

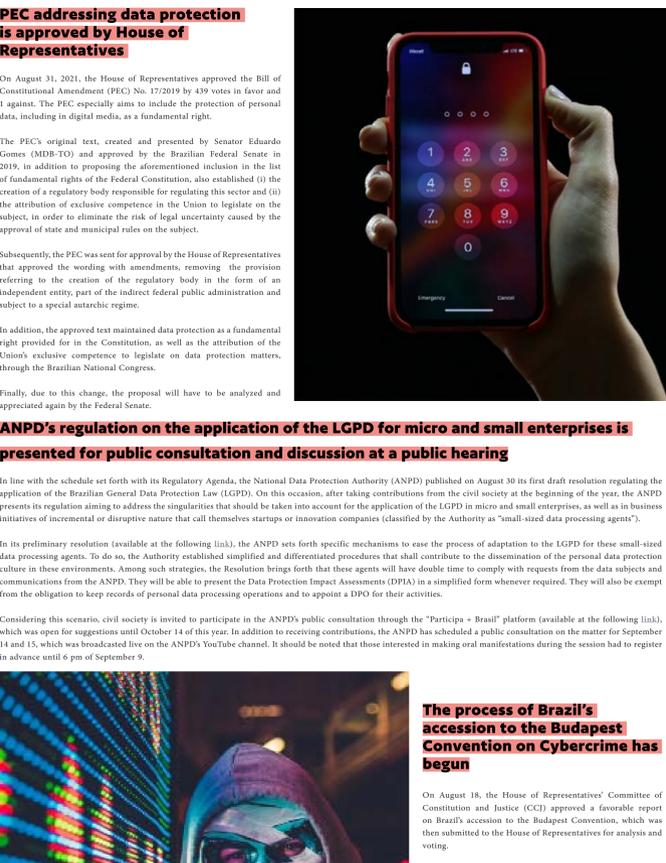
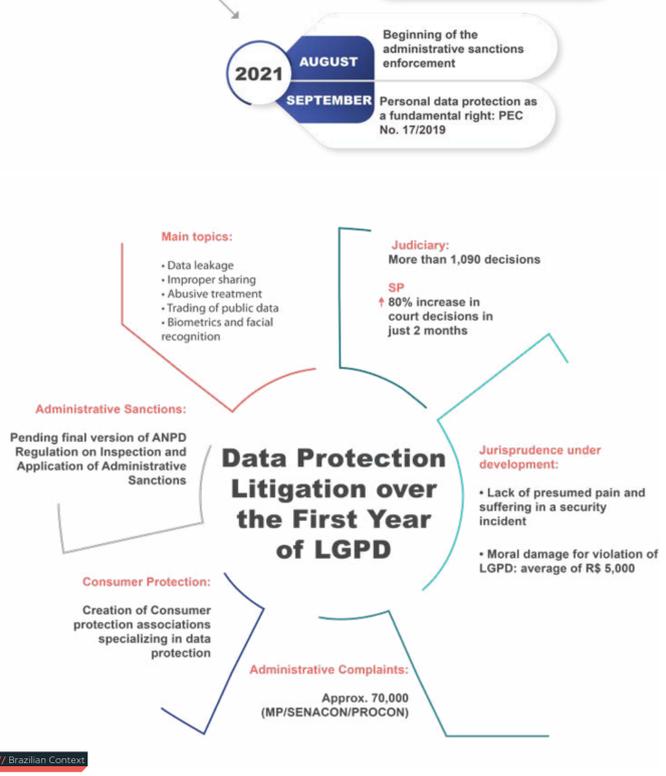
SPECIAL EDITION: 1 YEAR OF ENFORCEMENT OF LGPD

In this edition, we produced a special content in celebration of the first year of LGPD (Brazilian General Data Protection Law)...

Throughout this year, we have witnessed the beginning of a journey, a new perspective on privacy and data protection...

Private companies and public entities have worked tirelessly to comply with the new Law in a naturally more unstable period...

Amidst the adequacy and compliance phases, the new law was put to the test and we can say that it worked...



PEC addressing data protection is approved by House of Representatives

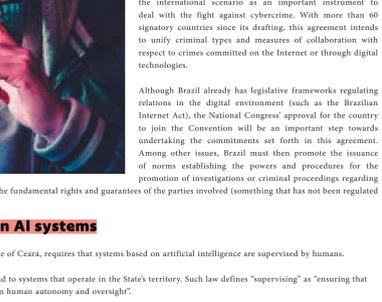
On August 31, 2021, the House of Representatives approved the Bill of Constitutional Amendment (PEC) No. 17/2019 by 439 votes in favor...

The PEC's original text, created and presented by Senator Eduardo Gomes (MDB-TO) and approved by the Brazilian Federal Senate in 2019...

Subsequently, the PEC was discussed by the House of Representatives that approved the wording with amendments...

In addition, the approved text maintained data protection as a fundamental right provided for in the Constitution...

Finally, due to this change, the proposal will have to be analyzed and appreciated again by the Federal Senate.



ANPD's regulation on the application of the LGPD for micro and small enterprises is presented for public consultation and discussion at a public hearing

In line with the schedule set forth with its Regulatory Agenda, the National Data Protection Authority (ANPD) published on August 30 its first draft resolution...

In its preliminary resolution (available at the following link), the ANPD sets forth specific mechanisms to ease the process of adaptation to the LGPD...

Considering this scenario, civil society is invited to participate in the ANPD's public consultation through the 'Participa + Brasil' platform...



Requirement for human supervision in AI systems

The Law No. 17,611/2021, approved by the Legislative Assembly of the State of Ceará, requires that systems based on artificial intelligence are supervised by humans.

Law No. 17,611/2021 is applicable to companies headquartered in Ceará and to systems that operate in the State's territory...

It is worth noting that human review of automated processes, which are essentially performed by artificial intelligence, was provided in the original wording...

The Law follows the worldwide trend of trying to regulate biases often reproduced by artificial intelligence...

The process of Brazil's accession to the Budapest Convention on Cybercrime has begun

On August 18, the House of Representative's Committee on Constitution and Justice (CCJ) approved a favorable report on Brazil's accession to the Budapest Convention...

The Budapest Convention was originally signed in 2001 by the Council of Europe and, in direct connection to the changes triggered by the growing digitalization...

Although Brazil already has legislative frameworks regulating relations in the digital environment, such as the Brazilian Internet Act, the National Congress' approval for the country to join the Convention will be an important step...

Among other issues, Brazil must then promote the issuance of norms establishing the powers and procedures for the formal investigation of cybercrimes...

As highlighted above and in accordance with Brazilian Data Protection Law (LGPD), consent is a free, informed and unambiguous manifestation in which the data subject agrees to her/his processing of personal data for a given purpose...

Brazilian Data Protection Authority (ANPD) is expected to provide specific guidelines on obtaining consent; meanwhile, the guidelines set out above are fully applicable to the Brazilian reality.

Guidelines for cloud-based environments' security

The Maltese National Data Protection Authority (Information and Data Protection Commissioner) published, at the end of August, guidelines on obtaining consent for the use of cookies on data subjects' electronic devices.

Initially, the Maltese Authority established that the applicable legal basis for the use of cookies is the prior and informed consent of the data subject...

In light of General Data Protection Regulation (GDPR), processing agents must ensure that: the consent has been freely given, in a specific and informed way...

The Maltese Authority is guided by the principle of transparency, which aims for the provision of basic information about the processing of personal data to its respective holders...

In addition, a list of practices that are not considered adequate to the data protection rules was also made available: (i) 'cookie wall', a banner that only allows users and visitors to websites and applications to access them after they provide consent for all cookies...

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French Authority's world data protection map

The world_data_protection_map of the French Data Protection Authority (Commission Nationale de l'Informatique et des Libertés or CNIL) classifies countries according to their level of adequacy - adequate, partially adequate and not adequate country - with regard to data protection rules of General Data Protection Regulation (GDPR), as well as presents the applicable national law and the national competent authority of each country.

With respect to Brazil, CNIL understands that the country does not have an adequate level of data protection. In other words, the Brazilian data protection ecosystem does not meet GDPR's standards...

Meanwhile, still within South America, Argentina and Uruguay are considered countries with an adequate level of data protection, which makes it unnecessary to obtain authorization from the European Commission to international transfers to those countries...

In parallel with Brazilian Data Protection Law (LGPD), international transfer, out of Brazil, is only allowed: (i) to countries or international bodies that provide an adequate degree of protection of personal data compatible with LGPD's rules - such countries must be listed and classified by the Brazilian Data Protection Authority (ANPD)...

Guidance on the requirements cookies consent

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Cyberpace Administration of China publishes a draft regulation on algorithmic recommendations and solicits public opinion

On August 27, 2021, the Cyberpace Administration of China (CAC) published the new normative draft to regulate the recommendations of algorithms for internet information services platforms.

The draft has several duties and responsibilities applicable to algorithm recommendation service providers. For instance: a) observing morals and social ethics, respect commercial ethics and professional ethics, as well as respect the principles of equality and transparency...

Regarding the provision of the algorithm recommendation service for minors, the draft provides for the obligation to comply with the duties of online protection of minors in accordance with applicable Chinese laws...

The draft also provides that algorithm recommendation service providers must improve the recommendation mechanisms and preserve information, in particular the daily history of the algorithm recommendation for at least six months...

Finally, the draft also establishes a fine of 5,000 to 30,000 yuan to these service providers in case of violation of the provisions set out in the draft.

In this sense, CAC will be open to receive public opinion in relation to the aforementioned regulatory draft until September 26.

The Protecting Household Privacy Act of Illinois

The General Assembly of the State of Illinois recently enacted the Public Act No. 102-0597, named the Protecting Household Privacy Act. The document regulates the access and use of a private household's electronic data by law enforcement.

In greater detail, the Act, which will be effective January 1, 2022, states that a law enforcement agency cannot obtain electronic communication from devices within a household without a court order based on probable cause or unless voluntarily provided by the house owner...

The Act also dictates case data retention. If a law enforcement agency obtains household electronic data, it may be retained if it is suspected evidence of criminal activity or relevant to an ongoing case...

The same principle applies to data disclosure. If a law enforcement agency obtains household electronic data, the agency shall only disclose the information obtained to a third party if the information is relevant to a criminal proceeding or investigation by a grand jury...

Lastly, the Act establishes that if a court finds that a law enforcement agency used household electronic data as evidence, and that such data was obtained in violation of the Act, then the information shall be presumed to be inadmissible in any judicial or administrative proceeding.

Justice Court of São Paulo State overrules judgment against construction company for alleged personal data leaks

The 3rd Private Law Panel of the Justice Court of São Paulo State amended a ruling issued by the lower court to exempt a construction company from paying compensation to consumers, ruling out the enforcement of the LGPD...

The original judgment ordered the construction company to pay damages totaling BRL 10,000.00 for alleged third party sharing consumer personal data with other companies - financial institutions and internet decoration businesses.

The current understanding of the Justices is as follows: (i) absence of unequivocal proof of damage to consumers under a description of circumstances, which would not go beyond mere annoyance, and (ii) absence of proof of interference or fault of the construction company in the alleged improper transfer or leakage of personal data...

The decision, which is still subject to appeal, demonstrates a significant result of the recent position of the TJSP in an attempt to curb sentences for unreasonable damages based on alleged violations of the LGPD, seeking proper enforcement based on reasonableness and considering the concrete case.

Justice Court of São Paulo State revokes injunction ordering the vaccination of a list of COVID-19 vaccinated persons

The association for the defense of the Citizenship of Franca (União de Defesa da Cidadania de Franca - UDEFICF) filed a Court Injunction against the Mayor of Franca to request, under Municipal Law No. 9,011/2021, the daily disclosure of a list naming all persons who received the vaccine against COVID-19...

The lower court partially granted the injunction, ordering that Defendant took the necessary measures to disclose the said list. However, the panel rejected the request regarding people who had already taken the vaccine to prevent compromising their integrity and honor of those individuals.

The petitioner then filed an Interlocutory Appeal arguing that the disclosure of said list would not violate the integrity and honor of the persons listed, since the Access to Information Law and the LGPD granted the Public Administration the right to disclose personal data, subject to the public interest and the enforcement of government policies.

In turn, the 1st Public Law Panel of the Justice Court of São Paulo State (TJSP) denied the appeal, essentially prohibiting the publication of data on any vaccinated people. According to the Court, Municipal Law No. 9,011/2021 is contrary to the provisions under article 5-X of the Federal Constitution and the LGPD provisions regarding the data privacy and processing solely under one of the legal bases described in art. 7 of the LGPD.

In addition, the panel mentioned that the purpose of the municipal rule (to curb possible illegalities) could be achieved by other means, such as sending the lists to the Public Prosecution Office, the body responsible for defending the legal order, the democratic regime, and the unassailable social and individual rights.

This understanding is in line with the decision of the TJSP Special Panel that understood, about a month ago, that there was a violation of constitutional principles for the intimacy and privacy of subjects of personal data in the case of disclosure of information relating to people vaccinated for COVID-19 in the Municipality of Nova Odessa.

Justice denies MPJR's request to list persons vaccinated for COVID-19 publicly

Judge Marcelly Alvarenga Leite of the 9th Public Finance Court denied the request by the Rio de Janeiro Public Prosecution Office (MPRJ) to allow the City of Rio de Janeiro to publish a daily list naming people vaccinated for COVID-19 in the city.

The request filed by the MPRJ was based on the principle of publicity, claiming there was evidence of doses of COVID-19 vaccines being diverted to people who were not in priority groups. The Judge, however, denied the request, arguing that public control of the coronavirus vaccination campaign can be entirely carried out through the city's platforms and existing mechanisms...

This ruling provided by the Court of the State of Rio de Janeiro is in line with a recent decision rendered by the 1st Public Law Panel of the Justice Court of São Paulo regarding the disclosure of a list of vaccinated persons in the Municipality of Franca - as reported above. But, as mentioned before, the ruling is at odds with the precedents of the TJSP Special Panel, which, in August of this year, understood there was no violation of the constitutional principles of intimacy and privacy.

This scenario demonstrates that the case law around issues relating to personal data protection is not yet established.

Supreme Court Justice Gilmar Mendes restricts lifting bank and tax secrecy based on Data Protection

Justice Gilmar Mendes, of the Federal Supreme Court (STF), partially granted a preliminary injunction in a Writ of Mandamus (MS 38,187) filed by a video production company against the Parliamentary Inquiry Commission (CPI) on the Pandemic, to (i) suspend the lifting of confidentiality on telematic and telephone data - until the final decision in the Plenary of the STF; and (ii) uphold the lifting of the company's banking data - connection.

Concerning telematic data - connection records, access records and the content of private communications -, the Justice explained that said data is protected by the fundamental right to privacy and protection of personal data. The Justice also mentioned the paradigmatic ADI 6389, relating that this constitutional protection involves, from a subjective perspective, the protection of individuals against the risks threatening their personality as a result of the collection, processing, use, and circulation of personal data; and, from an objective perspective, this allows individuals to control the flow of their data (informational self-determination).

Concerning banking data - connection records, access records and the content of private communications -, the Justice explained that said data is protected by the fundamental right to privacy and protection of personal data. The Justice also mentioned the paradigmatic ADI 6389, relating that this constitutional protection involves, from a subjective perspective, the protection of individuals against the risks threatening their personality as a result of the collection, processing, use, and circulation of personal data; and, from an objective perspective, this allows individuals to control the flow of their data (informational self-determination).

Specifically regarding fiscal and banking data, the Justice understood that the lifting of secrecy must be upheld provided that it is limited in time and that the information collected remains under the custody of the CPI President, Omar Aziz, who may provide access to the Colleague to documents related to the Commission's investigation only during a meeting in chambers.

PROCON/MS fines the business for violating the LGPD in contracting payroll-deductible loans

The Consumer Protection Agency in the State of Mato Grosso do Sul (PROCON/MS) fined a consulting and insurance brokerage firm after finding in a due diligence procedure, likely violations of the LGPD in payroll-deductible loan contracts.

The business posted advertisements describing how easy it was to obtain cash through payroll-deductible loans based on FGTS (Brazilian Government Savings Incentive Fund), without consulting credit protection agencies, provided that applicants/consumers disclosed their personal data.

PROCON found that this requirement was accompanied either by any documentation proving consumers' willingness or consent to their data processing nor by any restriction to using this data for a specific purpose.

Because of the irregularities, PROCON/MS set a deadline for the submission of justifications and the presentation of a legal defense, and only afterward PROCON/MS will decide on the application of any penalties.

PROCON-SP demands clarifications from banks and fintechs about the invoice scam

Cases related to the so-called "invoice scam" have increased recently. In the said scam, criminals use data such as (a) names, social security numbers, and (b) phone numbers to send messages or potential victims, offering to negotiate an alleged debt, or even giving discounts on cash payments on a card invoice. Upon clicking on a link in the message, victims are redirected to pages that mimic the websites of banks and fintechs and issue fake bills.

Given this increased number of cases, PROCON-SP (Consumer Protection Agency in São Paulo) notified banks and financial institutions and gave them 72 hours, as of September 8, to register, report and describe the security mechanisms they adopt to allow consumers to verify the authenticity of fake bills sent to them.

Additionally, the consumer protection and defense agency questioned whether other measures and action plans have been developed to prevent new cases from occurring. Finally, the notification required banks to clarify the measures taken upon the occurrence of fraud, both individually and collectively.

Justice Court of the Federal District and State Territories suspends website that sells personal data

The Public Civil Action filed by MPDEF (Brazilian Federal District and Territories Public Prosecution Office) was granted in court to order the company responsible for the facultativirtual.com.br domain to refrain from selling personal data and eliminate all personal data retention of the Brazilian Personal Data Base.

The MPDEF stated the company sold personal information provided to several users - such as name, address, phone number, e-mail address and even their profession - to companies interested in promoting targeted Internet advertising. Given this and based on the legal provisions established in the LGPD, in the CDC (Consumer Defense Code), and in the Federal Constitution, the Judge a quo ruled on the company's unlawful practice, since consumers did not provide their express consent to process their personal data.

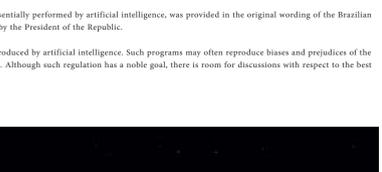
The decision highlighted the company's position. In their defense, the company assured their commitment to adapt their services to the protection standards of personal data and to refrain from disclosing any information that violates privacy.

The Judge's understanding follows recent guidance from the TIDFET (Justice Court of the Federal District and State Territories), which has considered that the sale of personal data over the Internet without data subjects' proper consent is illegal, precisely due to the apparent violation of privacy and intimacy. In this sense, previous rulings have already been rendered in the same direction, such as, for example, the decision rendered by the 3rd Civil Court of Brasília that blocked a website called "Tudo sobre Todos" (Everything About Everyone) and suspended the service offered by the company Serasa Experian - the service suspension was initially denied by the lower court. However, the appellate court (TIDFET) granted it subsequently.

Brazilian Federal Prosecution Office follows other institutions in the public sphere and adapts to the LGPD

The "services" page of the MPF (Brazilian Federal Prosecution Office) website now includes a form through which personal data subjects can request information on the existence and any processing of their data carried out by the MPF. According to the LGPD, citizens are entitled to verify, free of charge, which of their data was collected, how said data is stored, and even request the deletion of their data.

This initiative came after the TJSC (Justice Court of Santa Catarina State) launched LGPD last month, an application to make it easier for citizens to file requests related to privacy and protection of their data within the scope of the Courts of Santa Catarina State.



Newsletter content produced by TozziniFreire's Cybersecurity & Data Privacy practice.

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