INFORMATION TECHNOLOGY & COMMUNICATIONS

CLIENT ALERT

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THE PROVISIONAL MEASURE THAT CREATES THE BRAZILIAN DATA PROTECTION AUTHORITY IS SANCTIONED AND CONVERTED INTO LAW

On Tuesday, July 9th, Provisional Measure No. 869/2018 (PM) was published and converted into law (Law No. 13,853/2019), amending several articles of the Brazilian General Personal Data Protection Law (LGPD) (Law No. 13,709/2018), and creating the Brazilian Data Protection Authority (ANPD), previously vetoed by former president Michel Temer.

The new text of the PM, which has been in debate since February by the Joint Committee formed in the National Congress, had already been approved on May 28th in the form of a Conversion Bill (PLV No. 7/2019) by the Chamber of Deputies and on the following day by the Federal Senate.

Among other important changes to the General Personal Data Protection Law (in Portuguese, *Lei Geral de Proteção de Dados Pessoais - LGPD*), one of the changes worth highlighting is that the new Law established a wider and more flexible authorization for the processing of Sensitive Personal Data related to health, by including in the list of professionals already authorized to process data for the purpose of protection of health (which included health professionals and sanitary entities) 'health services', whose concept is not, however, defined in the text of the LGPD. In addition, the Law states that personal data to which the access is public may be further processed for a different purpose, as long as it is a legitimate purpose, and the rights of the data subjects and the general principles established in the LGPD are preserved.

With regards to the ANPD, we emphasize that the Law establishes a transitional legal nature for the Authority. Initially created as an entity of the Direct Federal Public Administration, the text conceives the possibility of its transformation within 2 years by the Executive Branch into an entity of the Indirect Administration, subject to a special autarchic regime and linked to the Presidency.

This possibility of the transition of the nature of the ANPD is beneficial to the companies that transfer data to the European Union (EU), since the General Data Protection Regulation (GDPR) provides, as one of the requirements to determine if the protection level of a country is considered adequate in regard to personal data, the need for the country to have an independent supervisory authority. Being included in the European Commission's list of countries with adequate protection level allows for

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an easier scenario in the international data transfer with the EU, dispensing any possible bureaucratic procedures involved in the other legal bases that are allowed by the GDPR for such transfers.

Although the aforementioned provisions were maintained by the law published yesterday, the original text of the Provisional Measure forwarded by the Brazilian Congress also suffered a number of vetoes by the President, among which we highlight the following:

- **Revision of automated decisions by a natural person:** The article that provided the right for data subjects to obtain a revision of automated decisions based on their data exclusively by a natural person was vetoed in the Law.

  The Presidency considered the 'human revision' as detrimental to current business models, especially startups, and thus, Article 20 of the LGPD does not contain the obligation for automated decisions to be reviewed by a natural person, that is, the algorithms themselves can review decisions regarding personal, professional, consumer and credit profiles or related to personality aspects of the data subject.

- **DPO:** The original text of the Provisional Measure established the obligation of the DPO to hold regulatory/legal knowledge to exercise its professional activities as a bridge between Agents, data subjects and the ANPD. This section was also vetoed in the new Law.

  According to the Presidential Message, such legislative proposal would be an overly strict and interventionist requirement of the State affecting the discretion of companies themselves in selecting their own employees.

- **Information Access Act:** The Law sought, through section IV of Article 23 of the LGPD, to protect and preserve the personal data of the applicants requesting information under the Information Access Act (Law No. 12,527/2001), prohibiting the sharing of their data in the sphere of public power and with individuals of private law. However, the inclusion of the section was also vetoed by the Presidency.

- **Sanctions:** Originally, the LGPD provided for the following administrative sanctions in case of non-compliance: (i) warnings; (ii) fines of up to 2% of the revenues of the company, group or conglomerate in Brazil, limited to 50,000,000.00 BRL per infraction; (iii) a daily fine of up to 50,000,000.00 BRL per infraction; (iv) disclosure of the violation; (v) blockage of personal data; and (vi) data elimination. Although the aforementioned sanctions were maintained, other sanctions were vetoed: i.e. the partial suspension of the operation of the offending database, the suspension of the exercise of the data processing activity relating to the infringement, both for up to 6 months, which can be extended for an equal period, and the partial or total prohibition of the exercise of activities related to data processing.

- **Official fees:** Finally, still in relation to the ANPD, the President vetoed section V of Article 55-L, which included as a revenue of the entity the proceeds arising from the collection of fees for the services rendered by the Authority. Due to the transitory nature of the Authority, initially of Direct Administration, the veto establishes that there is no charge for the activities performed by the ANPD until it is transformed into an autarchy.

The LGPD officially enters into force on August 16, 2020.

Our Intellectual Property & Information Technology team is available should any questions arise on the matter.

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