is normally advisable to get consent in writing for evidential purposes. Minors cannot give consent without parental authorisation.

Under the *Marco Civil da Internet* express consent is required for certain types of processing and that consent must be based on clear prior information as to the purpose for which such data is collected.

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Sensitive Personal Data

What is sensitive personal data?

Despite the lack of specific data protection legislation defining the meaning of "sensitive data" in Brazil, recent case law does provide a concept of sensitive personal data similar to the one expressed in the *standard types of sensitive personal data*.

Are there additional rules for processing sensitive personal data?

This type of data is likely to attract additional protection and may be subject to specific

protection. For example: (i) Labour Law restricts the use of sensitive data for the purpose of discriminatory background checks; and (ii) medical data is subject to additional confidentiality obligations.

Are there any formalities to obtain consent to process sensitive personal data?

While there are no additional legislative requirements, it is strongly advisable to inform the individual of such data processing and to get formal consent in writing, preferably in hard copy.

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Scope of Application

What is the territorial scope of application?

There is no specific provision on the territorial effect of data protection laws. It is, therefore, likely to apply to: (i) the processing of personal data in Brazil; and (ii) processing of personal data which relates to Brazilian citizens or residents regardless of where the organisation carrying out the processing is based.

The *Marco Civil da Internet* applies where: (i) the collection, storage or processing takes place in Brazil; or (ii) at least one of the endpoints to the communication is located in Brazil. It also applies to foreign companies if there is a local entity of the corporate group in Brazil or if services are offered to the Brazilian public.

Who is subject to data protection legislation?

There is no distinction in Brazil between *data controllers* and *data processors*. All persons using personal data need to comply with Brazilian laws applicable to this matter.

Are both manual and electronic records subject to data protection legislation?

Both manual and electronic records are subject to the laws that deal with data protection.

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Rights of Data Subjects

Compensation

The collection of sensitive data of employees, customers or other third parties may raise claims for compensation for moral damages, which may be awarded if the Brazilian Courts consider there is no reasonable business need to collect such data or that the data was misused. Despite the lack of specific legislation on this matter, the collection of non-sensitive data is unlikely to raise claims for compensation for moral damages.

Fair processing information

There is no general obligation to provide fair processing information, though information about the purpose for which personal data is being processed must be provided to obtain an informed consent under the *Marco Civil da Internet*.

Rights to access information

Under the CDC, consumers must be given access to his/her own data contained in any files, index cards, records, personal and consumer data, as well as their respective sources. This request can be made free of charge.

In addition, the Federal Constitution, as further regulated by Federal Law No. 9.507/97, guarantees to any individual or legal entity the *habeas data* proceeding against controllers of public and private databases in order to access and rectify any of their data.

Objection to direct marketing

An individual is entitled to revoke its consent to the processing of personal data for the purposes of the direct marketing of goods, work or services.

Other rights

Where the database is held by a public entity, citizens have the so-called *habeas data* right to correction of personal data. The CDC gives consumers the right to request immediate rectification of his/her data, which should be made and notified to the consumer within five days. Under the *Marco Civil da Internet*, users have the right to have their personal data deleted at the end of their contract with the internet provider.

Certain other rights exist, for example, credit reference agencies must not disclose negative credit entries (such as a public protest for payment) that are more than five years old.

Security

Security requirements in order to protect personal data

Except for certain sector-specific regulated areas (e.g. banking, tax and telecommunication), there is no specific requirement regarding security measures for the protection of personal data. However, reasonable efforts must be made, and reasonable technology must be used, in order to protect personal data.

Specific rules governing processing by third party agents (processors)

Where personal data is disclosed it is important that any party who may subsequently have access to that information takes all appropriate measures in order to keep it confidential.

Although not legally required, organisations should consider executing a confidentiality agreement with any person to whom they disclose personal data (whether employees, outsourced service providers or any other third parties), since unauthorised access, use or transfer of data, may trigger liability. A confidentiality agreement will minimise the organisation's risk exposure in connection with such disclosure.

Notice of breach laws

None.

Transfer of Personal Data to Third Countries

Restrictions on transfers to third countries

There is no specific rules on transfer of personal data to third countries.

Despite the lack of express regulation on the transferring of personal data locally or abroad, it is possible to infer from the existing law that when the database is created or transferred locally or abroad, the individual must be notified.

Notification and approval of national regulator (including notification of use of Model Contracts)

Not applicable.

Use of binding corporate rules

Not applicable.

Enforcement

Sanctions

The Criminal Code imposes criminal sanctions for violations of privacy in the event of: (i) interference with private or commercial correspondence or interception or violation of telephonic, telegraphic or radio communication, which can result in imprisonment for up to two years (or up to three years if the violator is engaged in activities related to the postal service, telephonic, telegraphic or radio communication); (ii) accessing a private computer without authorisation in order to obtain personal advantages or have access to private electronic communication, which can result in imprisonment for up to two years; and (iii) disclosure in breach of duties of secrecy or professional secrecy, which can result in imprisonment for up to one year. In addition, article 10 of the Brazilian Banking Secrecy Law (Complimentary Law No. 105/01) provides for criminal sanction for violation of banking secrecy, which can result in imprisonment for up to four years.

Violation of the Federal Constitution or Civil Code may give rise to rights to compensation (see above).

The *Marco Civil da Internet* imposes significant penalties for those that misuse information about private internet usage. These sanctions include: (i) a warning; (ii) a fine of 10% of the offending entity economic group's gross income in Brazil; (iii) temporary suspension of any processing; and (iv) a prohibition on conducting business.

Practice

Published cases mainly relate to the processing of personal data: (i) by fiscal authorities; (ii) in the telecommunications sector; (iii) by employers; (iv) relating to health and medical matters; (v) in marketing activities; and (vi) consumer relations.

Enforcement authority:

Enforcement authority

Brazilian laws are enforced by the courts. Enforcement action is also taken by public authorities with regulatory oversight of the consumer, financial and telecoms sectors. In the case of consumers, the Bureau of Consumer Protection may also impose administrative fines.

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ePrivacy | Marketing and cookies

National Legislation

ePrivacy laws

Accessing a person's private computer in order to obtain, modify or destroy any kind of data, or accessing electronic communication without authorisation, whether express or implied, aiming at obtaining personal advantages, may trigger criminal sanctions of imprisonment for up to three years and a fine. Moreover, the *Marco Civil da Internet* includes new privacy and personal data protection rules applicable to private internet usage.

Amendments to the CDC have been proposed to further regulate the sending of unsolicited "spam" emails.

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Cookies

Conditions for use of cookies

There are no specific cookie laws. However, various laws, including the CDC and Marco Civil da Internet, suggest cookies should only be used when: (i) the individual's consent is obtained; or (ii) the cookie does not identify the individual.

In order to obtain consent, the website must make sure that the individual receives clear upfront information why the cookies are being used and what data is collected. The individual must expressly opt-in to the disclosure of data and records to third parties.

Regulatory guidance on the use of cookies

Not applicable.

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Marketing by E-mail

Conditions for direct marketing by e-mail to individual subscribers

There are no specific laws regarding this matter. However, considering the general privacy and data protection principles and consumer rights provisions, marketing e-mails or spams should not be sent to subscribers who previously objected.

Conditions for direct marketing by e-mail to corporate subscribers

There is no distinction between individual and corporate subscribers.

Exemptions and other issues

None.

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Marketing by Telephone

Conditions for direct marketing by telephone to individual subscribers (excludes automated calls)

Many states have enacted "do not call" provisions to control telemarketing to mobile and fixed telephones. Companies may not call numbers on those lists for the purposes of telemarketing, unless the consumer has given prior permission in writing with an express expiration date.

Conditions for direct marketing by telephone to corporate subscribers (excludes automated calls)

There is no distinction between individual and corporate subscribers.

Exemptions and other issues

Philanthropic entities, such as charities raising funds, are not subject to these restrictions.

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Marketing by Fax

Conditions for direct marketing by fax to individual subscribers

There is no specific regulation concerning marketing by fax, although the general privacy and data protection principles are applicable.

Conditions for direct marketing by fax to corporate subscribers

Not applicable.

Exemptions and other issues

Not applicable.