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LGPD ET AL.

Report on the Law of Data Disclosure in Brazil

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Abstract

This report sheds light on Brazilian data law within the framework of a comparative study from legal studies, cultural studies and business informatics, which aims to investigate the extent to which decisions to disclose personal data is based on a cultural imprint as well as on the existing legal framework. To establish this, the country report sets a baseline. In addition to a brief overview of the Brazilian legal framework, it deals decisively and in depth with issues relating to data law. The focus is on regulatory aspects relating to the collection, processing and dissemination of personal data. Central feature is the “Lei Geral de Proteção de Dados” (LGPD), which covers the processing of personal data and establishes fundamental privacy rights for data subjects, including the right to be informed by data controllers about data processing. Questions asked include: Which legal sources regulate Brazilian data law? What is personal data in Brazilian data law? How may this data be collected, processed and enforced?

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Data Protection, Privacy, Brazil, LGPD, Lei Geral de Proteção de Dados Pessoais, Data Subject, Processing, Personal Data, Consent, Data Protection Law, Data Law.

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A. Generalities*

I. Cultural Vectors of Data Disclosure

Identification of cultural preconditions for individual data disclosure: cultural parameters that may influence decision-making concerning individual data disclosure; narratives concerning data disclosure; synonyms for “Data Protection” and “Privacy” in the local language; cultural practices and expectations concerning data disclosure and use (taboos etc.); Data protection and privacy discourse, especially call for reform.

With a population of over 213 million and an area of 8,5 million square kilometers,¹ Brazil is the largest country in South America.

Contemporary Brazilian politics have been characterized by corruption, ranging from several law enforcement operations throughout the last 5 (five) decades and

culminating in the “Operation Car Wash” (*Operação Lava-Jato*) scandal which implicated a large part the Brazilian political elite.² This, together with growing political polarization led to the election of Jair Bolsonaro as president in 2018,³ who has caused considerable controversy in his downplaying of the Covid-19 pandemic,⁴ which leaves Brazil with uncertainty concerning its legal and political future.

At the same time, as one of the BRICS countries,⁵ the Brazilian Economy has advanced considerably in recent times,⁶ followed by significant slowdown in the last years.⁷

Additionally, social and economic inequality is high,⁸ which leads to significant differences

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Note on Translations: We based our translation of the provisions of the LGPD on the translation by Ronaldo Lemos and others, ‘Brazilian General Data Protection Law (LGPD, English translation): ,’ (October 2020) <<https://iapp.org/resources/article/brazilian-data-protection-law-lgpd-english-translation/>> accessed 1 April 2022, slightly amending the wording where we felt it was necessary to convey a more accurate picture. Translations of other laws were prepared by us except where indicated otherwise individually.

¹ Central Intelligence Agency, ‘CIA World Factbook - Brazil’ <www.cia.gov/the-world-factbook/countries/brazil/> accessed 1 April 2022.

² Benjamin Fogel, ‘Brazil: Corruption as a Mode of Rule’ (2019) 51(2) NACLA Report on the Americas 153.

³ Wendy Hunter and Timothy J Power, ‘Bolsonaro and Brazil’s Illiberal Backlash’ [2019] Journal of Democracy 68.

⁴ Julie Ricard and Juliano Medeiros, ‘USING MISINFORMATION AS A POLITICAL WEAPON:

COVID-19 AND BOLSONARO IN BRAZIL’ [2020] HKS Misinfo Review.

⁵ Term coined by Jim O’Neill, ‘Building Better Global Economic BRICs’ [2001] Global Economics Paper, Goldman Sachs.

⁶ Real GDP has roughly doubled since 1990, see World Bank, ‘GDP (constant 2015 US\$) - Brazil’ (n.d.) <<https://data.worldbank.org/indicator/NY.GDP.MKTP.KD?locations=BR>> accessed 1 April 2022. On the other side, significant slowdown has occurred since 2014, see Marcelo Neri, ‘Inequality in Brazil: Inclusive growth trend of this millennium is over’ 2019(1) WIDER Policy Brief Helsinki: UNU-WIDER.

⁷ Carlos A Luque and others, ‘The Roots of Brazil’s Economic Crisis - Project Syndicate’ (28 August 2020) <<https://www.project-syndicate.org/commentary/brazil-economic-growth-crisis-since-2013-by-carlos-antonio-luque-et-al-2020-08>> accessed 1 April 2022.

⁸ Gini Index of 53.4 as of 2019, one of the highest in the world, see World Bank, ‘Gini Index (World Bank estimate)’ (n.d.) <https://data.worldbank.org/indicator/SI.POV.GINI?most_recent_value_desc=true&view=chart> accessed 1 April 2022; See also Carlos Góes and Izabela Karpowicz, ‘Inequality in Brazil: A Regional Perspective’ <<https://www.imf.org/en/Publications/WP/Issues/2017/10/31/Inequality-in-Brazil-A-Regional-Perspective-45331>> accessed 1 April 2022; Marc Morgan, *Extreme and Persistent Inequality: New Evidence for Brazil Combining National Accounts, Surveys and Fiscal Data, 2001-2015* (2017).

between the lives of poor and affluent citizens⁹ and defines many aspects of life in Brazil.¹⁰

Attitudes of individual Brazilians towards privacy and data protection have been observed as quite lax,¹¹ at least until recently,¹² while digital affinity is high.¹³ On the other hand, there is a prevalence of privacy-related cyberattacks,¹⁴ which are well illustrated by the recent hacking incidents sustained by the Superior Court of Justice¹⁵ and the Supreme Court of Justice¹⁶.

There have, however, been several important developments in Brazilian data privacy regulation, the most important of which is the

LGPD¹⁷, which will be covered extensively in this report.

The starting point of modern Brazilian privacy regulation is the 1988 Constitution, which explicitly mentions protections for the rights of privacy and private life.¹⁸ Additionally, the constitutional remedy of *habeas data* was introduced, which gives the right to access one's own data and is widespread in Latin America.¹⁹

This alone did not lead to comprehensive privacy protection. The 1990 Consumer Defense Code (CDC)²⁰ introduced protections concerning data banks in Art. 43, but made no mention of privacy in this context. In 2011, the Access to Information

⁹ Called "different universes" in Al Jazeera, Business and Economy News, 'Brazilians thrown back into poverty as COVID aid dries up' (2021) <<https://www.aljazeera.com/economy/2021/3/29/brazilians-thrown-back-into-poverty-as-covid-aid-dries-up>> accessed 1 April 2022.

¹⁰ Renan Pimentel, "Equal Before the Law," But Not in Practice: Brazil's Social Inequality Crisis - Harvard Political Review' (2022) <<https://harvardpolitics.com/brazil-social-inequality/>> accessed 1 April 2022.

¹¹ Ereni Markos, George R Milne and James W Peltier, 'Information Sensitivity and Willingness to Provide Continua: A Comparative Privacy Study of the United States and Brazil' (2017) 36(1) Journal of Public Policy & Marketing 79.

¹² There seems to be at least some evidence to changing attitudes, see Angelica Mari, 'Data privacy awareness grows in Brazil' (2020) <<https://www.zdnet.com/article/data-privacy-awareness-grows-in-brazil/>> accessed 1 April 2022.

¹³ See Bryan Harris, 'Brazilians' love affair with tech leaves them vulnerable to data theft' (2021) <<https://www.ft.com/content/fb5026e7-538a-4d6a-907f-1bd03fc4b82a>> accessed 1 April 2022.

¹⁴ Nir Kshetri and Joanna F DeFranco, 'The Economics of Cyberattacks on Brazil' (2020) 53(9) Computer 85 accessed 4 April 2022.

¹⁵ AP News, 'Brazilian police investigate online hacking of high court' (2020) <<https://apnews.com/article/technology-virus-outbreak-brazil-courts-hacking-2e37d1fbb60d911ab310962b29dcfb79>> accessed 1 April 2022).

¹⁶ On May 6, 2021, the Brazilian Supreme Court was targeted, see Márcio Falcão and Fernanda Vivas, 'Supremo investiga suposto ataque hacker a sistema da Corte' (2021) <<https://g1.globo.com/politica/noticia/2021/05/07/supremo-investiga-tentativa-de-ataque-hacker-a-sistema-da-corte.ghtml>> accessed 1 April 2022. Apparently, the hacker's intention was to raise awareness DefCon Lab, 'Hacker do STF?' (2021) <<https://www.defcon-lab.org/hacker-do-stf/>> accessed 1 April 2022.

¹⁷ 'Law 13.709/2018 - Lei Geral de Proteção de Dados Pessoais' (General Law for the Protection of Personal Data, abbreviated by the Portuguese name) <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13709compilado.htm> accessed 1 April 2022.

¹⁸ See Art. 5 item X of 'Constituição da República Federativa do Brasil de 1988' (Constitution of the Federal Republic of Brazil 1988) <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm> accessed 1 April 2022; Translation available at Supremo Tribunal Federal, 'CONSTITUTION of the Federative Republic of Brazil' <http://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf> accessed 12 February 2022.

¹⁹ Andrés Guadamuz, 'Habeas Data vs. The European Data Protection Directive' [2001] Journal of Information, Law & Technology accessed 1 April 2022

²⁰ 'Law 8.078/1990 - Código de Defesa do Consumidor' (Consumer Defense Code, abbreviated CDC) <http://www.planalto.gov.br/ccivil_03/leis/l8078coompilado.htm> accessed 1 April 2022.

Law²¹ was introduced, regulating access to publicly held information and its relationship with data protection. Further sectoral and individual regulatory instruments in the field of privacy led to a fragmented legal situation.²²

The first step towards comprehensive data privacy regulation was taken with the introduction of the *Marco Civil da Internet - MCI* (Internet Bill of Rights)²³ in 2014. An important factor for the passing of the MCI was the public discussion after the Snowden revelations²⁴ on global surveillance by the United States in 2013.²⁵ The MCI contains several provisions recognizing and dealing with the right to privacy, but it is largely limited in its scope to the internet and was thus not all-encompassing.

After a debate on the introduction of a specific data protection law dating back to at least 2010,²⁶ following the implementation of GDPR²⁷ in Europe in 2018 and under the impression of the Cambridge Analytica scandal,²⁸ LGPD, a comprehensive Data Protection Law inspired by GDPR²⁹ was passed by the Brazilian legislative mid-2018.³⁰

Some turbulence followed, with the President, Michel Temer, vetoing several parts of the bill, most notably the creation of the National Data Protection Authority (ANPD)³¹. Controversially, Temer then established the ANPD as a direct administrative body under the control of the presidency³² and extended the period of adoption of the LGPD by six months to August 15, 2020, on the very last

²¹ 'Law 12.414/2011 - Lei do Cadastro Positivo' <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12414.htm> accessed 1 April 2022

²² Danilo Doneda and Laura S Mendes, 'Data Protection in Brazil: New Developments and Current Challenges' in Serge Gutwirth, Ronald Leenes and Paul de Hert (eds), *Reloading Data Protection: Multidisciplinary Insights and Contemporary Challenges* (Springer Netherlands 2014)

²³ 'Law 12.965/2014 - Marco Civil da Internet' (Internet Bill of Rights, abbreviated MCI) <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm> accessed 1 April 2022.

²⁴ Ewen Macaskill and others, 'NSA files decoded: Edward Snowden's surveillance revelations explained' <<https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded>> accessed 1 April 2022.

²⁵ Daniel Arnaudo, *Brazil, the Internet and the Digital Bill of Rights: Reviewing the State of Brazilian Internet Governance* (Igarapé Institute 2017) 6.

²⁶ Daniella Jinkings, 'Governo vai debater criação de marco legal para proteção de dados pessoais no Brasil - Rede Brasil Atual' (2010) <<https://www.redebrasilatual.com.br/cidadania/2010/12/governo-vai-debater-criacao-de-marco-legal-para-protecao-de-dados-pessoais-no-brasil/>> accessed 4 April 2022

²⁷ 'Regulation (EU) 2016/679 - General Data Protection Regulation' (abbreviated GDPR) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R0679-20160504>> accessed 1 April 2022.

²⁸ Compare Nicholas Confessore, 'Cambridge Analytica and Facebook: The Scandal and the Fallout So Far' (2018) <<https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>> accessed 1 April 2022.

²⁹ Danilo Doneda and Laura Schertel Ferreira Mendes, 'A Profile of the new Brazilian General Data Protection Law' [2019] *Internet Governance and Regulations in Latin America* 291.

³⁰ Noting the parallel to GDPR: Renato Opice Blum and Camilla Rioja, 'Brazil's "GDPR" Sanctioned with Extraterritorial Effects' [2018] *International Journal for the Data Protection Officer, Privacy Officer and Privacy Counsel* 12.

³¹ Autoridade Nacional de Proteção de Dados (National Data Protection authority), Official Website <<https://www.gov.br/anpd/pt-br>> accessed 1 April 2022.

³² This has been subject to criticism regarding its independence, see for example the Institute of Technology and Society of Rio de Janeiro (ITS-Rio): first in the Proposition for the Creation of the ANPD (Instituto de Tecnologia e Sociedade, 'Manifesto: Autoridade Nacional de Proteção de Dados' (2018) <<https://itsrio.org/pt/artigos/manifesto-autoridade-nacional-de-protecao-de-dados/>> accessed 1 April 2022) and also in the Manifest for the ANPD (Instituto de Tecnologia e Sociedade, 'Proposta: Criação da Autoridade Brasileira de Proteção aos Dados Pessoais' (2018) <<https://itsrio.org/pt/publicacoes/proposta-anpd/>> accessed 1 April 2022).

days of his tenure as President,³³ by means of a provisional measure.³⁴

Jair Bolsonaro then tried to delay the implementation of the LGPD through another provisional measure,³⁵ but this was not confirmed by the legislature within the required timeframe.³⁶ LGPD finally came into force on September 18, 2020.³⁷ However, the ANPD would only commence administrative sanctioning from August 1, 2021.³⁸

ANPD's internal structure is defined in Decree n. 10.474/2020³⁹ and officially inaugurated its activities on November 5th, 2020, when its first Board of Directors was appointed.⁴⁰ In this context, the large amount of personnel with a military background was criticized by some.⁴¹

On August 10, 2021, two Decrees were published,⁴² by which the Brazilian President, Jair Bolsonaro, appointed the members of the

National Council of Personal Data Protection and Privacy (*Conselho Nacional de Proteção de Dados Pessoais e da Privacidade – CNPD*), ANPD's advisory body, in observance of Arts. 58-A and 58-B LGPD.

The latest important development in Brazil relating to data protection has been the elevation of data protection to the status of a constitutional right,⁴³ further strengthening protections.

II. Legal System and Lawmaking

Central characteristics; Sources of law and legal hierarchies; classification of belonging to legal spheres; Lawmakers and influential political and societal movements.

The Brazilian legal system is a blend of several legal traditions. Due to its past nature as a colony, Brazil was historically formed by Portuguese Law. It is classified as a civil law jurisdiction and has been influenced by a

³³ Dannemann Lundgren, 'New Brazilian Data Protection Law' 2019 GRUR Int 752.

³⁴ 'Provisional Measure 869/2018' <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/MPv/mpv869.htm> accessed 1 April 2022.

³⁵ 'Provisional Measure 959/2020' <http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/MPv/mpv959.htm> accessed 1 April 2022.

³⁶ Gretchen A Ramos and Giovanni Biscardi, 'Brazil's Data Protection Law Will Be Effective After All, But Enforcement Provisions Delayed Until August 2021' <<https://www.gtlaw.com/en/insights/2020/8/brazils-data-protection-law-effective-enforcement-provisions-delayed-august-2021>> accessed 1 April 2022.

³⁷ Luiza Parolin, 'Brazil's Data Protection Law' (2020) <<https://www.csis.org/blogs/technology-policy-blog/brazils-data-protection-law>> accessed 1 April 2022.

³⁸ Autoridade Nacional de Proteção de Dados, 'Sanções Administrativas: o que muda após 1º de agosto de 2021?' (2021) <<https://www.gov.br/anpd/pt-br/assuntos/noticias/sancoes-administrativas-o-que-muda-apos-1o-de-agosto-de-2021>> accessed 1 April 2022.

³⁹ 'Decree 10.474/2020' <http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/decreto/D10474.htm> accessed 1 April 2022.

⁴⁰ See DIÁRIO OFICIAL DA UNIÃO, 'DECRETOS DE 5 DE NOVEMBRO DE 2020' (Decrees of November 5th) <<https://www.in.gov.br/en/web/dou/-/decretos-de-5-de-novembro-de-2020-286734594>> accessed 1 April 2022.

⁴¹ Angelica Mari, 'Military takes over Brazil's National Data Protection Authority | ZDNet' (23 October 2020) <<https://www.zdnet.com/article/military-takes-over-brazils-national-data-protection-authority/>> accessed 1 April 2022; Veronica Arroyo, Estelle Massé and Fabricio Solagna, 'CDR e Access Now enviam carta-denúncia para Comissão Europeia, Conselho da Europa e Global Privacy Assembly' *Coalizão Direitos na Rede* (10 November 2020) <<https://direitosnarede.org.br/2020/11/10/cdr-e-access-now-enviam-carta-denuncia-para-comissao-europeia-conselho-da-europa-e-global-privacy-assembly/>> accessed 1 April 2022.

⁴² DIÁRIO OFICIAL DA UNIÃO, 'DECRETOS DE 9 DE AGOSTO DE 2021' (Decrees of August 9th) <<https://www.in.gov.br/en/web/dou/-/decretos-de-9-de-agosto-de-2021-337265774>> accessed 1 April 2022.

⁴³ Marcelo Brandão, 'Personal data protection now a right under Brazil Constitution' (2022) <<https://agenciabrasil.ebc.com.br/en/politica/noticia/2022-02/protection-personal-data-becomes-constitutional-right>> accessed 1 April 2022.

multitude of continental European jurisdictions, especially French, Italian and German law.⁴⁴ In addition to this, US influences can be seen, notably in the 1988 Constitution.⁴⁵

Brazil's constitutional architecture is characterized by federalism, with powers divided between the federal government and the states, and, to a lesser extent, the municipalities. However, many significant laws are present merely on the federal level.⁴⁶ The highest organs of the legislative, executive and judicial branches are the National Congress, comprised of the Chamber of Deputies and the Federal Senate, the President and the Supreme Federal Court, respectively.⁴⁷

There are several types of legal provisions within the Brazilian system, with the Constitution at the top of the hierarchy.⁴⁸ Next are legislative provisions, which comprise the *Processo Legislativo* (Legislative Process) and are listed in Art. 59 of the constitution. These include (I) *emendas à Constituição* (Amendments to the Constitution), (II) *leis complementares* (Supplementary Laws), (III) *leis ordinárias* (Ordinary Laws), (IV) *leis delegadas* (Delegated Laws), (V) *medidas provisórias* (Provisional

Presidential Decrees), (VI) *decretos legislativos* (Legislative Decrees) and (VII) *resoluções* (Resolutions).⁴⁹

An interesting variant among laws are *medidas provisórias* (Provisional Measures), which are decreed by the President under apparent exceptional and urgent circumstances and must be transformed into law by the legislative if they are to remain in force past a period of 60 days.⁵⁰ Sub laws are *decretos* (Decrees), which concern the (more detailed) implementation of these.⁵¹ A special role is filled by the LINDB,⁵² which specifies legal methodology in Brazil by providing rules for the interpretation of statutory law, e.g. allowing for analogy.

The judiciary is separated into the ordinary and special branch, of which the ordinary branch is again subdivided into state and federal courts. The special⁵³ branch includes electoral, military and employment courts. Above all these is the *Supremo Tribunal Federal* (Supreme Court).⁵⁴ To be noted is the extraordinary litigiousness of the Brazilian populace,⁵⁵ out of which a great number of rulings arises, a significant amount of which is contradictory in nature.⁵⁶

⁴⁴ Alexandre F Câmara, 'Legal Scholarship in Latin America: Traditions, Requirements, and Relevance' (2012) 46(2) The International Lawyer 663 <<https://www.jstor.org/stable/23824644>> accessed 1 April 2022.

⁴⁵ Jacob Dolinger, 'The Influence of American Constitutional Law on the Brazilian Legal System' (1990) 38(4) The American Journal of Comparative Law 803.

⁴⁶ For more detail, see Keith S Rosenn, 'Federalism in Brazil' (2005) 43(4) Duquesne Law Review 577.

⁴⁷ Lisiane Feiten Wingert Ody, 'Ch 2 § 5 II Staatsorganisationsrecht', *Einführung in das brasilianische Recht* 31–41

⁴⁸ Ibid 20–24.

⁴⁹ Listed in Art. 59 CF.

⁵⁰ Art. 62 CF. This was the method with which President Bolsonaro tried to delay the implementation of LGPD, *supra* A I.

⁵¹ Art. 84 IV CF.

⁵² 'Decreto-Lei 4.657/1942 - Lei de Introdução às normas do Direito Brasileiro' (translated: Introductory Law to Brazilian Legal Provisions) <http://www.planalto.gov.br/ccivil_03/decreto-lei/del4657compilado.htm> accessed 1 April 2022.

⁵³ "Special" in the sense of "specialized", as the courts have very specific areas of competence.

⁵⁴ For an examination of the Brazilian judiciary in a constitutional context, see Leonardo Martins, 'The Judiciary in Brazil'.

⁵⁵ Bruno Takahashi, 'WHY DO WE HAVE SO MANY SOCIAL SECURITY CLAIMS IN BRAZIL?' [2019] 91 <<http://hdl.handle.net/10091/00021408>> accessed 1 April 2022.

⁵⁶ See the detailed analysis in Augusto Zimmermann, 'How Brazilian Judges Undermine the Rule of Law: A Critical Appraisal' (2008) 11 International Trade and Business Law Review 179. See also Geanluca Lorenzon, 'Corruption and the Rule of Law: How Brazil Strengthened Its Legal System' [2017] Cato Institute Policy Analysis, 827.

B. Information Regulation in General

I. Structure of Information Law

Constitutional and basic rights aspects; relevant regulations concerning intellectual property, secrecy, cybercrime (data privacy aut idem infra at C.); Which regulations are based on international provisions (especially concerning intellectual property)?

A significant amount of Brazilian legislation deals with information-related topics. On the constitutional level, Art. 5 CF lists several basic rights related to information, amongst these freedom of expression (IV), the inviolability of personal intimacy and private life (X), secrecy of correspondence (XII), protection of authors intellectual property (XXVII), and of industrial designs, trademarks, company names and other distinctive signs (XXIX). Additionally, the introduction of a right to data privacy to the basic rights was recently introduced in the legislative process.⁵⁷

An important element in Brazilian information law is the Access to Information Law,⁵⁸ which allows individuals to access publicly held data.

Habeas data has been a constitutional remedy since 1988, contained in Art. LXXII and

regulated by the Habeas Data Law⁵⁹ intends to ensure the access of one's own personal information contained in governmental or public databases, also enabling the rectification of erroneous data contained therein.⁶⁰

According to the World Intellectual Property Organization (WIPO), Brazil is party to a total of 64 international treaties related to intellectual property,⁶¹ the most important recent development being the ratification of the Madrid Protocol, by which Brazil joined the international trademark system.⁶² Other important treaties are the Agreement on Trade-Related Aspects on Intellectual Property Rights (TRIPS)⁶³ and Convention establishing the WIPO⁶⁴

One of the central codifications concerning information is the Law on Industrial Property (hereafter: IP Law)⁶⁵, which regulates patents, utility models, trademarks, industrial designs and sets up general provisions concerning unfair competition within intellectual property, therefore also providing certain protections to unregistered rights.⁶⁶ Additionally, it protects certain geographical indications. A specific law governs copyrights,⁶⁷ with another law for copyrights

⁵⁷ Brandão (n 43).

⁵⁸ 'Law 12.527/2011 - Lei de Acesso a Informação' <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12527.htm> accessed 1 April 2022.

⁵⁹ 'Law 9.507/1997 - Lei do habeas data' <http://www.planalto.gov.br/ccivil_03/leis/19507.htm> accessed 1 April 2022.

⁶⁰ Guadamuz (n 19).

⁶¹ World Intellectual Property Organization, 'WIPO Lex - Brazil' (n.d.) <<https://wipo.lex.wipo.int/en/treaties/members/profile/BR>> accessed 1 April 2022.

⁶² World Intellectual Property Organization, 'Brazil Joins WIPO's International Trademark System' (2019) <https://www.wipo.int/pressroom/en/articles/2019/article_0007.html> accessed 1 April 2022.

⁶³ TRIPS was enacted in Brazil through ('Federal Decree 1.355/1994' <http://www.planalto.gov.br/ccivil_03/decreto/antig

os/d1355.htm> accessed 1 April 2022); For a detailed analysis of Brazilian compliance with TRIPS, see Kunisawa, Viviane Yumy Mitsuuchi Kunisawa, *The TRIPS Agreement Implementation in Brazil: Patents in the Pharmaceutical Area* (Nomos Verlagsgesellschaft mbH & Co. KG).

⁶⁴ World Intellectual Property Organization, 'WIPO-Administered Treaties: Contracting Parties > WIPO Convention > Brazil' (n.d.) <<https://wipo.lex.wipo.int/en/treaties/parties/remarks/BR/1>> accessed 1 April 2022.

⁶⁵ 'Law 9.279/1996 - Lei da Propriedade Industrial' <http://www.planalto.gov.br/ccivil_03/leis/19279.htm> accessed 1 April 2022. English translation at World Intellectual Property Organization (n.d.) <<https://www.wipo.int/edocs/lexdocs/laws/en/br/br003en.pdf>> accessed 1 April 2022.

⁶⁶ Art. 195 IP Law.

⁶⁷ 'Law 9.610/1998 - Lei dos Direitos Autorais' <http://www.planalto.gov.br/ccivil_03/leis/19610.htm> accessed 1 April 2022. English translation available

on computer programs.⁶⁸ Further sectoral intellectual property regulation covers plant breeds and⁶⁹ integrated circuits⁷⁰.

Several criminal law provisions in the Penal Code⁷¹ cover information-related topics, amended with cybercrime provisions by Law 12.737/2012,⁷² which introduced the crime of “invasion of a computer device”,⁷³ accompanied by Law 12.735/2012,⁷⁴ which established police units responsible for the investigation of cybercrimes, and, more recently, Law 14.155/2021,⁷⁵ which increased punishments for certain acts committed electronically or through the internet.⁷⁶ Furthermore, the Anti-Terrorism Law (Law 13.260/2016)⁷⁷ can apply to acts of sabotage of certain types of public infrastructure through “cybernetic means” (Art. 2 § 1 IV).

The IP Law contains further criminal provisions for each of the protected areas, as

well as a criminal prohibition on various kinds of unfair competition in Art. 195, including the provision or disclosure of false information (I), the disclosure or exploitation of IP-related confidential knowledge, information or data (X), thus broadly providing protection for secrecy in this field, and the disclosure of test results of undisclosed data preceding intellectual property recognition (XIV).

Further criminal provisions concerning flows of information are contained in the Wiretap Act, which criminalizes the interception of telephone communications – not originally intended to go beyond government officials, but, since the wording allows for interpretation, a debate has emerged, causing the Courts to decide in different ways.⁷⁸

Another cornerstone of information law⁷⁹ is the MCI, which, aside from providing for data

at Ricci Intellectual Property, ‘Brazilian Copyright Law – Law No. 9.610/98’ (2017) <<https://riccipi.com.br/brazilian-copyright-law-law-9-61098-2/?lang=en>> accessed 1 April 2022.

⁶⁸ ‘Law 9.609/1998 - Lei do Software’ <http://www.planalto.gov.br/ccivil_03/leis/19609.htm> accessed 1 April 2022, hereinafter “Software Law”. English translation available at World Intellectual Property Organization, ‘Brazil: Law No. 9.609 of February 19, 1998, on the Protection of Intellectual Property of Software, its Commercialization in the Country, and Other Provisions’ <<https://wipolex.wipo.int/en/text/125391>> accessed 1 April 2022.

⁶⁹ ‘Law 9.456/1997 - Lei de Proteção de Cultivares’ <http://www.planalto.gov.br/ccivil_03/leis/19456.htm> accessed 1 April 2022.

⁷⁰ ‘Law 11.484/2007 - Lei de Incentivo à Indústria de TV Digital’ <http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/lei/11484.htm> accessed 1 April 2022.

⁷¹ ‘Decree-Law 2.848/1940 - Código Penal’ <http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm> accessed 1 April 2022.

⁷² ‘Law 12.737/2012’ <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/112737.htm> accessed 1 April 2022

⁷³ FMP - Fundação Escola Superior do Ministério Público, ‘Lei Carolina Dieckmann: você sabe o que essa lei representa?’ FMP - Fundação Escola Superior do Ministério Público (16 August 2021)

<<https://fmp.edu.br/lei-carolina-dieckmann-voce-sabe-o-que-essa-lei-representa/>> accessed 1 April 2022

⁷⁴ ‘Law 12.735/2012’ <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/112735.htm> accessed 1 April 2022

⁷⁵ ‘Law 14.155/2021’ <http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/L14155.htm> accessed 1 April 2022

⁷⁶ The Library of Congress, ‘Brazil: Punishment for Crimes Committed Electronically or Over Internet Increased’ (1 June 2021) <<https://www.loc.gov/item/global-legal-monitor/2021-06-08/brazil-punishment-for-crimes-committed-electronically-or-over-internet-increased/>> accessed 1 April 2022

⁷⁷ ‘Law 13.260/2016’ <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/113260.htm> accessed 1 April 2022

⁷⁸ ‘Law 9.296/1996 - Lei de Interceptação Telefônica’ <http://www.planalto.gov.br/ccivil_03/leis/19296.htm> accessed 1 April 2022. This law regulates article 5º, XII, of the Brazilian Constitution. Although article 1 states that it deals with providing evidence in criminal investigation and criminal procedural instruction, it also expressly mentions the interception of telephone communications, of any nature, what has led legal authors to debate about whether article 10 – applies only to officials or any person.

⁷⁹ In the sense of internet regulation as information technology regulation.

privacy, sets up principles for the use of the internet in Brazil. Structured as a “Bill of Rights”, it sets off with general principles for the use of the internet and provides for net neutrality in Art. 9.

II. Allocation of Informational Legal Positions

Commodity/commoditization, especially. “intellectual property”; collective goods; public goods.

The Brazilian Law on Industrial Property⁸⁰ explicitly provides for several different intellectual property rights: Patents and Utility Models (Art. 6-93), Industrial Designs (Art. 94-121), Marks (Art. 122-175) and Geographical Indications (Art. 176-182). Furthermore, it protects other informational interests under the general protection from unfair competition in Art. 195, such as trade secrets.

A patent can be granted for an invention which meets the requirements of novelty, an inventive step and an industrial application (Art. 8 IP Law), the requirement of novelty only being fulfilled if not currently considered part of the state of the art (Art. 11 IP Law). Utility models (Art. 9 IP Law) are generally governed by the same rules as patents but concern a novel industrial application and require an inventive act (rather than an inventive step). Industrial design rights concern ornamental shapes or ornamental arrangements of lines and colors, providing a novel and original visual result and must be

able to be applied to a product which is suitable to be produced industrially (Art. 95 IP Law).

Distinctive visually perceptible signs may be protected by (trade)marks,⁸¹ further categorized into product or service marks, certification marks and collective marks (Art. 123 I-III IP Law), with Art. 124 IP Law listing objects excluded from mark protection. Such Marks must also be registered with the INPI (Art. 128 IP Law). Furthermore, Art. 126 IP Law affords protection to unregistered marks that are considered well-known in their field of business, explicitly referencing the Paris Convention for the Protection of Industrial Property.⁸²

Art. 176 IP Law protects Geographical Indications, granting producers from specific regions exclusivity of use concerning what the law terms indications of source (Art. 177 IP Law) and denominations of origin (Art. 178 IP Law).⁸³ These differ somewhat from other intellectual property rights conferred under Brazilian law, as geographical location of the producing party allows for use of these rights, rather than being held as property or being assignable and licensable (Art. 182).

Trade Secrets are not explicitly protected under Brazilian law. However, they can be protected through the incorporation⁸⁴ of the TRIPS agreement,⁸⁵ which protects secrets to a certain extent in its Art. 39, and by the

⁸⁰ (n 65).

⁸¹ Translation note: The original *marca* is commonly translated both as trademark and mark, the latter term used hereinafter.

⁸² Paris Convention for the Protection of Industrial Property from 1883, last amended 1979, available online at World Intellectual Property Organization, ‘Paris Convention for the Protection of Industrial Property’ (n.d.) <<https://wipo.int/en/treaties/textdetails/12633>> accessed 1 April 2022.

⁸³ A very limited amount of such Geographical Indications are protected, with all those listed at Instituto Nacional da Propriedade Industrial, ‘Pedidos

de Indicação Geográfica no Brasil’ (2021) <<https://www.gov.br/inpi/pt-br/servicos/indicacoes-geograficas/pedidos-de-indicacao-geografica-no-brasil>> accessed 4 April 2022.

⁸⁴ ‘Decree 1.355/1994’ <http://www.planalto.gov.br/ccivil_03/decreto/antigos/d1355.htm> accessed 1 April 2022.

⁸⁵ ‘WTO | intellectual property (TRIPS) - agreement text - general provisions’ (3 April 2017) <https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm> accessed 1 April 2022

provision against unfair competition in Art. 195 IP Law.⁸⁶

The Brazilian Copyright Law⁸⁷ provides certain works with copyright protections, with the special Brazilian Software Copyright Law⁸⁸ going into detail on copyright pertaining to computer programs.

Copyright⁸⁹ protections, which apply to intellectual creations (Art. 7)⁹⁰ are split into moral rights and patrimonial rights (Art. 22 Copyright Law), with only the latter open for licensing and assignment (Art. 49 I Copyright Law). Moral rights can, however, be inherited to some extent (Art. 24 § 1 Copyright Law).

Further specific intellectual property positions exist for Plant Varieties⁹¹ and Integrated Circuits.⁹²

In addition to the aforementioned Intellectual Property Rights, the Civil Code⁹³ creates provisions for personality rights in its Chapter II (Art. 11-21).

Informational legal positions pertaining to personal data are mentioned in Art. 17 LGPD and also governed by *habeas data* versus government institutions.⁹⁴ Additionally, data

stored physically can be protected under ordinary property rights.⁹⁵

A special role in allocating information is held by the Access to Information Law,⁹⁶ which allows individuals to request publicly held data. Except for the boundaries⁹⁷ set in this law, all publicly held data can be subject to an information request, therefore allocating publicly held data as a public good.⁹⁸

III. Institutions

Information regulation authorities; private institutions (industry associations), including international institutions; government administration and cultivation of informational goods.

A multitude of government institutions deal with the enforcement and development of informational and consumer regulation. In the area of intellectual property, these include the National Institute of Industrial Property (INPI - *Instituto Nacional da Propriedade Industrial*),⁹⁹ which is responsible for administering patents and similar intellectual property rights, the Interministerial Group for Intellectual Property (*Grupo Interministerial de Propriedade Intelectual*),¹⁰⁰ chaired by the Ministry of Economy and responsible for coordinating the government strategy concerning intellectual property, and the

⁸⁶ See O do Amaral, Luiz Henrique and others, 'Intellectual Property Rights in Brazil: Overview' <<https://uk.practicallaw.thomsonreuters.com/1-519-8905?transitionType=Default&contextData=%28sc.Default%29>> accessed 1 April 2022.

⁸⁷ (n 67).

⁸⁸ (n 68).

⁸⁹ The Portuguese term is *direitos autorais* (see Art. 1 Copyright Law), which might more accurately be translated as "authorial rights". However, translations commonly use the term of copyright, which is therefore used here.

⁹⁰ For more detail on works eligible for protection, see the detailed provisions in Art. 7-10 Copyright Law.

⁹¹ (n 69).

⁹² (n 70).

⁹³ 'Law 10.406/2002 - Código Civil' <http://www.planalto.gov.br/ccivil_03/leis/2002/L10406compilada.htm> accessed 1 April 2022.

⁹⁴ Discussed further *infra* C II 2.

⁹⁵ See, *inter alia*, Art. 1228 Civil Code.

⁹⁶ 'Law 12.527/2011 - Lei de acesso à informação' <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12527.htm> accessed 1 April 2022.

⁹⁷ Notable exceptions being classified (Art. 27-29) and personal information (Art. 31).

⁹⁸ Establishing a government open data policy 'Decree 8.777/2016' <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/decreto/d8777.htm> accessed 1 April 2022.

⁹⁹ Instituto Nacional da Propriedade Industrial, 'Instituto Nacional da Propriedade Industrial' <<https://www.gov.br/inpi/pt-br>> accessed 1 April 2022.

¹⁰⁰ Grupo Interministerial de Propriedade Industrial, 'O Grupo' <<https://www.gov.br/participamaisbrasil/o-conselho13>> accessed 1 April 2022.

National Council for the Combatting of Piracy (*Conselho Nacional de Combate à Pirataria*).¹⁰¹ The National Secretariat for Copyright and Intellectual Property (*Secretaria Nacional de Direitos Autorais e Propriedade Intelectual*)¹⁰² deals with copyright, for the registration of which the Copyright Office (*Escritório de Direitos Autorais*)¹⁰³ of the National Library is responsible. ANATEL is responsible for the regulation of telecommunications,¹⁰⁴ while ANCINE¹⁰⁵ is the national regulator responsible for audiovisual media.

The Public Ministries of Brazil, understood to be a sector of government independent of the executive, legislative and judiciary, have a significant amount of influence for the protection of collective interests and various consumers' rights, especially as a litigant, both on the national¹⁰⁶ and state level.¹⁰⁷

Regarding consumers' rights, the central institution is the National Consumer Secretariat (Senacon - *Secretaria Nacional do Consumidor*)¹⁰⁸ under the umbrella of the Ministry of Justice, responsible for the

coordination of consumer policy, but also the various State Departments for Consumer Protection (PROCON - *Departamento Estadual de Proteção e Defesa do Consumidor*).¹⁰⁹ The Administrative Council for Economic Defense (CADE - *Conselho Administrativo de Defesa Econômica*)¹¹⁰ is Brazil's top competition watchdog.

For internet regulation and as mentioned in Art. 9 § 1 and Art. 24 II MCI, the Internet Steering Committee (CGI.br – *Comitê Gestor da Internet*),¹¹¹ a mixed government/expert institution, is responsible for establishing various guidelines regarding internet use in Brazil along with the relevant subdivisions, the Information and Coordination Nucleus (NIC.br – *Núcleo de Informação e Coordenação do Ponto BR*)¹¹² responsible for implementation of CGI decisions and projects, and the Center for Studies, Response and Treatment of Security Incidents in Brazil (CERT.br – *Centro de Estudos, Resposta e Tratamento de Incidentes de Segurança no Brasil*)¹¹³ play an important role.

¹⁰¹ Ministério da Justiça e Segurança Pública, 'Combate à Pirataria' <<https://www.gov.br/mj/pt-br/assuntos/sua-protecao/combate-a-pirataria/>> accessed 1 April 2022.

¹⁰² Ministério do Turismo – Secretaria Especial da Cultura, 'Secretaria Nacional de Direitos Autorais e Propriedade Intelectual' <<https://www.gov.br/turismo/pt-br/secretaria-especial-da-cultura/aceso-a-informacao/acoes-e-programas-1/secretaria-nacional-de-direitos-autorais-e-propriedade-intelectual>> accessed 1 April 2022.

¹⁰³ Biblioteca Nacional, 'Direitos Autorais' <<https://www.bn.gov.br/servicos/direitos-autorais>> accessed 1 April 2022.

¹⁰⁴ Agência Nacional de Telecomunicações, 'Anatel' (17 March 2022) <<https://www.gov.br/anatel/pt-br>> accessed 1 April 2022

¹⁰⁵ 'Goals & functions | Página | ANCINE | Agência Nacional do Cinema | Ministério do Turismo | Governo Federal' (17 March 2022) <<https://antigo.ancine.gov.br/en/about-ANCINE/mission>> accessed 1 April 2022

¹⁰⁶ Ministério Público Federal, 'Ministério Público Federal' <<http://www.mpf.mp.br/>> accessed 1 April 2022.

¹⁰⁷ See, inter alia, Ministério Público do Distrito Federal e Territórios, 'Ministério Público do Distrito Federal e Territórios' <<https://www.mpdft.mp.br/portal/>> accessed 1 April 2022.

¹⁰⁸ Defesa do Consumidor – SENACON/Ministério da Justiça e Segurança Pública, 'A Senacon' <<https://www.defesadoconsumidor.gov.br/portal/a-senacon>> accessed 1 April 2022.

¹⁰⁹ See, for example, for the State of Paraná 'Departamento Estadual de Proteção e Defesa do Consumidor' (17 March 2022) <<https://www.procon.pr.gov.br/>> accessed 1 April 2022.

¹¹⁰ Ministério da Justiça e Segurança Pública, 'Conselho Administrativo de Defesa Econômica' <<https://www.gov.br/cade/pt-br>> accessed 1 April 2022.

¹¹¹ Comitê Gestor da Internet, 'Sobre o CGI.br' <<https://cgi.br/sobre/>> accessed 1 April 2022.

¹¹² Núcleo de Informação e Coordenação do Ponto BR, 'Sobre o NIC.br' <<https://www.nic.br/quem-somos/>> accessed 1 April 2022.

¹¹³ Centro de Estudos, Resposta e Tratamento de Incidentes de Segurança no Brasil, 'Sobre o CERT.br' <<https://www.cert.br/sobre/>> accessed 1 April 2022.

The National Data Protection Authority (ANPD - *Autoridade Nacional de Proteção de Dados*),¹¹⁴ a sub-division of the Presidency by organization, is responsible for enforcement of the LGPD.

On the international level, Brazil is a member of the World Trade Organization (WTO)¹¹⁵ and the World Intellectual Property Organization (WIPO),¹¹⁶ with the latter especially relevant for the administration of international intellectual property treaties. Important, especially from an economic perspective, is its membership in Mercosur (*Mercosul*),¹¹⁷ the South American regional free trade organization, which also provides for regulatory input. While not a member, Brazil also maintains a close relationship to the OECD.¹¹⁸ Concerning Data Protection on an international level, Brazil is currently an observer to the Council of Europe's Convention 108.¹¹⁹

There are also several Brazilian civil society groups relevant for the development of information regulation, some influential ones being the Getulio Vargas Foundation (FGV - *Fundação Getulio Vargas*),¹²⁰ a nationwide higher education institute and think tank active in

many areas, the Igarapé Institute (*Instituto Igarapé*),¹²¹ a think tank focused on public, climate and digital security, the Latin American Network of Studies on Surveillance, Technology and Society (LAVITS - *Rede Latino-Americana de Estudos Sobre Vigilância, Tecnologia e Sociedade*),¹²² a research network dealing with its namesake topics, Internetlab, a research center for matters of law and technology,¹²³ the Brazilian Institute of Consumer Policy and Law (Brasilcon - *Instituto Brasileiro de Política e Direito do Consumidor*),¹²⁴ an academic institution dealing with consumers rights, and Data Privacy Brasil,¹²⁵ devoted to research and education concerning data privacy. The Coalition for Rights on the Net (*Coalizão Direitos na Rede*) exists as a network of more than 50 academic and civil society groups and aims at protecting rights in the digital sphere.¹²⁶

IV. Procedural Aspects

Control and enforcement; individual; collective; through associations; by authorities (executive and judicial).

Executive authorities in Brazil enforce the measures as conferred to them via

¹¹⁴ Presidência de República, 'Autoridade Nacional de Proteção de Dados' <<https://www.gov.br/anpd/pt-br>> accessed 1 April 2022. See also *infra* C IV 2 c.

¹¹⁵ World Trade Organization (WTO), 'World Trade Organization – Global Trade.' <<https://www.wto.org/>> accessed 1 April 2022.

¹¹⁶ World Intellectual Property Organization (WIPO), 'World Intellectual Property Organization' <<https://www.wipo.int/portal/en/index.html>> accessed 1 April 2022.

¹¹⁷ MERCOSUR, 'MERCOSUR' <<https://www.mercosur.int/en/>> accessed 1 April 2022.

¹¹⁸ Organization for Economic Co-operation and Development, 'Brazil' <<https://www.oecd.org/brazil/>> accessed 1 April 2022.

¹¹⁹ Council of Europe, 'Parties, CONVENTION 108 IN THE WORLD' <<https://www.coe.int/en/web/data-protection/convention108/parties>> accessed 1 April 2022.

¹²⁰ Fundação Getulio Vargas, 'Portal FGV' <<https://portal.fgv.br/>> accessed 1 April 2022.

¹²¹ Instituto Igarapé, 'Instituto Igarapé' <<https://igarape.org.br/>> accessed 1 April 2022.

¹²² Lavits, latin american network of surveillance, technology and society studies, 'Lavits' <<https://lavits.org/a-lavits/?lang=en>> accessed 4 April 2022.

¹²³ InternetLab, 'About | InternetLab' (1 February 2022) <<https://internetlab.org.br/en/about/>> accessed 4 April 2022

¹²⁴ 'BRASILCON - Sobre nós' (17 March 2022) <<https://www.brasilcon.org/sobre-nos>> accessed 1 April 2022

¹²⁵ DataPrivacyBR, 'Quem Somos' <<https://dataprivacy.com.br/quem-somos/>> accessed 1 April 2022.

¹²⁶ Coalizão Direitos na Rede, 'Quem Somos - Coalizão Direitos na Rede' (4 March 2022) <<https://direitosnarede.org.br/quem-somos/>> accessed 1 April 2022

administrative act.¹²⁷ The defense against these acts may, in certain circumstances, occur via administrative tribunals structured as part of the executive or through alternative dispute resolution methods, but is mainly carried out through the courts as part of the judiciary. It should be noted that Brazil employs a unitary system in its court structure regarding the distinction between the public and private sector, with no separate administrative courts existing.¹²⁸

Civil lawsuits by private natural persons or legal entities are another possibility to enforce laws and obtain damages in certain situations,¹²⁹ taking place before State and Federal courts, with Federal or State jurisdiction depending on the matter at hand.¹³⁰ Small claims' courts (*Juízados Especiais*) also exist,¹³¹ which process, among other specific claims, those in which the value in dispute do not surpass the equivalent to 40 times the amount of the national minimum wage. Therefore, within this limit, individuals may also pursue action before these small claims' courts.

Collective litigation is another possibility for action,¹³² governed by the Law on Public Civil Action¹³³ and the Consumer Defense Code (Articles 81 to 104).¹³⁴ One variant is Public

Civil Action,¹³⁵ whereby suits pertaining to diffuse¹³⁶ and collective rights¹³⁷ can be brought by the Public Ministry, certain other government entities as well as associations aiming to protect such rights.¹³⁸ The CDC, on the other hand, also allows for (essentially) the same entities to sue collectively on behalf of individual consumers' rights and interests.¹³⁹

¹²⁷ Such as the administrative sanctions under the CDC (Art. 55-60) or under the LGPD, see *infra* C IV 3 c.

¹²⁸ Ricardo Perlingeiro, 'BRAZIL'S ADMINISTRATIVE JUSTICE SYSTEM IN A COMPARATIVE CONTEXT' (2014) 1(3) RINC 33.

¹²⁹ E.g. (moral) damages for the violation of the privacy rights set forth in Art. 21 Civil Code.

¹³⁰ Rogério Carmona Bianco, Guilherme Gomes Pereira and Mônica N Murayama, 'Litigation and enforcement in Brazil: overview' <[https://uk.practicallaw.thomsonreuters.com/9-502-2479?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/9-502-2479?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 1 April 2022.

¹³¹ 'Law 9.099/1995' <http://www.planalto.gov.br/ccivil_03/leis/19099.htm> accessed 1 April 2022.

¹³² See Antonio Gidi, 'Class Actions in Brazil: A Model for Civil Law Countries' (2003) 51(2) The American Journal of Comparative Law 311 accessed 1 April 2022.

¹³³ 'Law 7.347/1985 - Lei da Ação Civil Pública' <http://www.planalto.gov.br/ccivil_03/leis/L7347C/ompilada.htm> accessed 1 April 2022.

¹³⁴(n 20).

¹³⁵ Art. 1 Law on Public Civil Action.

¹³⁶ Diffuse rights are defined in Art. 81 I CDC as trans-individual, indivisible rights held by indeterminate purposes and linked by circumstances of fact.

¹³⁷ Collective rights are defined in Art. 81 II CDC as trans-individual, indivisible rights held by a group, category or class of persons linked together or with the opposing party by a basic legal relationship.

¹³⁸ Art. 5 Law on Public Civil Action.

¹³⁹ Thereby also allowing for collective action suits on rights as defined in Art. 81 III CDC: "homogenous individual interests or rights, to be understood as arising from common origin."

C. Regulations Concerning Disclosure of Personal Data

I. Legal Structure of Data Disclosure

Existence of “Data Protection Law”; mandatory and nonmandatory regulation; Differentiation between public and private Sector; public or private sector as a role model for regulation; general or sectoral regulation; Self-regulation (codes of conduct); Basic principles of regulation [preventive ban or freedom of processing]; risk-based approach (potential for misuse; Protection of certain categories of data); privileged areas [personal; family; media; research].

The Federal Constitution¹⁴⁰ provides the legal foundation of the right to privacy in Art. 5 X¹⁴¹, which provides for protection of intimacy and private life, Art. 5 XII, which protects privacy in the context of communications, and in Art. 5 LXXIX, which explicitly gives a right to personal data protection¹⁴².

The centerpiece of Brazilian data protection regulation is LGPD, which is universally applicable and not limited to the private, public or other sectors. Further data protection provisions exist in the MCI as well as the corresponding executive decree, but these are limited in their scope to the internet. Additionally, the international scope of LGPD is wider than other regulation, with Art. 3 LGPD adopting the marketplace location principle (Art. 3 II),¹⁴³ whereby the offering of

goods or services or processing of data aimed at individuals located on Brazilian territory is enough for applicability.

GDPR and LGPD, perhaps as an expression of the so-called “Brussels effect”,¹⁴⁴ contain many similarities. Of these, the most striking is the general architecture: Both combine broad definitions of personal data¹⁴⁵ and processing of such¹⁴⁶ with an exhaustive list of conditions under which processing is allowed.¹⁴⁷ A further similarity exists with the wide scope of extraterritorial applicability¹⁴⁸ focused on the geographic location of the protected individuals.¹⁴⁹

The Brazilian Civil Code, in Art. 21, deems the right to private life “inviolable” and allows for civil action.¹⁵⁰

Further data protection provisions are fragmented and concern individual issues. Sectoral regulations deal with the financial sector, taxation, consumers’ rights, healthcare, telecommunications and child rights.¹⁵¹

Additionally, there exist various criminal provisions in the Criminal Code related to privacy: Art. 138-145 deal with defamation and slander, with untrue information about another person as a central point; Art. 141 § 2 increases the penalty in the case of disclosure of such forbidden acts in online social media. Art. 147 defines the crime of intimidation. Art. 147-A – recently introduced by Law n.

¹⁴⁰ *ibid.*

¹⁴¹ Art. 5 X: “intimacy, private life, honor and people’s image are inviolable, ensured the right to compensation for material or moral damage resulting from their violation;”.

¹⁴² Aline J Zinni, ‘Data Protection becomes a fundamental right in Brazil’ *Kasznar Leonardos* (11 February 2022) <<https://www.lexology.com/library/detail.aspx?g=c2988a00-4d17-4b5f-96cf-d2b4c1ea8d4a>> accessed 1 April 2022

¹⁴³ Lundgren (n 33).

¹⁴⁴ Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford Scholarship Online 2020)

¹⁴⁵ See *infra* Section C II 1.

¹⁴⁶ See *infra* Section C III 1.

¹⁴⁷ See *infra* in this Section.

¹⁴⁸ See previous paragraph.

¹⁴⁹ For an article-by-article comparison, see Alexis Kateifides and others, ‘Comparing privacy laws: GDPR v. LGPD’ <https://www.dataguidance.com/sites/default/files/gdpr_lgpd_report.pdf> accessed 1 April 2022.

¹⁵⁰ Civil Code (n 93).

¹⁵¹ See the good overview of sectoral regulation Jaqueline de Souza Abreu, Fabiane M Sousa Nakagawa and Juliana Pacetta Ruiz, ‘Data Protection in Brazil, Review of Legal Background’ (2017) <<https://www.internetlab.org.br/wp-content/uploads/2017/03/Data-Protection-in-Brazil-InternetLab.pdf>> accessed 1 April 2022.

14.132/2021 - raises, to the criminal level, the conduct of harassment or stalking. Art. 151 and 152 protect correspondence, and, specifically, business correspondence, from unlawful access or disclosure to a non-recipient, therefore protecting information conveyed by these means. Art. 153 and 154 deal with the illegal disclosure of information in private documents and breaches of professional secrecy, respectively. Art. 154-A criminalizes hacking, prohibiting the invasion of computer devices for obtaining, tampering with or destroying data.¹⁵²

Concerning the individual's relationship to government entities, the action of *habeas data* and the Brazilian Access to Information Law allows for access to certain personal data. The recently passed Digital Government Policy¹⁵³ also contains several provisions relevant for individual data.¹⁵⁴

While one of the stated aims of the introduction of LGPD was the simplification of the fragmented legal landscape, the other privacy-related provisions were not actually repealed, leaving open for interpretation the question of their relationship and hierarchy to one another to some extent.¹⁵⁵

LGPD conceptually relies on a preemptive ban of all processing activity concerning personal data combined with an exhaustive list of permissible acts of processing in Art. 7.¹⁵⁶ This is combined with a stricter approach concerning what LGPD calls sensitive data, with its Art. 11 putting up more stringent processing requirements, and concerning

children's data with additional requirements in Art. 14.

On the other side, certain areas are privileged in Art. 4: natural persons within private and non-economic purposes, journalistic and artistic activity are exempt from LGPD regulation, academic purposes partially so.¹⁵⁷ Concerning government activity, Art. 4 III exempts purposes of public safety, national defense, state security and criminal investigation and prosecution.

The MCI also adopts a preemptive ban in its Art. 7 VIII subject to (rather broad) exceptions, but can, due to its limited scope, not be considered universal when compared to LGPD.

Regulations apart from LGPD and the MCI refrain from such a universal approach to regulation, rather dealing with individual cases considered problematic – this could also be seen as a risk-based approach.

II. Concepts and Terms for Such Data

1. Personal Data as a Matter of Protection

Situational (spoken words etc.); local (at home); logical ("spheres"); informational (datum, information); Treatment of public or publicized data; limitations and expansions of definition; categories.

The concept of personal data in Brazilian law developed over time.

Although an early mention of personal data in Brazilian Law can be found in Art. 43 of the CDC, the expression was far from attaining its current meaning – and a specific/structured

¹⁵² Introduced in Law 12.737/2012, known as *Lei Carolina Dieckmann*. (n 72). For background information on its name and introduction, see FMP - Fundação Escola Superior do Ministério Público (n 73).

¹⁵³ 'Law 14,129/2021' <http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/L14129.htm> accessed 1 April 2022.

¹⁵⁴ The proposed concept of data transparency in Art. 29 is limited by protection of personal data (II) and thus in conflict.

¹⁵⁵ Doneda and Schertel Ferreira Mendes (n 29).

¹⁵⁶ Art. 7: "Processing of personal data shall **only** be carried out under the following circumstances (...)" (emphasis ours.).

¹⁵⁷ Art. 4 II b): "is done exclusively: (...) academic purposes, with Arts. 7 and 11 being applicable in these cases".

concept -, as it was interpreted in this context. Due to the fact that it originally aimed at regulating consumer databases, the final goal was to allow only the processing of “personal data” not sheltered by the constitutional guarantee of privacy and directly connected to the development of the so-called consumer society.¹⁵⁸

The first explicit legal definition of Personal Data in the Brazilian system was inaugurated by the Access to Information Law. In Art. 4 IV, personal data is defined as “data related to an identified or identifiable natural person”.

Years later, with the publication of Decree nº 8.771/2016 - which regulates the MCI -, a more elaborate concept was introduced, once article 14, I, defines it as “data related to the identified or identifiable natural person, including identification numbers, location data or electronic identifiers, when these are related to a person”.

Interestingly, though, that the MCI not only differentiates personal data from what it defines as “registration data” - this being data regarding “personal qualification, affiliation and address” - but it also creates a special

exception to the latter, when it comes the preservation of fundamental guarantees¹⁵⁹. It also leaves the definition of “personal qualification” to Decree no. 8.771/2016¹⁶⁰.

Facing the provision of article 10, § 3, of the MCI, some authors propose that these category of data – *dados cadastrais* – constitute a sub-category of personal data, which are in a “more public sphere”¹⁶¹ and, therefore, “are deemed less classified”¹⁶².

The LGPD, reproducing the definition from the *Access to Information Law*, defines personal data in Art. 5 I as “information regarding an identified or identifiable natural person”. Furthermore, it establishes “sensitive personal data” in Art. 5 II¹⁶³ for areas deemed especially worthy of protection.

Art. 12,¹⁶⁴ together with the definition in Art. 5 III,¹⁶⁵ clarifies, however, that anonymized data is not considered personal data, adopting an understanding of anonymity relative to the available means of deanonymization. Additionally, Art. 12 § 2 LGPD states that anonymized data is considered personal data when used to create behavioral profiles (profiling).¹⁶⁶ However, LGPD does not

¹⁵⁸ Ada P Grinover and others, *Código Brasileiro de Defesa do Consumidor - Comentado pelos Autores do Anteprojeto - Direito Material e Processo Coletivo - Volume Único* (2019)

¹⁵⁹ “Art. 10. The custody and availability of the connection and access records to internet applications covered by this Law, as well as personal data and the content of private communications, must take into account the preservation of intimacy, private life, privacy and honour and image of the parties directly or indirectly involved (...) § 3 The provision in the caput does not prevent access to registration data that inform personal qualification, filiation and address, as provided by law, by administrative authorities that have legal competence for your request.”

¹⁶⁰ “Art. 11. (...)§ 2 The following are considered registration data: I - filiation; II - the address; and III - personal qualification, understood as the user's name, first name, marital status and profession.”

¹⁶¹ Souza Carlos Affonso, Lemos Ronaldo and Celina Bottino, *Marco Civil da Internet. Jurisprudência Comentada* (2017).

¹⁶² Ibid. As stated by the authors, “Due to the nature of the registration data being closer to the public sphere

than to the private life of its owner, the Marco Civil da Internet established less restrictive rules for the access of such information when required by an administrative authority. As stipulated in § 3 of art. 10, there is no need for a court order for such request.”

¹⁶³ Art. 5 II LGPD: “sensitive personal data: personal data concerning racial or ethnic origin, religious belief, political opinion, trade union or religious, philosophical or political organization membership, data concerning health or sex life, genetic or biometric data, when related to a natural person”.

¹⁶⁴ Art. 12 LGPD: “Anonymized data shall not be considered personal data, for purposes of this Law, except when the process of anonymization to which the data were submitted has been reversed, using exclusively its own efforts, or when it can be reversed applying reasonable efforts.”

¹⁶⁵ Art. 5 III LGPD: “anonymized data: data related to a data subject who cannot be identified, considering the use of reasonable and available technical means at the time of processing”.

¹⁶⁶ Art. 12 § 2 LGPD: “Data can be considered personal, for purposes of this Law, when they are used

present a concept for pseudonymization in Art. 5, since the legislator opted to make that specific reference within Art. 13 §4, *i.e.*, when dealing with databases containing health data.

Additionally, as opposed to the GDPR¹⁶⁷, the LGPD does not expressly exclude from its scope the personal data of deceased individuals. Even so, in a systematic approach¹⁶⁸, it seems reasonable that the same understanding would apply here, since Art. 1 GDPR indicates that “the free development of the personality of the natural person” lies within its *mens legis* and Art. 5 I relates to an “identified or identifiable natural person”, while the Civil Code states that “*the person’s civil personality begins from birth with life (...)*”¹⁶⁹ and “*The existence of the natural person ends with death (...)*”¹⁷⁰. This does not mean, however, that a deceased person’s personality rights are not subject to protection and enforcement, albeit the legitimacy to pursue damages would rest with the deceased person’s relatives.¹⁷¹

2. Attribution of Data to Individual Persons

Creation; possession/control; personal connection; differentiation between domestic and foreign nationals;

to formulate behavioral profiles of a particular natural person, if that person is identified”.

¹⁶⁷ As per recital 27 GDPR.

¹⁶⁸ Camila Chizzotti and Karim Kramel, ‘A LGPD e a proteção de dados de pessoas falecidas’ (2020) <<https://lawinnovation.com.br/a-lgpd-e-a-protecao-de-dados-de-pessoas-falecidas/>> accessed 1 April 2022.

¹⁶⁹ Art. 2 Civil Code.

¹⁷⁰ Art. 6 Civil Code.

¹⁷¹ “This does not mean that the rights held by the deceased are not subject to protection, but only that this protection does not derive directly from the LGPD, although it is supported by other norms, such as art. 12 of the Civil Code (...)” José M T Silva, ‘O provimento 23/2020 da Corregedoria Geral da Justiça do Estado de São Paulo: a LGPD e os serviços extrajudiciais de notas e de registro’ (2021) <<https://www.migalhas.com.br/coluna/migalhas-de-protecao-de-dados/341184/o-provimento-23-2020-da-corregedoria-geral-da-justica-do-estado-de-sp>> accessed 1 April 2022.

treatment of multi-referential data; limitations and expansions of definition; categories.

Within LGPD,¹⁷² data is attributed to individual persons through the concept of *personal* data (Art. 5 I LGPD).¹⁷³ While this alone implies a relationship between data and the referenced person, Art. 5 V LGPD goes further, defining the data subject as “a natural person to whom the personal data that are the object of processing refer to”, establishing the legal link between these. Attribution of data to an individual may be eliminated through anonymization, which Art. 5 X LGPD defines as “use of reasonable and available technical means at the time of the processing, through which data loses the possibility of direct or indirect association with an individual”. Anonymization therefore eliminates the relationship between the individual and the data and, consequently, the qualification of such data as personal data in the sense of Art. 5 I LGPD.

Furthermore, Art. 17 LGPD provides for *titularidade* of data, which may roughly be translated to ownership.¹⁷⁴ However, this is not ownership in the sense that it may be sold or transferred¹⁷⁵, but rather a guaranteed, non-

¹⁷² This is generally transferable to other regulations using the same definition of personal data as the LGPD.

¹⁷³ Detail on definitions *supra* C II 1.

¹⁷⁴ Art. 17 LGPD: “Toda pessoa natural tem assegurada a titularidade de seus dados pessoais e garantidos os direitos fundamentais de liberdade, de intimidade e de privacidade, nos termos desta Lei.”

¹⁷⁵ In this matter, Bioni advances that “(...) the debate regarding the ownership of personal data does not apply to the Brazilian legal system. The negotiability of personality rights is limited to the fruition of such goods (*lato sensu*) and not, properly, to their ownership (*stricto sensu*), in accordance with the understanding of the words “non-transferable” and “non-renounceable” contained in Art. 11 of the Civil Code.” (Bruno Bioni, *Proteção de Dados Pessoais: A Função e os Limites do Consentimento* (2020) 204), while Mendes adds that “In this way, it is clear that the question ‘who owns the personal data’ is a false question. The nature of the protected asset, the very personality to which the personal data refer, requires that the protection of personal data be understood not as a right to property, but as a kind of personality rights (...) against the risks

disposable¹⁷⁶ moral right, logically equivalent to the personality rights provided for in the Civil Code. This position is then set forth as the basis for the rights of the data subject¹⁷⁷ in Art. 18 – 22 LGPD.

LGPD does not explicitly differentiate between domestic and foreign nationals, with such categories being irrelevant for the legal definitions whenever LGPD is applicable.¹⁷⁸

To the extent covered by the relevant regulations and insofar as this can be considered as being related to data, creation of such data can allow for an attribution to the individual as creator under intellectual property regulation, notably copyright (as author) and patents (as inventor).¹⁷⁹

Outside LGPD, relevant regulation dealing with the attribution of data to an individual exists within *habeas data*, which is constitutionally guaranteed in Art. 5 LXXII, LXXVII CF and further detailed in the Habeas Data Law.¹⁸⁰ Art. 5 LXXII a) refers to “knowledge of information related to the person of the petitioner”, thereby attributing such data to the petitioner.

The Freedom of Information Law,¹⁸¹ based on Art. 5 XXXIII CF and insofar similar to *habeas data*, is generally not based on attribution to individuals, but on notions of interest.¹⁸² In its

Art. 4 IV however, it adopts the same definition of personal data as the LGPD,¹⁸³ allowing for similar considerations as above concerning attribution.

3. Reception and Recipients

Special regulation for non-profit/non-commercial actors; the public as a legal recipient; use of public data; size-based obligations for companies; differentiation between recipients and third parties (especially within company groups); differentiation between local and international action; outsourcing options.

The reception of personal data is explicitly listed as an example of “an operation carried out with personal data” in Art. 5 X LGPD¹⁸⁴ and is therefore legally considered *processing* of personal data. Art. 3 clarifies that any such processing operation falls under the scope of LGPD, whether carried out by a natural person or by a legal entity of public or private law. Consequently, reception of personal data by any such entity generally falls under the preemptive ban of Art. 7 LGPD.

Processors of personal data, and thus, recipients, will always either be considered “controller” (*controlador*) or “operator” (*operador*). The “controller” is defined in Art. 5 VI LGPD as a “natural person or legal entity of either public or private law in charge of making the decisions regarding the processing

caused for the collection, processing and circulation of personal data” (Laura Schertel Mendes, *Privacidade, proteção de dados e defesa do consumidor: linhas gerais de um novo direito fundamental* (Saraiva 2014)).

¹⁷⁶ Although several provisions referencing ‘non-disposable rights’ may be found within the Constitution (Arts. 127, 225 and 231) as well as in the Civil Procedure Code (Arts. 373, § 3º, I and 392), the Brazilian legal system does not provide a formal, express definition of it. As explained by Nilton da Costa and Rebeca dos Santos, “the legislator did not concern himself with offering elements to clarify the criteria by which a right would be considered non-disposable. It is, thus, an undefined legal concept, although widely explored by the Brazilian legislation.” (César Antunes da Costa, Nilton and Rebeca Barbosa dos Santos, ‘A transação de direitos indisponíveis na mediação’ [2019] *Revista Direito UFMS* 212). On the concept of inalienable and non-disposable rights see also Gilmar Ferreira Mendes and Paulo Gustavo Gonet Branco, *Curso de Direito Constitucional* (2021).

¹⁷⁷ Original *titular dos dados pessoais*, showing the linguistic relationship to *titularidade*.

¹⁷⁸ Applicability of LGPD is dealt with in its Art. 3.

¹⁷⁹ See *supra* B I 2.

¹⁸⁰ (n 59).

¹⁸¹ (n 58).

¹⁸² Art. 5 XXXIII of the Federal Constitution: “[...] of private interest to such persons, or of collective or general interest” (n 18).

¹⁸³ Relevant in this context especially as grounds for restriction of access to information on the basis that it pertains to a third party’s personal data, see Art. 31 Freedom of Information Law.

¹⁸⁴ Art. 5 X LGPD: “tratamento: toda operação realizada com dados pessoais, como as que se referem a [...] *recepção*, [...]”.

of personal data”,¹⁸⁵ while the “operator” is a “natural person or legal entity of either public or private law that processes personal data in the name of the controller”.¹⁸⁶ Together, these are defined as “processing agents” (*agentes de tratamento*) in Art. 5 IX LGPD.

Art. 4 LGPD is a notable example of differentiation between recipients, declaring LGPD not to be applicable in certain circumstances. Art. 4 I LGPD exempts natural persons¹⁸⁷ processing personal data exclusively for private and non-economic purposes. Art. 4 II a) exempts the processing of personal data done exclusively for journalistic and artistic purposes, thereby privileging such recipients.

Academic purposes, and hence such recipients are partially¹⁸⁸ exempt from LGPD in Art. 4 II b). This is related to Art. 7 IV LGPD,¹⁸⁹ which allows for processing for the carrying out of studies by research entities.¹⁹⁰ The two are not equivalent, as the definition of research entities in Art. 5 XVIII is much narrower, only including public or non-profit research bodies and entities organized under Brazilian law and located in Brazil.

Health professionals, health services and sanitary authorities may process data for the protection of health under Art. 7 VIII LGPD,¹⁹¹ thereby establishing another recipient-specific regulation. Art. 11 §§ 4, 5 LGPD further creates recipient-specific regulation in the case of health services, pharmaceutical and health insurance, allowing

for communication and shared use of sensitive personal data referring to health, restricted for private health care providers for the purpose of the conclusion of contracts.

Art. 4 III LGPD completely exempts the processing of personal data by public authorities¹⁹² in cases of public safety, national defense, state security and the investigation and prosecution of criminal offenses, which is to be governed by specific legislation, yet to be edited.¹⁹³ And, although Art. 4 § 1 LGPD states that such cases shall be governed by specific legislation, it is likely that any legal provisions in this aspect will take several years to be created.¹⁹⁴ The public administration as a recipient may process personal data under the special Art. 7 III and Art. 23-30 LGPD.

The public is not considered a recipient in the legal sense under LGPD. However, publicly accessible data is specifically dealt with in Art. 7 §§ 3, 4 LGPD. While § 3 remains vague, stating that the purpose, good faith and public interest justifying its availability should be considered when dealing with publicly accessible data, § 4 explicitly waives the requirement of consent in cases where personal data is manifestly made public by the data subject.

Concerning size-based regulation, Art. 55-J XVIII LGPD makes it the responsibility of the ANPD to enact special provisions for microenterprises, small businesses and

¹⁸⁵ Portuguese: “controlador: pessoa natural ou jurídica, de direito público ou privado, a quem competem as decisões referentes ao tratamento de dados pessoais”.

¹⁸⁶ Portuguese: “operador: pessoa natural ou jurídica, de direito público ou privado, que realiza o tratamento de dados pessoais em nome do controlador”.

¹⁸⁷ Legal entities processing personal data for non-commercial purposes are therefore not exempt hereunder.

¹⁸⁸ Art. 4 II b) states that Art. 7 and 11, the main prohibition and processing articles, are applicable in this case.

¹⁸⁹ And the nearly identical Art. 11 II c) LGPD.

¹⁹⁰ Portuguese: *órgão de pesquisa*.

¹⁹¹ And the nearly identical Art. 11 II f) LGPD.

¹⁹² For detail, read Art. 4 §§ 3 and 4 LGPD.

¹⁹³ The Federal Government has edited Presidential Decree n. 10.406/2019, on the governance of data sharing in the scope of the Federal Administration (n 93). However, it is important to add that the aforementioned Presidential Decree does not match the legal requirements stated in Art. 4, § 1, LGPD as it wasn't designed to fulfill said provision -, given that it would require an *Ordinary Law* to do so (hierarchy requirement).

¹⁹⁴ See Renne Müller Cruz, ‘Análise do artigo 4º da Lei de Proteção de Dados’ (2019) <<https://jus.com.br/artigos/71291/analise-do-artigo-4-da-lei-de-protecao-de-dados>> accessed 1 April 2022.

startups.¹⁹⁵ Such provisions have recently been enacted by the ANPD.¹⁹⁶

While the concept of the third party exists in LGPD,¹⁹⁷ it is not legally defined and can therefore be understood in a broad manner, even including society as a whole in the case of legitimate interest.¹⁹⁸ The differentiation between the recipient and other parties can be made via the definition of controller and operator, thereby occurring amongst personal and entity lines, with no specific regulation concerning company groups.¹⁹⁹ However, the definition of shared use of data includes data sharing amongst private entities.²⁰⁰ Specific grounds for processing to third parties or within company groups do not exist within Art. 7 and 11 LGPD.

Indirect differentiation between local and international recipients can be found within Art. 33-36 LGPD. While applicability of LGPD does not change according to local or foreign status of the recipient,²⁰¹ the international transfer of personal data²⁰² is only permissible when meeting the conditions set forth in Art. 33 LGPD, most notably to countries that provide an adequate²⁰³ level of personal data protection (I) or in case the

controller can otherwise prove and guarantee compliance with the principles of data protection (II), but also in cases of specific and highlighted consent (VII). An international recipient wishing to transfer such data to their home or another jurisdiction must therefore additionally consider these provisions, leading to a *de facto* differentiation.

III. Relationship between Discloser and Recipient

1. Provisions for Disclosure

Does regulation exist? personal data as intellectual property and commercial good; data law as a framework for action; „informational self-determination”.

Today, the central regulation for data disclosure in Brazil is LGPD, significantly surpassing all previous regulation in terms of detail and scope of applicability. For data disclosure in the internet, the MCI also remains as a framework.²⁰⁴

Art. 1 LGPD lays out the purpose of the Law as “protecting the fundamental rights of freedom and privacy and the free development of the personality of the natural person”.

¹⁹⁵ Art. 55-J XVIII: “The National Authority has the following duties: (...) to enact rules, guidelines and simplified and special procedures, including deadlines, so that microenterprises and small businesses are able to adapt to this Law, as well as incremental or disruptive business initiatives that declare themselves startups or innovation companies”.

¹⁹⁶ Imprensa Nacional, ‘RESOLUÇÃO CD/ANPD Nº 2, DE 27 DE JANEIRO DE 2022 - DOU - Imprensa Nacional’ (28 January 2022) <<https://in.gov.br/web/dou/-/resolucao-cd/anpd-n-2-de-27-de-janeiro-de-2022-376562019>> accessed 1 April 2022

¹⁹⁷ See Art. 7 VII and IX LGPD.

¹⁹⁸ Bruno Bioni, Marina Kitayama and Mariana Rielli, *O Legítimo Interesse na LGPD: quadro geral e exemplos de aplicação* (2021) 21.

¹⁹⁹ See Art. 5 VI and VII LGPD.

²⁰⁰ See Art. 5 XVI LGPD: “shared use of data: communication, dissemination, international transfer, interconnection of personal data or shared processing of banks of personal data (...) among private entities”.

²⁰¹ Art. 3 LGPD: “This law applies to any processing operation (...) irrespective of the means, the country in which its headquarter is located or the country where the data is located, provided that: (...)”

²⁰² Definition in Art. 5 XV LGPD: “international data transfer: transfer of personal data to a foreign country or to an international entity if which the country is a member”.

²⁰³ Adequacy of the level of data protection is evaluated by the ANPD, see Art. 34 LGPD.

²⁰⁴ Regarding data protection provisions, the MCI is partially equivalent to LGPD, which surpasses the MCI in its level of detail. Despite this, the MCI provisions have not been repealed and their interpretation in relation to LGPD have not yet been clarified. As result, we will discuss the MCI alongside LGPD here. For the relationship between MCI and LGPD, see Luíza Couto Chaves Brandão, ‘O Marco Civil da Internet e a Proteção de Dados: diálogos com a LGPD’ 20(3) *Proteção de dados pessoais: privacidade versus avanço tecnológico* 35.

Art. 2 LGPD sets forth fundamental concepts²⁰⁵ of personal data protection, these being respect for privacy (I), informational self-determination (II), freedom of expression, information, communication and opinion (III), inviolability of intimacy, honor and image (IV), economic and technological development and innovation (V), free enterprise, free competition and consumer defense (VI), and human rights, free development of personality, dignity and exercise of citizenship by natural persons (VII).

In addition to these general concepts, Art. 6 LGPD names ten principles for the processing of personal data, these being purpose (I), adequacy (II), necessity (III), free access (IV), quality of data (V), transparency (VI), security (VII), prevention (VIII), nondiscrimination (IX), and accountability (X).

Principles in the MCI concerning data disclosure are contained within Art. 3 II (“privacy protection”) and III (“protecting personal data”). Furthermore, Art. 7 I-III and VII to X MCI assure the privacy of users of the internet and provides for data protection.

Central to LGPD is the general prohibition on the processing of personal data if not done under one (or more)²⁰⁶ of the grounds listed in Art. 7 LGPD. This prohibition conceptually relies on the very broad definition of “processing” (*tratamento*) in Art. 5 X LGPD,

which is “any operation carried out with personal data”, the article then listing a multitude of examples of processing, these being “collection, production, receipt, classification, use, access, reproduction, transmission, distribution, processing,²⁰⁷ filing, storage, deletion, evaluation or control of the information, modification, communication, transfer, dissemination or extraction”.

Commercialization of personal data is also subject to these principles and requirements, with the provision of “ownership” of personal data in Art. 17 LGPD not allowing for a full transfer.²⁰⁸ Furthermore, personal data could, in certain situations, also be protected by intellectual property provisions such as copyright.²⁰⁹

As highlighted in Art. 2 II LGPD (informational self-determination)²¹⁰ and through the central concept of consent in Art. 7 I and Art. 11 I LGPD, as well as through further provisions,²¹¹ a main objective of LGPD is to allow data subjects control over the processing of their personal data. The right to informational self-determination was recognized by the Supreme Court (STF) in 2020²¹² as arising from the protections of the constitution.²¹³

a. Prohibited Disclosures

Protections of secrecy; multi-referentiality; disclosure to actors abroad; communication towards the public.

The disclosure of personal data is subject to and thus may be prohibited under secrecy

²⁰⁵ Portuguese: *fundamentos*, which could also be translated more literally as foundations or grounds.

²⁰⁶ Chiara Spadaccini de Tefé and Mario Viola, “Tratamento de dados pessoais na LGPD: estudo sobre as bases legais: .” (2020) 9(1) 1 1 <<https://civilistica.emnuvens.com.br/redc/article/view/510>> accessed 1 April 2022.

²⁰⁷ In the English translation, this seems redundant. The Portuguese text lists this as *processamento* as opposed to the general term of *tratamento*.

²⁰⁸ *Supra* C II 2.

²⁰⁹ *Supra* B II.

²¹⁰ See Leonardo R Bessa, ‘A LGPD e o direito à autodeterminação informativa’ (2020)

<<http://genjuridico.com.br/2020/10/26/lgpd-direito-autodeterminacao-informativa/>> accessed 1 April 2022.

²¹¹ Discussed in detail *infra* C III 3.

²¹² Supremo Tribunal Federal, ‘Medida Cautelar na Ação Direta de Inconstitucionalidade: MC ADI 6387 DF - DISTRITO FEDERAL 0090566-08.2020.1.00.0000’ (17 June 2020) <<https://stf.jusbrasil.com.br/jurisprudencia/862328261/medida-cautelar-na-acao-direta-de-inconstitucionalidade-mc-adi-6387-df-distrto-federal-0090566-0820201000000>> accessed 1 April 2022

²¹³ This decision predates the explicit inclusion of a right to data protection in the constitution.

provisions. Notable criminal provisions protecting secrecy are Art. 153 Penal Code, prohibiting the disclosure of private documents or confidential correspondence and Art. 154 Penal Code, prohibiting the disclosure of professional secrets. Art. 195 XI IP Law also prohibits (and penalizes) disclosure of confidential knowledge or information in relation to industry or commerce obtained through contractual relationships or within employment, while Art. 195 XII prohibits disclosure of such information obtained illicitly or as a result of fraud.²¹⁴ Violation of company secrecy also allows for termination of employment with just cause as of Art. 482 g) of the Labor Code.²¹⁵ In contrast to such secrecy provisions, Art. 4-A to 4-C of Law 13.608/2018²¹⁶ protects whistleblowing within the public sector, protecting informants from liability and retaliation.²¹⁷

The Access to Information Law further prohibits disclosure of information classified as ultra-secret, secret or restricted from within the public sector.²¹⁸

The Law for the Protection of Undisclosed Information²¹⁹ prohibits the disclosure of data

submitted to regulatory authorities as part of regulatory procedures concerning the marketing of products, e.g. pharmaceuticals.

Another notable secrecy provision exists with the concept of bank secrecy set forth in the Bank Secrecy Law.²²⁰ However, this applies only to financial institutions as defined in Art. 1 § 1 Bank Secrecy Law.

Confidentiality agreements²²¹ can also prohibit disclosure of information, possibly including personal data. Such an agreement usually defines the scope of confidential information and obligates the parties (as well as their employees, agents and financial advisors) not to disclose such information. Excluded from this prohibition of disclosure is information already in the possession of the receiving party, information in the public domain, as well as cases in which disclosure occurs due to valid judicial or government order.²²² Similar disclosure prohibitions can, however, arise from the principle of objective good faith, without need for an explicit agreement.²²³

Furthermore, LGPD itself can prohibit disclosure of personal data: Art. 5 X LGPD explicitly names communication, transfer and dissemination, *inter alia*, as an example of

²¹⁴ Art. 195 IP Law deals with a multitude of crimes of unfair competition within the intellectual property regime.

²¹⁵ ‘Decree-Law 5.452/1943 - Consolidação das Leis do Trabalho’
<http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm> accessed 1 April 2022.

²¹⁶ ‘Law 13.608/2018’
<http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13608.htm> accessed 1 April 2022.

²¹⁷ Licks Legal, ‘THE WHISTLEBLOWER IN BRAZIL’ (2021)
<<https://www.lickslegal.com/post/the-whistleblower-in-brazil>> accessed 4 April 2022.

²¹⁸ See Art. 23-30 Access to Information Law. Further regulation concerning security and classified information is contained within Decree 7.845/2012. ‘Decree 7.845/2012’
<http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2012/Decreto/D7845.htm> accessed 1 April 2022.

²¹⁹ ‘Law 10.603/2002 - Lei de Proteção da Informação não divulgada’
<http://www.planalto.gov.br/ccivil_03/leis/2002/110603.htm> accessed 1 April 2022.

²²⁰ ‘Complementary Law 105/2001 - Lei do Sigilo Bancário’
<http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp105.htm> accessed 1 April 2022.

²²¹ Also known as NDAs (Non-Disclosure Agreements).

²²² Lucas Pacheco Vieira, Pablo A Lima Mourão and Alexandre Carter Manica, ‘ACORDOS DE CONFIDENCIALIDADE (NDA) EM STARTUPS’ (2018) 2(1) Revista De Direito Da Empresa e Dos Negócios 25
<<http://www.revistas.unisinos.br/index.php/rden/article/view/17625>> accessed 1 April 2022.

²²³ *ibid* 29: “Em regra, devido ao princípio da boa-fé objetiva, não haveria a necessidade de previsão contratual para assegurar o sigilo das informações confidenciais obtidas no âmbito de uma negociação.”

processing.²²⁴ Therefore, disclosure of personal data is prohibited under Art. 7 LGPD, and, when referring to sensitive data, under Art. 11 LGPD. While data disclosed by the data subject can be dealt with by the data subject through consent under Art. 7 I LGPD and Art. 11 I LGPD, the data subject needs to take care to comply with the processing requirements when disclosing data referring to a data subject other than his- or herself. It should be noted, however, that such prohibition would not apply when being subject to Art. 4 I LGPD, which excludes processing “done by a natural person exclusively for private and non-economic purposes” from the scope of applicability of LGPD.

Disclosure to actors abroad further falls under the scope of Art. 33 to 36 LGPD.²²⁵ However, a prohibition of disclosure from the perspective of the data subject would again be unproblematic in the case of personal data referring to him- or herself due to the possibility of consent, Art. 33 VIII LGPD, or in cases of non-applicability under Art. 4 I LGPD.

Prohibitions of communication towards the public under LGPD would, additionally, not exist if considered exclusively journalistic purposes under Art. 4 II a) LGPD and thus excluded from the scope of applicability of LGPD.

The right to privacy under Art. 21 Brazilian Civil Code could further prohibit disclosure of personal data. Such prohibitions of privacy under the Civil Code need to be balanced against competing interests. An example of

this can be found in a decision from 2015, where the Supreme Court ruled, by unanimous decision of its Full Chamber, that the aforementioned article 21 does not entail a need to obtain consent in order to publicize biographic works, since the foregoing legal disposition must be interpreted according to the Constitution, *i.e.*, “in line with the fundamental rights to freedom of expression of intellectual, artistic, scientific and communication activities, regardless of censorship or biographical person's license, in relation to literary or audiovisual biographical works (or of their relatives, in the case of deceased persons).”²²⁶

b. Disclosure Obligations

Identification obligations and prohibition of anonymity; tax and other control.

A multitude of Brazilian provisions contain disclosure obligations, of which some notable examples are discussed here. The Income Tax Law²²⁷ mandates individuals’ disclosure of income for the purpose of taxation in Art. 7. Another example is the mandate to disclose ultimate beneficiaries in a normative instruction by the Federal Revenue Department.²²⁸ The Brazilian Law of Limited Stock Companies²²⁹ mandates the disclosure of some personal data (name, nationality, marital status, profession and residence) of founders in the prospectus of public companies (Art. 84 XI) and requires shareholders to disclose their name, nationality and residence when attending shareholder meetings (Art. 127). The Public

²²⁴ Art. 4 X LGPD: “tratamento: toda operação realizada com dados pessoais, como as que se referem a (...) comunicação, transferência, difusão”.

²²⁵ *Supra* C II 3.

²²⁶ Supremo Tribunal Federal, ‘Ação Direta de Inconstitucionalidade (ADI) no. 4815’ <<https://portal.stf.jus.br/processos/detalhe.asp?incidente=4271057>> accessed 21 January 2022.

²²⁷ ‘Law 9.250/1995’ <http://www.planalto.gov.br/ccivil_03/leis/l9250.htm> accessed 1 April 2022.

²²⁸ ‘Normative Instruction 1.863/2018 by the RFB’ <<http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=97729>> accessed 1 April 2022.

²²⁹ ‘Law 6.406/1976 - Lei das Sociedades Anônimas’ <http://www.planalto.gov.br/ccivil_03/leis/l6404con.sol.htm> accessed 1 April 2022.

Registry Law²³⁰ further requires the disclosure of the names, nationality, marital status, profession and residence of founders and directors of legal entities in Art. 120.

Widely relevant disclosure obligations for natural persons are also contained in the Public Registry Law, which lists basic information for everyone (see Art. 29) and creates obligations to register information concerning every birth (Art. 50), marriage (Art. 70), and death (Art. 77) in the territory of Brazil. Similarly, disclosure of personal data is also required to obtain an identification card.²³¹

Under the Code of Criminal Procedure,²³² witnesses must testify in criminal proceedings (Art. 203), except in the named cases of personal relation (Art. 206), which explicitly includes the requirement to declare name, age and others, therefore constituting an obligation to disclose personal data. The Code of Criminal Procedure further allows judges to request information during proceedings.²³³

In this context, the constitutional prohibition on anonymity in the context of free speech must also be mentioned, which states that “anonymity is forbidden” in Art. 5 IV and has led to the blocking of anonymous communication methods by a court in the past.²³⁴ On the other hand, Art. 19 of the Civil

Code²³⁵ explicitly protects pseudonyms when adopted for lawful purposes as part of the protections for personality rights, and anonymization is explicitly mentioned in Art. 12 LGPD.

Contractual data sharing obligations can also arise, whether as a primary obligation, i.e. in a data licensing agreement, or when necessary to fulfil other contractual provisions.

c. Voluntary Disclosure

Protection in dependency and hierarchy contexts; access to alternatives; prohibition of coupling; voluntary commercialization of personal data; Incentives to data disclosure and protection therefrom (protection of adolescents; competition law; nudging); prerequisites for consent; “privacy fatigue”; peer pressure (e.g. WhatsApp).

Specific norms regarding the protection of voluntary decision-making are sparse within LGPD, and rely on information requirements to ensure an “informed” decision and the (judicial) interpretation of the prerequisites for consent set forth in the definition of Art. 5 XII.²³⁶ This is then combined with various transparency obligations and control rights,²³⁷ ensuring informational self-determination.²³⁸

As the central method for ensuring voluntary disclosure, processing of personal data on the basis of consent shall be explored in more detail. Consent is defined in Art. 5 XII LGPD

²³⁰ ‘Law 6.015/1973 - Lei do Registros Públicos’ <http://www.planalto.gov.br/ccivil_03/leis/l6015compilada.htm> accessed 1 April 2022.

²³¹ See ‘Law 12.037/2009’ <http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l12037.htm> accessed 1 April 2022, and ‘Decree 9.278/2018’ <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/decreto/D9278.htm> accessed 1 April 2022.

²³² ‘Decree-Law 3.689/1941 - Código de Processo Penal’ <http://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm> accessed 1 April 2022.

²³³ Ricardo Barretto Ferreira and others, ‘The Privacy, Data Protection and Cybersecurity Law Review - The Law Reviews’ (5 November 2021) <<https://thelawreviews.co.uk/title/the-privacy-data-protection-and-cybersecurity-law->

[review/brazil#footnote-040-backlink](https://thelawreviews.co.uk/title/the-privacy-data-protection-and-cybersecurity-law-review/brazil#footnote-040-backlink)> accessed 1 April 2022

²³⁴ Fernando Favorito, ‘Justiça suspende aplicativo Secret em todo Brasil’ (2014) <<https://fernandafav.jusbrasil.com.br/noticias/134379351/justica-suspende-aplicativo-secret-em-todo-brasil>> accessed 1 April 2022.

²³⁵ (n 93).

²³⁶ Details below. See also *infra* C III 2 a.

²³⁷ Details *infra* C III 3.

²³⁸ Bruno Bioni, Mariana Rielli and Marina Kitayama, ‘O Legítimo Interesse na LGPD: quadro geral e exemplos de aplicação’ (2021) 33 <<https://fpf.org/blog/fpf-and-data-privacy-brasil-webinar-understanding-legitimate-interests-as-a-lawful-ground-under-the-lgpd/>> accessed 1 April 2022.

as “free, informed and unambiguous manifestation whereby the data subject agrees to her/his processing of personal data for a given purpose”.²³⁹

Consent is the first of the ten allowed variants of processing, contained in Art. 7 I LGPD, which allows processing of personal data “with the consent of the data subject”.²⁴⁰ Art. 8 LGPD, referring explicitly to Art. 7 I LGPD²⁴¹ then goes into detail concerning requirements for such consent, stating that it “shall be given in writing or by other means able to demonstrate the manifestation of the will of the data subject”.²⁴² Art. 8 § 1 LGPD clarifies that consent given in writing “should be included in a clause that stands out from the other contractual clauses.” Art. 8 § 2 LGPD lays the burden of proof concerning legally valid consent upon the controller, while Art. 8 § 3 LGPD prohibits the processing of personal data in case the consent is defective. Art. 8 § 4 LGPD limits the scope of consent, requiring that “consent shall refer to particular purposes, and generic authorizations for processing personal data shall be considered void”.²⁴³ Another important prerequisite for

consent under LGPD exists in Art. 9 § 1 LGPD in relation to information obligations, stating that “in situations where consent is required, it shall be considered void if the information provided to the data subject contains misleading or abusive content or was not previously presented in a transparent, clear and unambiguous way,”²⁴⁴ thereby linking beforehand information with consent in accordance to the requirement of an “informed” manifestation in Art. 5 XII LGPD.

In hierarchical situations such as employment, in which a potential or current employee might feel compelled to give consent, should be considered when establishing whether this consent was given validly under the definition of Art. 5 XII LGPD in order to satisfy constitutional provisions for the protection of workers.²⁴⁵ Similar imbalances in power²⁴⁶ could also lead to differing assessments of the validity of consent under the definition in Art. 5 XII LGPD.

When concerning the processing of sensitive data,²⁴⁷ Art. 11 I LGPD puts forth additional²⁴⁸

²³⁹ Portuguese: “Art. 5 XII - consentimento: manifestação livre, informada e inequívoca pela qual o titular concorda com o tratamento de seus dados pessoais para uma finalidade determinada”.

²⁴⁰ Portuguese: “Art. 7 I - mediante o fornecimento de consentimento pelo titular”.

²⁴¹ Art. 8 LGPD: “The consent provided in item I of Art. 7 of this Law”. Portuguese: “O consentimento previsto no inciso I do art. 7º desta Lei”.

²⁴² Portuguese: “consentimento (...) deverá ser fornecido por escrito ou por outro meio que demonstre a manifestação de vontade do titular”.

²⁴³ Portuguese: “O consentimento deverá referir-se a finalidades determinadas, e as autorizações genéricas para o tratamento de dados pessoais serão nulas.”

²⁴⁴ Portuguese: “Na hipótese em que o consentimento é requerido, esse será considerado nulo caso as informações fornecidas ao titular tenham conteúdo enganoso ou abusivo ou não tenham sido apresentadas previamente com transparência, de forma clara e inequívoca.”

²⁴⁵ Clara Lacerda Accioly, ‘A PROTEÇÃO DE DADOS DO TRABALHADOR: O DIREITO DO TRABALHO CONSTITUCIONALIZADO E SEU

DIÁLOGO COM O DIREITO À PRIVACIDADE? 15 255
<<https://periodicos.unb.br/index.php/redunb/article/view/22429>> accessed 4 April 2022.

²⁴⁶ For example consumer protection situations.

²⁴⁷ See also section C II 1.

²⁴⁸ Art. 11 LGPD is considered a “qualification” for processing, such that Art. 7 LGPD is still applicable in cases of processing of personal data next to Art. 11 LGPD. It should be noted that processing under Art. 11 LGPD will always also fulfil the requirements of Art. 7 LGPD, therefore making this distinction less relevant. However, applicability of Art. 7 I LGPD next to Art. 11 I LGPD guarantees that the prerequisites for consent in Art. 8 LGPD, which explicitly refers only to Art. 7 I LGPD, are also relevant for consent under Art. 11 I LGPD. For more information on the relationship between Art. 7 and 11 LGPD, see Regina Detoni Cavalcanti Rigolon Korkmaz, Maria, ‘Dados Sensíveis na Lei Geral de Proteção de Dados Pessoais: mecanismo de tutela para o livre desenvolvimento da personali-dade’ (2019) <<http://repositorio.ufjf.br/jspui/bitstream/ufjf/11438/1/mariareginadetonicavalcantirigolonkorkmaz.pdf>> accessed 1 April 2022.

requirements for consent, as it states that “the processing of sensitive personal data shall only occur (..) I – when the data subject or her/his legal representative specifically and distinctly consents, for the specific purposes”, thereby implying a stricter standard for the information requirement and purpose limitation.²⁴⁹ However, as these are largely considered to be included in the requirements for consent under Art. 7 I LGPD already, it is doubtful whether this creates any additional requirements in practice.

Further reference to consent is made in Art. 14 LGPD, which deals with the processing of personal data of children and adolescents.²⁵⁰ Art. 14 § 1 LGPD states that “the processing of children’s personal data shall be done with specific and highlighted consent given by at least one of the parents or the legal representative”.²⁵¹ However, this provision creates difficulties: First and foremost, the omission of adolescents in § 1 as compared to the lead sentence has led to debate on whether this was intentional or a legislative mistake, with some voices arguing that, *ex negativo*, no

such additional consent requirements apply to adolescents,²⁵² while others argue that the doctrine of full protection, with support on the principle of the best interest²⁵³, mandates the applicability of Art. 14 § 1 LGPD for adolescents.²⁵⁴ Additionally, the relationship between Art. 14 § 1 and Art. 7 (and, by extension, Art. 11) LGPD is unclear, with Art. 14 § 1 LGPD seemingly requiring parental or legal representative consent in all cases of processing, not only when processing occurs on the basis of consent.

While not considered a form of consent under LGPD, voluntary disclosure is dealt with indirectly in Art. 7 V LGPD, which allows for processing of personal data “when necessary for the execution of a contract or preliminary procedures related to a contract of which the data subject is a party, at the request of the data subject”.²⁵⁵ By requiring a request of the data subject for processing under this variant, an element of volition is needed for processing.

²⁴⁹ According to Bioni, sensitive data constitute a specific species of the genus “Personal Data”, which comprises a “different typology given that its content offers a special vulnerability: discrimination”. Thus, “among some of these more restricted provisions, there is as special consent – even more qualified – from the data subject, as a counterbalance to the inherent risk of processing such category of personal data.” Bioni, *Proteção de Dados Pessoais* (n 175).

²⁵⁰ The terms “children” (*crianças*) and “adolescents” (*adolescentes*) are defined in Law 8.069/1990, also known as the *Estatuto da Criança e do Adolescente* (ECA), which translates to Children’s and Adolescents’ Statute. ‘Law 8.069/1990 - Estatuto da Criança e do Adolescente’ <http://www.planalto.gov.br/ccivil_03/leis/l8069.htm> accessed 1 April 2022. Under Art. 2 ECA, children are persons under the age of 12, while adolescents are persons between the age of 12 and 18.

²⁵¹ Portuguese: “O tratamento de dados pessoais de crianças deverá ser realizado com o consentimento específico e em destaque dado por pelo menos um dos pais ou pelo responsável legal”.

²⁵² “In Brazil, the LGPD tried to follow the COPPA standard.(...)This thesis would be coherent when analyzed in the context of the provision of services in the information society, since, in practice, the rule adopted worldwide follows the ‘COPPA standard’,

allowing consent directly granted by people aged 13 or over.” – Fernando von Teschenhausen Eberlin, *Direitos da criança na sociedade da informação* (2020).

²⁵³ An established principle in Brazilian Law. See Gonçalves, Camilla de Jesus Mello, ‘Breves considerações sobre o princípio do melhor interesse da criança e do adolescente’ (2011) 263 *Revista Brasileira de Filosofia* <https://issuu.com/edileide91/docs/breves_consideracoes_sobre_o_prin> accessed 1 April 2022. See also Superior Tribunal de Justiça (STJ), ‘Habeas Corpus’ <https://scon.stj.jus.br/SCON/jurisprudencia/doc.jspx?livre=PRINCIPIO+MELHOR+INTERESSE&b=ACOR&p=false&l=10&i=9&operador=mesmo&tipo_visualizacao=RESUMO> accessed 21 January 2022.

²⁵⁴ Elora Fernandes and Filipe Medon, ‘Proteção de crianças e adolescentes na LGPD’ (2021) 4(2) *Revista Eletrônica da PGE-RJ* <https://revistaeletronica.pge.rj.gov.br/index.php/pg_e/article/view/232> accessed 1 April 2022.

²⁵⁵ Portuguese: “quando necessário para a execução de contrato ou de procedimentos preliminares relacionados a contrato do qual seja parte o titular, a pedido do titular dos dados”.

Art. 7 § 4 LGPD waives the requirement of consent in Art. 7 I LGPD for “data manifestly made public by the data subject”,²⁵⁶ following the notion that for data voluntarily made public, additional consent would be redundant.

The MCI also deals with consent for certain data processing acts, albeit limited to its scope of the internet (Art. 1) and in considerably less detail than LGPD. Art. 7 MCI, which enumerates the rights of users in the internet, guarantees that “(...) personal data will not be shared with third parties, except upon the user’s express free and informed consent or as provided by law” (VII)²⁵⁷ and provides for the right “to express consent on the collection, use, storage and processing of personal data, which should occur prominently from the other contractual terms” (IX).²⁵⁸ Art. 16 II MCI then prohibits the possession of “personal data that is excessive in relation to the purpose for which consent was given by its data subject” when providing internet applications.²⁵⁹ Since the passing of LGPD, however, their practical relevance is likely low, as they mirror the more precise regulation there.

Interestingly in this context, the LGPD does not contain any regulation explicitly dealing with the premise of “privacy by default”, merely touching this in an unspecific manner in Art. 49, which states, *inter alia*, that “systems (...) shall be structured in order to meet (...) standards if good practices and governance [and] general principles provided in this law”, which could, in conjunction with the principles in Art. 6, be read to require

such and other safeguards to the voluntary element in data disclosure. Additionally, such provisions could be contained in future regulation by the ANPD, for example under Art. 51 LGPD or the largely similar Art. 44-J VIII, which states that the ANPD “shall encourage the adoption of technical standards that facilitate data subjects’ control over their own data”.²⁶⁰ A notable provision in this regard is Art. 7 XI MCI, which deals with consent, which specifies that such consent must take place separately from other contractual clauses, thereby prohibiting coupling in such contexts.

2. Recipient Obligations

a. Requirements for Personal Data Reception

Information; requirements concerning content and formalities; warnings; notifications; assurances.

As personal data reception is considered processing²⁶¹ of personal data under the definition in Art. 5 X LGPD, all acts of data reception must be measured by the central provisions allowing for processing of personal data,²⁶² Art. 7 LGPD and Art. 11 LGPD, for sensitive data.

Art. 7 LGPD enumerates ten grounds for processing of personal data, these being consent (I),²⁶³ compliance with a legal or regulatory obligation by the controller (II), by the public administration on the basis of legal provisions (III), carrying out of studies by research entities (IV), for the execution of contracts or preliminary procedures at the request of the data subject (V), for judicial and arbitration procedures (VI), for the protection

²⁵⁶ Portuguese: “dados tornados manifestamente públicos pelo titular”.

²⁵⁷ Portuguese: “não fornecimento a terceiros de seus dados pessoais (...) salvo mediante consentimento livre, expresso e informado ou nas hipóteses previstas em lei”.

²⁵⁸ Portuguese: “consentimento expresso sobre coleta, uso, armazenamento e tratamento de dados pessoais, que deverá ocorrer de forma destacada das demais cláusulas contratuais”.

²⁵⁹ Portuguese: “é vedada a guarda (...) de dados pessoais que sejam excessivos em relação à finalidade para a qual foi dado consentimento pelo seu titular.”

²⁶⁰ This article should be considered in the systematic context of Art. 50 LGPD in the same section, which deals with self-regulation by controllers and processors.

²⁶¹ Portuguese: “tratamento”.

²⁶² Except if both the act of disclosure and reception is exempt from the scope of application of LGPD under its Art. 4.

²⁶³ As consent is the method to ensure voluntary disclosure by the data subject, this ground for processing is discussed in more detail above at C III 1 c.

of life or physical safety (VII), for the protection of health within professional procedures (VIII), on the basis of legitimate interest (IX) and the protection of credit (X).

Art. 11 LGPD similarly enumerates grounds for processing of sensitive data, these being specific and distinct consent (I), and in cases where processing of sensitive data is indispensable²⁶⁴ (II) for the controller's compliance with legal or regulatory obligations (a), shared processing of data by the public administration on the basis of legal provisions (b), studies carried out by research entities (c), for judicial and arbitration procedures (d), for the protection of life or physical safety (e), for the protection of health within professional procedures (f), and for the prevention of fraud and ensurance of safety of the data subject in processes of identification and authentication of registration in electronic systems (g).

Art. 9 states the informatory requirements in LGPD, providing for the data subject's "right to easy access to information concerning the processing of her/his data", then enumerating seven items which must be included in such information,²⁶⁵ While not explicitly mentioned here, this information must be provided by the controller and operator.²⁶⁶ The article does not clearly state in which manner the controller and operator must make this information accessible for the data subject. Anyhow, Art. 9 § 3 LGPD requires active information of the data subject whenever the "processing of personal data is a condition for the provision of a product or service or for the exercise of a right". In this case, this conditionality must be "specially highlighted"²⁶⁷ and notice must be given of the means to exercise the rights in

Art. 18 LGPD.²⁶⁸ This implies that the general obligation to the controller and operator does not require explicit notice. Further requirements for information are put forward when processing occurs on the basis of consent:²⁶⁹ Art. 9 § 1 LGPD requires the information provided to the data subject to be presented in advance in a transparent, clear and unambiguous way and prohibits misleading or abusive content, declaring consent void if this is not the case. In this case, "presentation" implies an active notification of the data subject. Furthermore, Art. 9 § 2 LGPD deals with changes in the purpose of processing (on the basis of consent), stating that, in this case, the controller shall inform the data subject in advance, with the data subject then being able to revoke consent. It should be concluded, therefore, that active notification requirements are generally needed only in the cases of Art. 9 §§ 1-3 LGPD. Whenever processing children's or adolescents' data, any information needs to be given in an age-appropriate manner, Art. 14 § 6 LGPD. Additionally, the heightened transparency requirements set out in Art. 10 § 2 LGPD when processing data on the basis of legitimate interest could, in particular in high-risk situations, require active information of the data subject.²⁷⁰ In cases of data transfer abroad on the basis of specific and highlighted consent, the international nature must be communicated beforehand, Art. 33 VIII LGPD.

While not explicitly dealing with data protection, Art. 46 CDC states that contracts are not binding for consumers in case they are not given the opportunity to see the content or if they are drafted in a manner that makes it difficult to understand. This can lead to

²⁶⁴ Portuguese: *indispensável*. This requirement is a key difference to Art. 7 LGPD, despite the grounds for processing being otherwise largely identical in wording.

²⁶⁵ More detail on Art. 9 LGPD *infra* C III 3 a.

²⁶⁶ Stating that this is the obligation of the "data processing agent" as defined in Art. 5 IX LGPD: "the controller and the operator". Bioni, Kitayama and Rielli (n 198) 32.

²⁶⁷ Portuguese: "com destaque sobre esse fato".

²⁶⁸ See in comparison Art. 9 VII LGPD.

²⁶⁹ "In the event that consent is required". Portuguese: "Na hipótese em que o consentimento é requerido".

²⁷⁰ This is argued by Bioni, B. Bioni, Kitayama and Rielli (n 198) 32.

informatory requirements also relevant for data disclosure contexts.²⁷¹

In the scope of the internet, the MCI remains applicable next to the LGPD provisions, despite going into much less detail on data protection than LGPD. However, it does not explicitly name grounds for the processing of personal data other than consent. Information about the use of personal data are named in Art. 7 VIII MCI as being a right of the internet user – however, this also does not differ from LGPD and is therefore unlikely to be seen as proscribing divergent requirements. As the data subject is commonly a consumer, general transparency requirements set out by the CDC²⁷² can also obtain relevance in determining relevant information requirements.

When processing by legal entities of public law occurs, they must communicate this according to Art. 23 I LGPD, with forms to be provided by the ANPD under § 1. This includes “notarial and registry bodies”, § 4.

b. Obligations Concerning the Handling of Received Personal Data

Purpose dedication/limitation; technological and organizational measures; data security; deletion and retention; further transmission and limitations thereto, also concerning transmission abroad.

General and unspecific obligations concerning the handling of received personal data can arise out of the (partially overlapping) principles of Art. 6 LGPD. The central principle concerning the handling of personal data post-reception is the principle of purpose limitation (*finalidade*²⁷³) in Art. 6 I LGPD which is set out as “processing done for legitimate, specific and explicit purposes of which the data subject is informed, with no

possibility of subsequent processing that is incompatible with these purposes”. thereby linking the collection²⁷⁴ of personal data to the purpose of collection. Of further importance for handling of data is the principle of adequacy (*adequação*) in Art. 6 II LGPD, whereby the processing, and therefore, nearly any subsequent operations on the data, must be compatible with the purposes communicated to the data subject. The principle of necessity (*necessidade*) Art. 6 III LGPD contains the obligation to limit the processing to the minimum necessary to achieve the purposes of processing. The principle of data quality (*qualidade dos dados*) in Art. 6 V LGPD provides, *inter alia*, for an obligation to update personal data. The principle of prevention (*prevenção*) in Art. 6 VIII LGPD obligates processors to adopt “measures to prevent the occurrence of damages due to the processing of personal data”, while the related principle of accountability (*responsabilização e prestação de contas*²⁷⁵) obligates processors to adopt compliance measures to ensure data protection. These principles are elaborated in the other provisions of the LGPD, which contain more detailed rules for the handling of received personal data.

Provisions related to limitation of processing to the purpose are common throughout the LGPD. Art. 8 § 4 LGPD states that consent needs to refer to particular purposes, and prohibits generic authorizations. Art. 9 § 2 LGPD, dealing with processing on the basis of consent, requires notification of the data subject in situations where the purpose of processing changes and allows for revocation of consent in this situation. Art. 10 § 1 LGPD limits processing on the basis of legitimate

²⁷¹ Renato Leite Monteiro, ‘Existe um direito à explicação na Lei Geral de Proteção de Dados do Brasil?’ [2018] <<https://igarape.org.br/wp-content/uploads/2018/12/Existe-um-direito-a-explicacao-na-Lei-Geral-de-Protecao-de-Dados-no-Brasil.pdf>> accessed 4 April 2022.

²⁷² (n 20). See especially the basic consumer rights set out in Art. 6 II-IV.

²⁷³ Literally: “finality” or “purpose”.

²⁷⁴ Which is considered processing under the LGPD definition of processing.

²⁷⁵ Literally: “responsibility and provision of accounts.”

interest²⁷⁶ to the “personal data which are strictly necessary for the intended purpose”, thereby raising the bar for purpose limitation in comparison to the other grounds of processing. Art. 11 I LGPD, which concerns the processing of sensitive data with consent, limits this to “specific purposes”.²⁷⁷ Art. 11 II LGPD, concerning processing of personal data without consent, goes even further, limiting processing to the purposes enumerated there. Art. 11 § 5 LGPD prohibits processing of health data by private healthcare for risk evaluation. Art. 14 § 3 LGPD furthermore allows the collection of children’s personal data without consent only for the purpose of contacting parental figures. Concerning all processing purposes, Art. 15 I LGPD proscribes termination of processing of personal data when the purpose has been achieved. Purpose limitation must also be adhered to by the operator on a secondary level, with Art. 39 LGPD stating that the operator is obligated to follow the instructions of the controller concerning processing.

Technical and organizational measures for the handling of personal data by the recipient must also be adhered to. An example for a specific technical measure is found in the ground of processing of Art. 7 IV LGPD, whereby research entities have to ensure anonymization, wherever possible. Technical and organizational obligations when processing on the basis of Art. 7 IV LGPD are further specified in Art. 13 LGPD. Art. 19 § 1 LGPD dictates that personal data “shall be stored in a format that facilitates the exercise of the right to access”. Art. 37 LGPD mandates the keeping of records of personal data processing operations for both controllers and operators, and Art. 38 LGPD allows the ANPD to request the preparation of a data protection impact assessment. A key

organizational requirement is the appointment of a data protection officer (Art. 41 LGPD) in charge of data protection compliance measures, as set out in Art. 41 § 2 LGPD. Regarding organizational governance, Art. 49 LGPD requires the “systems used for processing personal data (...) be structured in order to meet the security requirements, standards of good practices and governance, general principles provided in this Law and other regulatory rules”. Art. 50 LGPD details the establishment of good practices by individuals or associations, which “shall be published and updated periodically and may be recognized and disclosed by the national authority” (ANPD). Art. 51 LGPD further states that the ANPD “shall encourage the adoption of technical standards that facilitate data subjects’ control of their personal data”.

Several provisions also require recipients to implement data security measures, with Art. 46 LGPD obliging processors to adopt “security, technical and administrative” measures for security. Art. 47 LGPD further states that parties involved in processing of personal data must commit to ensure security regardless of the phase of processing or even after processing. Art. 48 LGPD addresses security incidents,²⁷⁸ which must be communicated to the ANPD (§ 1) and can lead to mandatory publication of the event (§ 2 I) and measures combatting the incident (§ 2 II). When preparing the aforementioned data protection impact assessment according to Art. 38 LGPD, which includes the “methodology (...) for ensuring the security of the information”.

Art. 16 LGPD details the handling of received data after processing has been terminated,²⁷⁹ with the default being an obligation to delete the personal data. Art. 16 LGPD then enumerates four situations in which storage is

²⁷⁶ Processing variant in Art. 7 IX LGPD.

²⁷⁷ Portuguese: *finalidades específicas*. It is difficult to judge whether this significantly limits the spectrum of purposes in comparison to consent concerning non-sensitive data, as Art. 8 § 4 LGPD already limits

processing on the basis of consent to “particular purposes” (*finalidades determinadas*).

²⁷⁸ “Occurrence of a security incident that may create risk or relevant damage to the data subjects”.

²⁷⁹ As set out in Art. 15 LGPD.

permitted, the first (I) being compliance with legal or regulatory obligations. Item II allows for subsequent processing for studies performed by research entities, while item III authorizes transfer to third parties when done in compliance with LGPD provisions. Art. 16 IV LGPD allows for exclusive further use of the data by the controller after anonymization is achieved. Outside of Art. 16 LGPD, Art. 18 IV LGPD gives the data subject the right to request “anonymization, blocking or deletion of unnecessary or excessive data or data processed in noncompliance” with LGPD, and Art. 18 VI LGPD explicitly granting the right to obtain deletion of personal data to the individual, save for the instances of permitted storage in Art. 16 I-IV LGPD. It should be noted that deletion (*eliminação*) is also considered processing by Art. 5 X LGPD. However, the exceptions in Art. 16 LGPD should largely be covered by modes of processing.²⁸⁰ Art. 7 X MCI also requires deletion of personal data at the request of the data subject “at the end of the relationship between the parties”, which is weaker but roughly corresponds to the right in Art. 17 VI LGPD. While it is unlikely that this would supersede Art. 16 LGPD, the relationship between these is still unclear.

Relevant legal obligations for data retention as mentioned in Art. 16 I LGPD²⁸¹ are contained

in the MCI, which requires an autonomous system administrator²⁸² to keep connection logs²⁸³ for a period of one year, Art. 13. Additionally, an internet application provider²⁸⁴ needs to keep internet application access logs,²⁸⁵ for a period of 6 months, Art. 15. Connection logs and internet application access logs are information regarding an identified or identifiable natural person, and thus personal data under Art. 14 I of the MCI Decree and under Art. 5 I LGPD.²⁸⁶ Both periods may be extended by public authorities under certain circumstances, Art. 13 § 2 and Art. 15 § 2 MCI. Access to these may then be requested by authorities “for the purpose of gathering evidence and proof for legal proceedings in civil or criminal areas” and granted after judicial authorization, Art. 22. On the other hand, Art. 10 § 3 MCI states that a court order is not needed when administrative authorities request registration data,²⁸⁷ named as personal qualification, affiliation and address and further specified in Art. 11 § 2 of the MCI Decree, which repeats affiliation (I) and address (II) and clarifies that personal information (III) extends to the name, first name, marital status and profession of the data subject. Art. 11 § 3 of the MCI Decree further restricts such access requests, prohibiting collective requests and requiring specification of the information needed and the data subject. In judicial practice, however,

²⁸⁰ Art. 16 I corresponds with Art. 7 II, Art. 16 II with Art. 7 IV. Art. 16 III and IV need to be examined with regards to the legal basis. One could also argue that Art. 16 LGPD is *lex specialis* in relation to Art. 7 and therefore unproblematic (except for item III, which explicitly references compliance with LGPD provisions).

²⁸¹ This would also be considered a basis for processing under Art. 7 II LGPD “for compliance with a legal or regulatory obligation by the controller”, see Pauline Pacheco Moraes, ‘O consentimento previsto na LGPD’ (2020) <<https://www.conjur.com.br/2020-out-25/pauline-moraes-consentimento-previsto-lgpd>> accessed 1 April 2022.

²⁸² Portuguese: *Administrador de Sistema autônomo*. Defined in Art. 5 III MCI as “a person or legal entity that manages specific blocks of Internet Protocol addresses and their respective autonomous routing system, who is duly registered with the national

authority responsible for registration and distribution of IP addresses geographically referring to the country”.

²⁸³ Portuguese: *registros de conexão*. Defined in Art. 5 VI MCI as “a set of information regarding the date and time that the internet connection begins and ends, its duration and the IP address used by the terminal to send and receive data packets”.

²⁸⁴ Portuguese: *Provedor de aplicações de internet*.

²⁸⁵ Portuguese: *Registros de acesso a aplicações da internet*. Defined in Art. 5 VIII MCI as “a set of information regarding the date and time when a specific internet application was used, from a given IP address”. Internet applications, or *aplicações da internet*, are defined in Art. 5 VII MCI as “a set of features that can be accessed by a terminal connected to the internet”.

²⁸⁶ Detail on definitions of personal data *supra* at C II 1.

²⁸⁷ Portuguese: *dados cadastrais*. Discussed *supra* at C II 1.

the MCI (and MCI decree) provisions for obtaining such data are often disregarded, with judges focusing on applying abstract constitutional norms when deciding on authorities' access to data.²⁸⁸

Art. 37 LGPD, mentioned above and requiring processors to keep records, could also be considered a form of data retention obligation, despite not referring to retention of the actual data processed.

Further transmission of personal data is possible and explicitly mentioned in Art. 16 III LGPD. The broad definition of processing in Art. 5 X LGPD also applies to further transmission, leading to applicability of the prohibition of Art. 7 (and, in the case of sensitive data, Art. 11) LGPD if not covered by one of the grounds of processing. Art. 7 § 5 LGPD additionally requires, in the case of processing on the basis of consent, that transmission to other controllers²⁸⁹ requires specific consent for this purpose. Art. 7 IX LGPD also explicitly mentions third parties' legitimate interests as a basis for processing of personal data, which could be applied for transmission to such third parties. The fact, however, that Art. 10 LGPD, which provides additional requirements for processing on the basis of legitimate interest, only mentions the controller and not a third party, raises the question of applicability of Art. 10 to third parties.²⁹⁰ With respect to the systematic and teleological interpretation of the norm, it can be argued, however, that it still applies to these.²⁹¹ It should be noted, however, that

legitimate interest is intended to be limited to narrow circumstances and not as a catch-all ground for processing, thereby likely not significantly easing transfer to third parties.²⁹²

In case further transmission abroad is intended, the LGPD provisions for the international transfer of data must be respected.²⁹³

3. Control by Discloser

a. Transparency and Entitlement to Information

Transparency features prominently in LGPD as item VI of the principles of Art. 6 LGPD, which defines it as a “guarantee to the data subjects of clear, precise and easily accessible information about the carrying out of the processing and the respective processing agents, subject to commercial and industrial secrecy”.²⁹⁴ Furthermore, the concept of transparency appears in other Art. 6 principles, with the principle of purpose referring to “purposes of which the data subject is informed” (I) and the principle of adequacy referring to “purposes communicated to the data subject” (II). The principle of free access in Art. 6 IV LGPD provides for a “guarantee to the data subjects of facilitated and free of charge consultation about the form and duration of the processing, as well as about the integrity of their personal data”,²⁹⁵ thereby creating a right to request information on the level of these principles. When implementing a governance program for privacy, controllers and operators

²⁸⁸ Nathalie Frago, ‘O impacto do Marco Civil sobre a proteção da privacidade no Brasil’ <<https://internetlab.org.br/pt/especial/o-impacto-do-marco-civil-sobre-a-protecao-da-privacidade-no-brasil/>> accessed 1 April 2022.

²⁸⁹ Interestingly does not refer to transmission to an operator (*operador*), Art. 5 VII LGPD.

²⁹⁰ Raising this point and pointing to the ANPD for clarification Giarlarielli Advogados, ‘Legítimo interesse LGPD - Veja quais são os cuidados para utilizá-lo’ (2021) <<https://www.giarlarielli.adv.br/legitimo-interesse-lgpd/>> accessed 1 April 2022.

²⁹¹ Bioni, Kitayama and Rielli (n 198) 24–25.

²⁹² *ibid* 18–19.

²⁹³ *Supra* C II 3.

²⁹⁴ Portuguese: Art. 6 VI – “transparência: garantia, aos titulares, de informações claras, precisas e facilmente acessíveis sobre a realização do tratamento e os respectivos agentes de tratamento, observados os segredos comercial e industrial”.

²⁹⁵ Portuguese: Art. 6 IV – “livre acesso: garantia, aos titulares, de consulta facilitada e gratuita sobre a forma e a duração do tratamento, bem como sobre a integralidade de seus dados pessoais”.

must include measures that “have the purpose of establishing a relationship of trust with the data subject, by means of transparent operation (...)”. Art. 50 § 2 I e) LGPD.

Art. 9 LGPD gives the data subject “the right to facilitated access to information concerning the processing of her/his data”,²⁹⁶ explicitly referencing the principle of free access and then going into detail on the mode of granting such access and naming (non-exhaustively)²⁹⁷ information that must be provided. The information must therefore “be made available in a clear, adequate and ostensible manner”.²⁹⁸ The information that must be included according to the listed items are the “specific purpose of the processing” (I), the “type and duration of processing”, with this subject to commercial and industrial secrecy²⁹⁹ (II), “identification of the controller” (III) and his/her contact information (IV), information about shared use of data³⁰⁰ and the specific purpose of this (V), “responsibilities of the agents³⁰¹ that will carry out the processing” (VI), and the “data subject’s rights”, with explicit mention of those listed in Art. 18 LGPD required (VII). “Facilitated access to information” in this context requires the processor to make available the information in a manner that can easily be found by the data subject. Active notification of the data subject in this context is only required in the cases of Art. 9 §§ 1-3 LGPD and Art. 8 § 6 LGPD. Therefore, Art. 9 LGPD is primarily a transparency provision

as opposed to an *ex ante* notification requirement.

A special mention of transparency is included in Art. 10 LGPD, which sets out stricter requirements for processing on the basis of legitimate interest, Art. 7 IX LGPD. Art. 10 § 2 LGPD obligates the controller to “adopt measures to ensure transparency of data processing based on her/his legitimate interests”, emphasizing the importance of observing transparency in this case.³⁰²

The data subjects’ rights to request information in LGPD are contained in Art. 18 and Art. 19 LGPD. The systematic positioning in Chapter III and after Art. 17 LGPD imply that these rights are an essential component of the data ownership put forward in Art. 17. Art. 18 LGPD enumerates the rights of the data subject, with items I (“confirmation of the existence of processing”), II (“access to the data”), VII (“information about public and private entities with which the data subject has shared data”), VIII (“information about the possibility of denying consent and the consequences of such denial”) being rights concerning access to information. According to Art. 41 § 2 I LGPD, such explanatory action is the responsibility of the Data Protection Officer.

Art. 18 § 3 LGPD states that the rights may be “exercised by means of an express request,” with Art. 18 § 5 LGPD clarifying that the

²⁹⁶ Portuguese: “direito ao acesso facilitado às informações sobre o tratamento de seus dados”. *Facilitado* could also be translated as “easy” instead of “facilitated”.

²⁹⁷ Art. 9 LGPD (lead sentence) states that the enumeration refers to the items listed “among others”, Portuguese: “entre outras características previstas”.

²⁹⁸ Portuguese: “de forma clara, adequada e ostensiva acerca”. *Forma* could also be translated as “form” instead of “manner”.

²⁹⁹ “Commercial and industrial secrecy” or “segredos comercial e industrial” (Portuguese) is mentioned in the principle of transparency and here. The terminology is not included in the definitions of Art. 5 LGPD, but can

be understood to mean conflict with intellectual property provisions.

³⁰⁰ Defined in Art. 5 XVI LGPD.

³⁰¹ Defined in Art. 5 IX LGPD as “the controller and the operator”, therefore encompassing all those that will be handling the processing.

³⁰² Fernanda C Soares Santos, ‘O Legítimo Interesse Na LGPD: O Que é?’ (2021) <<https://lageportilhojardim.com.br/blog/legitimo-interesse-lgpd/>> accessed 1 April 2022. The author emphasizes that the re-statement of the transparency requirement must be understood in the context of the proportionality test for determining a legitimate interest.

fulfilment of the request must be free of charge and within the time periods provided “by regulation”.³⁰³ Art. 18 § 4 LGPD deals with the situation that it is “impossible to immediately adopt the measure” that was requested³⁰⁴ by the data subject and mandates a reply by the controller. This reply again needs to contain the information required in either item I (“communication that she/he is not the data processing agent and indicate, whenever possible, who the agent is”) or II (reason for non-compliance). Therefore, even in the case of non-compliance with data subject’s primary informational rights, information must be given, thereby furthering transparency.

Art. 19 LGPD goes into more depth on the rights of confirmation of the existence of processing (Art. 18 I LGPD) and access to personal data (Art. 18 II LGPD) reiterating that these “shall be provided by means of request of the data subject”. The article then provides for two alternatives to comply with providing these, item I allowing for provision “in a simplified format, immediately”, while item II offers a more detailed compliance variant, offering a “complete declaration that indicates the origin of the data, the nonexistence of registration, the criteria used and the purpose of the processing, subject to commercial and industrial secrecy. The latter variant allows for a period of 15 days from the request before responding. § 1 of Art. 19 LGPD states that a format should be chosen “that facilitates the exercise of the right of access”, with § 2 allowing the data subject to choose between the electronic and printed form. Art. 19 § 3 LGPD provides for the strongest right to access in the case of processing on the basis of consent (Art. 7 I) or contract (Art. 7 V), giving the data subject the

right to a complete electronic copy of the data, in a format suitable for subsequent use,³⁰⁵ albeit “subject to commercial and industrial secrecy”.

Art. 20 § 1 LGPD, as part of the right to request review of automated processing decisions, requires the controller to provide information on “criteria and procedures” for such decisions, again “subject to commercial and industrial secrecy”. § 2 clarifies that, in case such information is denied on the basis of commercial and industrial secrecy, the ANPD may carry out an audit concerning discriminatory aspects.³⁰⁶

When a “security incident that may create risk or relevant damage to the data subjects” occurs, the controller must communicate this both to the ANPD and the data subject (Art. 48 LGPD). The time period is still to be defined by the ANPD and must include the information mentioned in § 1 I - VI. The ANPD then has the option to order the controller to broadly disclose the event in media, therefore providing for transparency on a large scale, Art. 48 § 2 I LGPD. In addition, “disclosure and publication” of LGPD infractions by the ANPD is a possible administrative sanction, Art. 52 IV LGPD (“naming and shaming”).

Transparency obligations are also contained in the MCI, requiring “clear and complete information in service contracts” (Art. 7 VI), “clear and complete information” about personal data processing (Art. 7 VIII) and “publicity and clarity” of the terms of service of internet and internet application providers (Art. 7 XI).

³⁰³ This is the responsibility of the ANPD.

³⁰⁴ Art. 18 § 4 LGPD references the “measure mentioned in § 3 of this article”.

³⁰⁵ Explicitly mentions suitability for other processing operations. This provision has similarities to data

portability, with the difference that data is not forwarded to another party.

³⁰⁶ It remains to be seen as to how far this possibility of auditing can combat denial of information based on intellectual property protection of such automated decision-making algorithms, especially regarding the limitation of scope to “discriminatory aspects”.

The Positive Registry Law,³⁰⁷ which concerns credit databases,³⁰⁸ also sets out a right to access to the information contained in the database, so that individuals can check their credit history or credit score.

Another example of transparency rules can be found in the Consumer Defense Code (CDC),³⁰⁹ which sets forth general obligations³¹⁰ of transparency and good faith in relations between consumers³¹¹ and suppliers.³¹² Additionally, it contains explicit transparency rights in Art. 43, where consumers have the right to access to information about them stored in certain databases, including information about the source of this information.

Outside of data protection law and versus public authorities, the Access to Information Law,³¹³ which obligates public bodies to act in a transparent manner and allows for information requests, and the Digital Government Law,³¹⁴ which provides for an open data policy (Art. 29), increase transparency of such public institutions.

b. Co-Determination and Co-Decision Concerning Data Use

Restrictions for use; permission requirements; revocation of consent; contestation and objection; special rules for international contexts; technical requirements for the act of permission/consent.

With informational self-determination mentioned as a foundation of data protection law in Art. 2 II LGPD and in the principles of purpose, adequacy and necessity in Art. 6 I –

III LGPD, as well as through the concept of data ownership in Art. 17 LGPD, agency of individuals when dealing with their personal data is central to the regulation of data disclosure in Brazil. This is mirrored in Art. 51 LGPD, which states that the ANPD “shall encourage the adoption of technical standards that facilitate data subjects’ control over their personal data”. While transparency rules, which also aim at ensuring such control,³¹⁵ have been dealt with above and rules in the context of ending the processing of data or deletion will be examined below, control of the modalities of data use is discussed here.

In the context of processing of personal data on the basis of consent, the abovementioned principles of Art. 6 LGPD have great importance. Concerning data subjects’ influence on collected data short of provisions aimed at stopping or ending personal data processing, Art. 18 III LGPD allows for “correction of incomplete, inexact or obsolete data”,³¹⁶ mirroring the provision in Art. 43 § 3 CDC, which gives consumers the right to demand correction of inaccurate data in registries pertaining to them within 5 working days, and Art. 5 III Positive Registry Law, which gives the registered persons the right to challenge erroneous data and obtain their correction within 10 days. Art. 18 § 1 LGPD gives data subjects the right to petition the ANPD in context of the Art. 18 rights, therefore also applying to the right to correction. Art. 20 LGPD gives data subjects the right to request review of automated

³⁰⁷ (n 21).

³⁰⁸ See, on the relationship between credit scoring and data protection, Renan Soares Cortazio, ‘Bancos de dados no Brasil: uma análise do sistema credit scoring à luz da LEI N. 13.709/2018 (LGPD)’ (2019) 2(3) Revista Eletrônica da PGE-RJ <https://revistaelectronica.pge.rj.gov.br/index.php/pg_e/article/view/99> accessed 1 April 2022

³⁰⁹ (n 20).

³¹⁰ Leite Monteiro (n 271).

³¹¹ Portuguese: *Consumidor*. Defined in Art. 2 CDC as “any natural or legal person who acquires or uses a product or service as the final recipient”.

³¹² Portuguese: *Fornecedor*. Defined in Art. 3 CDC as “any natural or legal entity, whether public or private, national or foreign, (...), who engages in the production, assembly, creation, construction, transformation, import, export, distribution or commercialization of products or provision of services”.

³¹³ (n 96).

³¹⁴ (n 153).

³¹⁵ Arguing that transparency acts not only to ensure individual, but also general social control Bioni, Rielli and Kitayama (n 238) 32.

³¹⁶ Portuguese: “correção de dados incompletos, inexatos ou desatualizados”.

decision-making based on personal data, thereby allowing for indirect control of these.

Additionally, the articles concerning the protection of personality rights in the Civil Code, especially Art. 21, which protects privacy, can give individuals rights concerning the modalities of use of personal data against the controller in case of a violation of such personality rights.

c. Revocation

Data portability; deletion; „right to be forgotten / to forget”.

Art. 16 LGPD mandates deletion of personal data after processing has ended, which itself must end in the cases described by Art. 15 LGPD, which include achievement of purpose (item I) or the end of the processing period (item II), but also explicitly names the revocation of consent under Art. 8 § 5 LGPD.

When personal data is processed on the basis of consent mentioned in Art. 7 I LGPD (or, in the case of sensitive data, on the basis of specific and distinct consent as mentioned in Art. 11 I LGPD), this consent can be revoked. Art. 8 § 5 LGPD is the central norm here, stating that “consent may be revoked at any time, by express request of the data subject, through an easy and free-of-charge procedure, with processing carried out under previously given consent remaining valid as long as there is no request for deletion, pursuant to item VI of the lead sentence of Art. 18 of this law”. Reference is made to Art. 18 VI LGPD, which, as one of the data subjects’ rights,

provides for “deletion of personal data processed with the consent of the data subject” as one of these rights. Art. 18 IX reiterates that revoking consent under Art. 8 § 5 LGPD is one of the data subjects’ rights.³¹⁷ Revoking consent requires no explanation or reason of any kind by the data subject. This provision roughly corresponds with Art. 7 X MCI, whereby data subjects may request the deletion of personal data provided to an internet application at the end of the relationship between the parties, except for the records to be kept under MCI provisions.³¹⁸

There are, however, other provisions in the LGPD that also give the data subject the right to revoke his or her consent.³¹⁹ Art. 8 § 6 LGPD, which requires the controller to inform the data subject in case of certain (formal) changes in the information of Art. 9 LGPD allows for revocation of consent in case of disagreement with these. Art. 9 § 2 LGPD deals with the situation that the purpose of the personal data processing changes in a manner not compatible with the original consent. In this case, the data subject needs to be informed of these changes beforehand and may then revoke consent in case of disagreement with these changes.³²⁰

When not processing data on the basis of consent, a revocation of such non-existent consent is not possible, thereby weakening data subjects’ rights to obtain deletion of their data. In these situations, Art. 18 IV LGPD is of central importance.³²¹ It states that the data

³¹⁷ The repetition of this right in Art. 18 IX LGPD ensures mentioning of the right to revoke consent when required to inform the data subject of his or her rights, such as in Art. 9 § 3 LGPD.

³¹⁸ This provision is not without conflict with the LGPD, where Art. 16 provides for situations where personal data may be retained for the purposes mentioned there. It remains to be seen whether these retention possibilities allow for storage of personal data that should be deleted under Art. 7 X MCI.

³¹⁹ As consent can already be withdrawn without any reason whatsoever, these provisions would not strictly be necessary to establish this right, but can serve the

purpose of emphasizing these rights in the contexts found there.

³²⁰ This seems inconsistent to a certain extent, as, in case of such change of purpose, consent would no longer be valid (see Art. 8 § 4 LGPD as well as the definition in Art. 5 XII LGPD, noting a “given purpose” must be the object of consent). This provisions therefore *de facto* changes the consent requirement under Art. 7 I LGPD to allow processing on the basis of an opt-out, rather than the opt-in that characterizes consent.

³²¹ As Art. 18 LGPD is applicable in all cases of processing, Art. 18 IV LGPD is also applicable in situations where processing is based on consent, despite

subject has the right to obtain “anonymization, blocking or deletion of unnecessary or excessive data or data processed in noncompliance with the provisions of this law”.³²² Firstly, it establishes anonymization (Art. 12 LGPD)³²³ and blocking, i.e. the temporary suspension of processing of personal data³²⁴ as alternatives to deletion of data. Secondly, it allows for this either in the case of absence of necessity for processing of data, or in case of “noncompliance with the provisions of this law”. Such non-compliance could be understood strictly, as clear violations of the LGPD, while a broader interpretation of non-compliance would strengthen data subjects’ control over their personal data whenever processing occurs outside of consent.³²⁵ Related to this, Art. 18 § 2 LGPD clarifies the existence of a “right to opposition” whenever processing occurs.

Outside of the LGPD, there has been considerable discussion concerning a “right to be forgotten” in Brazilian Law, exemplified by a recent judgement by the STF. In February 2021, the STF’s Full Chamber judged over an Extraordinary Appeal³²⁶, by which the Claimant – the family of a subject victim to a sex crime suffered in the 1950’s – pursued reparation (monetary restitution) from the Defendant – a TV channel – for the unauthorized reconstitution and feature of the offense. The STF held that “incompatible with the Constitution is the idea of a right to be forgotten, thus understood as the power to prevent, due to the passage of time, the

disclosure of facts or data that are true and lawfully obtained and published in analogue or digital media. Any excesses or abuses in the exercise of freedom of expression and information must be analyzed on a case-by-case basis, based on constitutional parameters – especially those relating to the protection of honor, image, privacy and personality in general – and those expressed and specific legal provisions in the criminal and civil scopes”. While dismissing a general right to be forgotten, it should be noted that, by allowing a case-by-case analysis, such a right could rise to relevance in the future,³²⁷ particularly in case data protection is included as an explicit basic right in the constitution in the future.

An alternative to data subject rights aiming at an ending of processing or deletion of personal data can be found in the right to data portability, found as a right in Art. 18 V LPD, which states that the data subject has the right to “portability of the data to another service provider or product provider, by means of an express request, pursuant with the regulations of the national authority, subject to commercial and industrial secrecy”. Art. 40 LGPD then goes on to say the ANPD “may provide standards of interoperability for purposes of portability”, implying that data portability should be possible by electronic means. Excluded from data portability is data that has been anonymized, Art. 18 § 7 LGPD. Additionally, data portability is also provided for in Art. 11 § 4 I LGPD in the context of shared use of data between controllers providing health services, pharmaceutical

there being other, specific rights to deletion based on the revocation of consent.

³²² Portuguese: “anonimização, bloqueio ou eliminação de dados desnecessários, excessivos ou tratados em desconformidade com o disposto nesta Lei”.

³²³ As anonymization entails the removal personal relation from personal data, it could be argued that, even without this provision, it could be considered a form of deletion, as personal data ceases to be personal data when anonymized.

³²⁴ Defined in Art. 5 XIII LGPD as “temporary suspension of any processing operation, by means of retention of the personal data or the database”.

³²⁵ Arguing for such broad interpretation of noncompliance (in the context of processing on the basis of legitimate interest) control Bioni, Rielli and Kitayama (n 238).

³²⁶ *Relator Ministro Dias Toffoli* (2021) RE 1010606 Jusbrasil (Supremo Tribunal Federal)

³²⁷ For an in-depth analysis of this, see Luca Belli, “The Right to be Forgotten is Not Compatible with the Brazilian Constitution. or is it?” (23 March 2021) <<https://fpf.org/blog/the-right-to-be-forgotten-is-not-compatible-with-the-brazilian-constitution-or-is-it/>> accessed 1 April 2022.

assistance and health insurance concerning sensitive personal data related to health.

d. Procedural Aspects

Costs for and effectivity of the rights of the affected persons; consumer accessibility.

The rights mentioned in Art. 18 LGPD are exercised by means of an express request, which can be made by the data subject or his/her legal representative (§ 3). The lead sentence clarifies this can be made “at any time”. Similarly, Art 8 § 5 LGPD states that consent is revoked by an express request. This provision also states the procedure for revoking consent must be available free of charge; the same is said in relation to all rights mentioned in Art. 18 LGPD in its § 5 (“without costs to the data subject”). Deadlines for controllers’ compliance are set in Art. 19 II³²⁸ LGPD concerning the confirmation and access rights of Art. 18 I and II LGPD at 15 days. From a reverse interpretation of Art. 18 § 4 LGPD, which mandates an explanation in case of non-immediate compliance, one can deduce that immediate compliance with the request of the data subject is intended as a default. However, exact deadlines are still to be set by the ANPD,³²⁹ particularly with respect to small enterprises and startup companies,³³⁰ which means that considerable uncertainty in this regard currently exists. Responsible for receiving and acting upon such requests on the side of the controller is the Data Protection Officer, Art. 41 § 2 I and II LGPD.

In order to ensure effectivity of the rights, Art. 18 § 6 LGPD obligates the controller to further communicate correction, deletion, anonymization or blocking of data to data

processing agents whom it he or she has shared data with, in order for them to “repeat an identical procedure”.

In order not to leave action to the controller alone, Art. 18 § 1 LGPD allows the petitioning of the ANPD by the data subject, which may then, via its own instruments, ensure regulatory compliance. Art. 18 § 8 LGPD expands this, also allowing for petitioning of consumer defense entities. In case of non-compliance of a request to review automated decisions based on commercial and industrial secrecy, the ANPD may “carry out an audit to verify discriminatory aspects in automated processing of personal data”, Art. 20 § 2 LGPD. Art. 29 LGPD further allows the ANPD to request information from public entities and to use a “complementary technical report to ensure compliance” with LGPD, and Art. 31 LGPD allows ANPD to “issue a statement with applicable measures” to stop infringement of LGPD by such.

4. Enforcement

a. Damages and Compensation

Material and immaterial damages; reparations; profit forfeiture; punitive damages.

Section III of the LGPD provides for “Liability and Compensation of Damages”³³¹ (in Articles 42 to 45). Central is the lead sentence of Art. 42 LGPD, whereby “the controller or processor, who by exercising the processing of personal data, causes patrimonial, moral, individual or collective damages in violation of data protection law is obligated to redress these”,³³² providing a basis for compensation (via litigation).

³²⁸ Note that this is an alternative to item I, which mandates immediate (*imediatamente*) compliance in case of provision of the requested information in a simplified format.

³²⁹ Art. 18 § 5 LGPD: “(...) within the time periods (...) as provided in regulation”.

³³⁰ Art. 55-J XVIII LGPD: “to enact rules (...), including deadlines, so that microenterprises and small businesses are able to adapt to this law (...)”

³³¹ Portuguese: *Da Responsabilidade e do Ressarcimento de Danos*.

³³² Art. 42 LGPD: “O controlador ou o operador que, em razão do exercício de atividade de tratamento de dados pessoais, causar a outrem dano patrimonial, moral, individual ou coletivo, em violação à legislação de proteção de dados pessoais, é obrigado a repará-lo”.

Art. 42 § 1 LGPD deals with joint liability of operators in case of non-compliance with either law or the controller's instructions³³³ (I) and of other controllers (II) in case of co-involvement. Art. 43 enumerates cases where liability does not arise, particularly in case they did not carry out the processing (I), a violation of data protection law did not occur (II), or the damage occurred due to the exclusive fault of the data subject or a third party (III). It is, however, controversial, as to whether the LGPD sets forth a standard of strict liability or liability based on culpability.³³⁴ An additional basis for damages is contained in the sole paragraph of Art. 44 in case of inadequate security measures as of Art. 46 LGPD. Art. 45 LGPD further references the applicability of rules of liability in consumer relations, allowing for applicability of CDC provisions

While the differentiation between individual and collective damages mainly concerns the mode of litigation,³³⁵ the differences between patrimonial and moral damages are to be explored. While patrimonial damages simply concern the compensation of quantifiable monetary loss,³³⁶ moral damages³³⁷ are a more complex construct, and their exact nature a matter of contention amongst Brazilian jurists, leading to strongly divergent court

decisions.³³⁸ Due to the principle of compensation in Art. 944 of the Civil Code, punitive damages are, strictly speaking, not a feature of Brazilian Law. However, moral damages can contain a *de facto* punitive element.

Besides LGPD, to be mentioned is the possibility of obtaining damages on the basis of a violation of the personality rights including the right to a private life in Art. 21 Civil Code.

b. Procedural Aspects

"Threshold" for accessibility; right to initiation; burden of proof; dispute value; "small claims"; alternative dispute resolution; rights to bring/press charges; "rational apathy".

Generally, any offense against citizen's rights is subject to legal action, with Art. 5 XXXV of the Constitution guaranteeing access to the Judiciary (*Acesso ao Judiciário*).³³⁹ The LGPD has absorbed this guarantee in Art. 22, whereby "the defense of the interests and rights of data subjects may be carried out in court, individually or collectively, as provided in pertinent legislation (...)". In the scope of the LGPD, rights can thus be pursued not only individually but also collectively, with Art. 42 § 3 LGPD restating this concerning homogenous interests.³⁴⁰

³³³ See also Art. 39 LGPD, whereby the operator must comply with the controller's instructions pertaining to processing.

³³⁴ See concerning this generally on civil liability Bruno Bioni and Daniel Dias, 'Responsabilidade civil na proteção de dados pessoais: construindo pontes entre a Lei Geral de Proteção de Dados Pessoais e o Código de Defesa do Consumidor' (2020) <<https://civilistica.emnuvens.com.br/redc/article/view/662>> accessed 1 April 2022. See further Cicero Dantas Bisneto, 'Reparação por danos morais pela violação à LGPD e ao RGPD: uma abordagem de direito comparado' (2020) <<https://civilistica.emnuvens.com.br/redc/article/view/493>> accessed 1 April 2022.

³³⁵ See *infra* C III 4 b.

³³⁶ Art. 944 Civil Code.

³³⁷ For comparative analysis, see Miguel Reale, 'Moral Damages in Brazilian Law' (1992) <<https://www.e->

publicacoes.uerj.br/index.php/pbl/article/view/34329/24247> accessed 1 April 2022.

³³⁸ Dantas Bisneto (n 334).

³³⁹ Art. 5 XXXV: "the law shall not exclude any injury or threat to a right from review by the judiciary,". This does not exclude the procedural requisites to do so, especially in what comes to "interest to act" (*interesse de agir*), meaning that the Plaintiff will always have to demonstrate the "utility, necessity and adequacy of the judicial provision pleaded" Isabela Maiolino, 'Desafios para a defesa do consumidor e proteção de dados: necessidade de coordenação entre os sistemas' in Renato Opice Blum (ed), *Proteção de dados: desafios e soluções na adequação à lei* (2020)

³⁴⁰ "For better understanding, see Anderson Schreiber, 'Responsabilidade civil na Lei Geral de Proteção de Dados Pessoais' in Renato Opice Blum (ed), *Proteção de dados: desafios e soluções na adequação à lei* (2020), who explains that "the Brazilian legal system authorizes the filing of collective lawsuits aimed at repairing individual

Thus, public civil action by the Public Ministries or other allowed plaintiffs³⁴¹ aimed at enforcing diffuse or collective interests by suing for damages or an injunction is a relevant collective method of enforcement of LGPD.³⁴²

To be noted in this context however is the unequal access to justice in Brazil, which means that, *de facto*, drastically different possibilities of obtaining justice arise depending on individuals' monetary situation.³⁴³

Any judicial civil dispute involving the enforcement of Data Protection law is set to be processed and decided according to the procedural rules established in the Code of Civil Procedure (*Código de Processo Civil*).³⁴⁴

damages, provided that they result from damage to homogeneous individual interests, understood as those arising from common origin. (...) common origin does not necessarily mean a factual and temporal unit. A single class action can, therefore, be filed on behalf of all subjects who have their personal data exposed to the public due to a breach in the system of a given company. The lawsuit will, in this case, be collective, but the damages will continue to be individual."

³⁴¹ See *supra* Section B IV.

³⁴² Rafael A. F. Zanatta, Michel Roberto de Souza, 'A Tutela Coletiva em Proteção de Dados Pessoais: tendências e desafios' (2019) <https://www.researchgate.net/publication/344495215_A_Tutela_Coletiva_em_Protecao_de_Dados_Pessoais_tendencias_e_desafios> accessed 1 April 2022.

³⁴³ On this topic, see Alexandre dos Santos Cunha, 'Public Defenders' Offices in Brazil: Access to Justice, Courts, and Public Defenders Access to Justice and Liberal Democracies: Global, Regional and National Solutions to a Worldwide Problem' (2020) 27(1) *Indiana Journal of Global Legal Studies* 273; Daniel B Maldonado, 'El trabajo jurídico pro bono en Brasil: Transplantes jurídicos, acceso a la justicia y las obligaciones sociales de los abogados' (2019) 10(1) *Revista Direito e Práxis* 424; Antonio Gidi and Jr. H Zaneti, 'Brazilian Civil Procedure in the 'Age of Austerity'?' [2015] *Erasmus Law Review*.

³⁴⁴ 'Law 13.105/2015 or Código de Processo Civil' (2015) <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm> accessed 1 April 2022. For an English version, see Fredie Didier Jr. 'CPC brasileiro traduzido para a língua inglesa' (2017) <https://www.academia.edu/34624319/Brazilian_Co

Therefore, the burden of proof shall be imposed on the plaintiff, as a general rule, according to Art. 373 I & II CPC. Nonetheless, §§ 1 through 4 allow for a different approach, even offering the parties a permanent opportunity to agree upon the burden of proof's assignment. Additionally, in some cases, there is no need for evidence.³⁴⁵

In the scope of a consumer relations, which usually has relevance in data privacy contexts, the CDC also addresses this topic, allowing for the shifting of the burden of proof.³⁴⁶ And it goes further, as it deals with the matter on two other specific situations (Advertising³⁴⁷ and Abusive Clauses³⁴⁸). Moreover, the LGPD has its own provisions concerning the burden of proof, both *ope judicis*³⁴⁹ and *ope legis*³⁵⁰.

de_of_Civil_Procedure_Translated_to_English> accessed 1 April 2022.

³⁴⁵ "Art. 374. Evidence is not required for facts that are: I – publicly and widely known; II – affirmed by one party and confessed by the opposing party; III – admitted to the case as being undisputed; IV – regarding which there is the legal presumption of existence or veracity."

³⁴⁶ "Art. 6. The following are basic consumer rights: (...) VIII - protection of consumer rights facilitated, by shifting the burden of proof in favor of the consumer in a civil action when the judge finds that the accusation holds truth or when he is unable to satisfactorily fulfill its obligations according to ordinary rules from experiences."

³⁴⁷ Art. 38 CDC: "The burden of proof regarding the truthfulness and correction of the information or public communication will be the liability of its sponsor".

³⁴⁸ Art. 51: "Any clauses that impose any of the following situations, among others, will be nullified: (...) VI - transfer the burden of proof to the consumer".

³⁴⁹ "Art. 42 (...)2 The judge, in a civil lawsuit, at her/his discretion, may reverse the burden of proof in favor of the data subject when the allegation appears to be true, there are no funds for the purpose of producing evidence or when production of evidence by the data subject would be overly burdensome."

³⁵⁰ "Art. 8 The consent provided in item I of Art. 7 of this Law shall be given in writing or by other means able to demonstrate the manifestation of the will of the data subject. (...) §2 The burden of proof to demonstrate that the consent was duly obtained in compliance with the provisions of this Law is on the controller.

One of the biggest procedural challenges is to identify precisely the economic damage suffered by the plaintiff, especially when it comprises moral or any kind of immaterial rights. Generally, the criteria determined by Art. 944 Civil Code are used, which states that compensation corresponds to the extent of damage(s). The lack of specificity led the courts to search for more guidance, which can be found in literature.³⁵¹ An option is to include other circumstances, such as “a) the amount of personal data affected; b) the nature of the affected personal data: the leak of sensitive personal data, for instance, shall determine a larger compensation, especially if it involves biometric data, which cannot be replaced; c) recidivism of conduct; d) the omission of adopting security and technical measures to alleviate the damage or to collaborate with the ANPD; e) the lack of notification of the users regarding the incident; f) the proven use of the leaked personal data by a third-party”.³⁵²

Alternative dispute resolution methods are available as well in Brazil, towards which the Judiciary has increasingly directed its efforts, ever since the publication of the “National Judicial Policy for the Adequate Treatment of the Conflicts in the Scope of the Judiciary”

(*Política Judiciária Nacional de Tratamento Adequado dos Conflitos de Interesse no Âmbito do Poder Judiciário*).³⁵³ Also, the 2015 “civil procedure reform”, that introduced a new CPC (Law n. 13.105/2015), raised it to a prominent level of importance, even stating that “Arbitration is allowed, in accordance with statutory law.”, directly after referring to the Access of Justice.³⁵⁴ Nevertheless, specialists tend to agree that the scope of objective arbitrability (the list of matters that can be submitted to arbitration) depends on the national law applicable to the dispute and, since the Brazilian Arbitration Law (Law 9.307/1996)³⁵⁵ stipulates that all persons capable of contracting may use arbitration to settle disputes relating only to renounceable property rights (Art. 1), “it would not be possible to submit conflicts arising from the application of the LGPD, especially those between data subjects and processors, to arbitration”.³⁵⁶

On the other hand, the Brazilian Ministry of Justice (*Ministério da Justiça*) has deployed, through the National Consumer Office (*Secretaria Nacional do Consumidor*), an ADR system named *consumidor.gov.br* that “allows for the direct dialogue between consumers and companies to solve consumer conflicts over

Art. 43. Processing agents shall not be held liable only when they prove that: I – they did not carry out the personal data processing that is attributed to them; II – although they did carry out the processing of personal data that is attributed to them, there was no violation of the data protection legislation; or III – the damage arises from the exclusive fault of the data subject or a third party.”

³⁵¹ See Sergio Cavalieri Filho, ‘Programa de responsabilidade civil’ [2020] 153 accessed 11 February 2022.

³⁵² Walter Aranha Capanema, ‘A responsabilidade civil na Lei Geral de Proteção de Dados, in *Cadernos Jurídicos*’ (2020) <https://www.tjsp.jus.br/download/EPM/Publicacoes/CadernosJuridicos/ii_6_a_responsabilidade_civil.pdf?d=637250347559005712> accessed 1 April 2022.

³⁵³ Conselho Nacional de Justiça, ‘Resolução N° 125 de 29/11/2010’ <<https://atos.cnj.jus.br/atos/detalhar/156>> accessed 1 April 2022

³⁵⁴ “Art. 3. Neither injury nor threat to a right shall be precluded from judicial examination.

§ 1 Arbitration is allowed, in accordance with statutory law. (das war hier so, wie soll das formatiert werden?)

§ 2 The State must, whenever possible, encourage the parties to reach a consensual settlement of the dispute.

§ 3 Judges, lawyers, public defenders and prosecutors must encourage the use of conciliation, mediation and other methods of consensual dispute resolution, even during the course of proceedings.”

³⁵⁵ ‘Law 9.307/1996’ <http://www.planalto.gov.br/ccivil_03/LEIS/L9307.htm> accessed 1 April 2022.

³⁵⁶ Celina Bottino, ‘Lei Geral de Proteção de Dados Pessoais e Resolução de Conflitos: experiências internacionais e perspectivas para o Brasil’ (2020) <https://itsrio.org/wp-content/uploads/2020/04/Relatorio_LGPDResolucaoConflitos.pdf> accessed 1 April 2022.

the Internet”³⁵⁷ and could as such obtain relevance in data-related disputes.

IV. Objective Legal Obligations of the Recipient

1. Duties Concerning Received Data

a. Dependence on Authorization

Of business models, processing variants, terms and conditions.

LGPD largely does not rely on preliminary authorization from regulatory entities, instead aiming at reactive intervention (by the ANPD) and enforcement through civil disputes.

An exception to this could possibly be contained in the provisions dealing with sensitive personal data: Art. 11 § 3 LGPD provides that “communication or shared use of personal data between controllers for the purpose of obtaining an economic advantage may be prohibited or regulated by the national authority”, which could be understood to entail authorization of such. Art. 13 § 3 LGPD similarly allows for regulation concerning access to health data in the context of public health studies and could as such also rely on authorization by the ANPD or other authorities.

A different picture emerges in the case of international data transfers. Art. 33 LGPD lists different cases where international data transfer is allowed, mirroring Art. 7 and 11 LGPD by relying on a preventive ban with exceptions. Item I of the article allows international transfer “to countries or international organizations that provide a level of protection that is adequate to the provisions of this law”. Art. 34 LGPD then sets forth that the ANPD shall evaluate this level of data protection, leading to a *de facto* requirement of (generic) authorization in this regard. It is unclear, however, whether this evaluation is binding or whether controllers

might perform their own assessment, particularly with respect to foreign countries lacking an ANPD assessment. With regards to transfer on the basis of contractual clauses (Art. 33 II LGPD), Art. 35 LGPD requires explicit authorization by the ANPD. In the case of standard contractual clauses and global corporate standards, this is a generic, standardized authorization, while specific contractual clauses for a given transfer may be “verified” (*verificação*) by the ANPD.

b. Notification Obligations

Of business models and business activity; of processing activity.

The LGPD itself does not employ notification of specific modes of processing as a central concept.³⁵⁸ The only widely relevant notification obligation is contained in Art. 48, whereby controllers must “communicate to the national authority and to the data subject the occurrence of a security incident that may create risk or relevant damage to the data subjects”. Art. 48 § 1 LGPD contains the required information that must be communicated in this situation, and § 2 then allows for reactive measures to be ordered by the ANPD.

A notification obligation in the wider sense (to the public)³⁵⁹ is contained in Art. 50 § 3 LGPD, which states that internal governance rules shall be published and updated periodically. Regarding the public sector, Art. 27 LGPD requires the communication of situations where personal data is communicated or shared with legal entities of private law, by legal entities of public law, to the ANPD.

c. Documentation

Accountability.

Documentation in the LGPD is referenced prominently in Art. 6 X LGPD as the principle of accountability, whereby data processing

³⁵⁷ *ibid.*

³⁵⁸ Such obligations could, however, arise from future ANPD regulatory instruments.

³⁵⁹ This could also be considered a transparency requirement.

agents, i.e. processors and operators, must demonstrate the “adoption of measures which are efficient and capable of proving the compliance with the rules of personal data protection, including the efficacy of such measures”.³⁶⁰ The key provision for documentation is Art. 37 LGPD, whereby the “controller and the operator shall keep records of personal data operations carried out by them, especially when based on legitimate interest”. Legitimate interest is highlighted in this context due to the process of establishing such legitimate interest and balancing it against the rights and interests of the data subject, mirrored in Art. 10 § 2 LGPD, which puts forward the great importance of transparency in case processing is based on legitimate interest. While the ANPD has not put forward the exact structure of mandatory record-keeping yet, such records are likely to need to contain key information such as purpose, basis (Art. 7 and 11 LGPD) and whom the data was shared with.³⁶¹

As opposed to this “standard” record keeping put forward by Art. 37 LGPD, the subsequent Art. 38 LGPD allows the ANPD to require controllers to prepare a Personal Data Protection Impact Report (*relatório de impacto à proteção de dados pessoais*), which “shall include personal data, sensitive data, and refer to its data processing operations, pursuant to regulations, subject to commercial and industrial secrecy”. The sole paragraph then goes on to state the report “must contain at least a description of the types of data collected, the methodology used for collection and for ensuring the security of the information, and the analysis of the controller regarding the adopted measures, safeguards and mechanisms of risk mitigation”. The article, however, does not clarify all situations

in which the ANPD may request the preparation of such an impact report, the only explicit mentioning being Art. 10 § 3 LGPD, which concerns processing on the basis of legitimate interest. Art. 55-J LGPD, which lists the responsibilities of the ANPD, offers at least some insight on this in item XIII, which makes creating “regulations and procedures (...) on Personal Data Protection Impact Reports in cases in which the processing represents a high risk to the guarantee of the general principles of personal data protection” its job. This implies that such Impact Reports will be limited to high-risk data processing.

Specific documentation regulation can be found with regard to the public sector: Art. 29 LGPD allows the ANPD to request information from public entities concerning personal data processing, while Art. 32 LGPD allows the ANPD to request that public authorities prepare Personal Data Protection Impact Reports.

d. Processing Requirements

Prohibition subject to permission; balancing of interests; restrictions for terms and conditions; business practices; APIs/interfaces for third parties.

Processing, under the wide definition of Art. 5 X LGPD and as elaborated above,³⁶² is subject to compliance with one of the processing variants under Art. 7, in the case of sensitive personal data, under Art. 11 LGPD, and due to Art. 33 LGPD when international transfers of data take place.

Processing of personal data on the basis of legitimate interest under Art. 7 IX LGPD requires a more complex assessment when compared to other processing variants. Art. 7 IX LGPD contains the central requirements for this, requiring that data processing is

³⁶⁰ Portuguese: “Art. 6 X LGPD - responsabilização e prestação de contas: demonstração, pelo agente, da adoção de medidas eficazes e capazes de comprovar a observância e o cumprimento das normas de proteção de dados pessoais e, inclusive, da eficácia dessas medidas”.

³⁶¹ Edson Costa, ‘Registro Das Operações de tratamento de Dados Pessoais - LGPD e ROPA’ (2021) <<https://studioestrategia.com.br/2021/04/14/ropa-registro-das-operacoes-de-tratamento-de-dados-pessoais/>> accessed 1 April 2022.

³⁶² *Supra* C III 2 b.

“necessary to fulfil the legitimate interest of the controller or a third party, except when the data subject’s fundamental rights and liberties which require personal data protection prevail” and therefore a balancing of interests between the controller (or third party) and the data subject. While not the only possible method of assessing legitimate interest,³⁶³ this can be done by applying a four-step test, which includes the phases of assessing Legitimacy (1), Necessity (2), balancing of the interests (3) and applying safeguards (4).³⁶⁴ While not entirely clear if legally necessary under Art. 37 LGPD, it is recommended to document the process of the legitimate interest assessment to avoid noncompliance and improve transparency.³⁶⁵

Restrictions on terms and conditions exist in the CDC, which regulates the allowed content of such in relation to consumers, albeit not explicitly with regard to data protection. Art. 6 V CDC establishes “modification of contractual clauses that establish disproportionate benefits or their revision due to superseding facts that make them excessively onerous”, with Art. 46 to 54 CDC going into more detail.

e. Prohibitions and Obligations

Prohibition of processing variants (e.g. profiling); criminal liability; restrictions under competition regulations; prohibition of abuses (of power/market power); further transmission to third parties, especially governmental bodies; elicitation from abroad.

General Prohibitions in case of noncompliance with conditions are, as discussed before, common in LGPD, with Art. 7 (general), 11 (sensitive personal data), 14 (children’s and adolescents’ personal data) and 33 (international transfer) employing this

regulatory technique. Specific prohibitions are, on the other hand, quite rare in the LGPD, with Art. 4 § 4 prohibiting the transfer of entire databases of personal data relevant for public safety, national defense, state security or criminal prosecution to the private sector, Art. 11 § 4 prohibiting “communication or shared use of sensitive personal data referring in health in order to obtain an economic advantage”, Art. 14 § 4 prohibiting making personal data collection concerning children a prerequisite for activities such as games, and Art. 26 § 1, which, similarly to Art. 4 § 4, prohibits the transfer of public sector databases to private actors, except in specific cases.

Processing variants commonly seen as potentially problematic such as profiling and automatic decision-making are not prohibited. Rather, even data otherwise considered anonymous and therefore not seen as personal data are legally classified as personal data when “used to formulate behavioral profiles of a particular natural person, if that person is identified”³⁶⁶ in Art. 12 § 2 LGPD. Automatic decision-making on the other hand leads to a “right to review” as regulated in Art. 20 LGPD.

On the more macro level of competition regulation, there currently exists no data processing-specific regulation. However, this does not mean there is no regulatory action, as data-driven business models have come under scrutiny under conventional competition law instruments,³⁶⁷ albeit with difficulties in

³⁶³ Bruno Bioni, ‘Entenda O Legítimo interesse na LGPD’ (2021) <<http://genjuridico.com.br/2021/03/05/legitimo-interesse-na-lgpd/>> accessed 1 April 2022; Bioni, Rielli and Kitayama (n 238).

³⁶⁴ See Bioni, Rielli and Kitayama (n 238).

³⁶⁵ Bioni (n 363).

³⁶⁶ One could however, argue, that the caveat of identification leads to complete redundancy of Art. 12 § 2 LGPD, since the entire point of anonymization is to effectively remove the possibility of identification.

³⁶⁷ Diogo R Coutinho and Beatriz Kira, ‘Competition Policy and Personal Data Protection in Brazil: New Challenges and Continuing Concerns’ [2021] <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3879452> accessed 1 April 2022

market definition, the relevant market being an important category for action.³⁶⁸

The *Conselho Administrativo de Defesa Econômica* (CADE), the Brazilian competition authority,³⁶⁹ has worked on several data-centric cases in the past.³⁷⁰ The future of competition law instruments in relation to data issues Brazil seems to lie in increased cooperation between different regulatory agencies in order to bridge gaps.³⁷¹

2. Monitoring

a. Recipient's Self-Monitoring

Self-restrictions; compliance mechanisms; internal responsibilities (company privacy officers; ombudspersons).

Art. 50 LGPD encourages the creation of internal compliance mechanisms by establishment of rules for good practices and governance, be it “individually or by associations”. The lead sentence of the article lists possible contents of such governance rules, being “complaints and petitions by data subjects, security norms, technical standards, specified obligations for the different parties involved in processing, educational action, internal mechanisms for supervision and risk mitigation and other aspects related to personal data processing”. § 3 of Art. 50

allows the ANPD to “recognize” such best practices, again incentivizing and perhaps even providing some certainty on proper compliance. It should be noted, however, that the implementation of such a program is not mandatory. On the other hand, Art. 52 § 1 X LGPD makes this a (mitigating) factor for the ANPD to consider when applying sanctions, which could be a significant reason for implementation.

Then again, simply compliance with LGPD provisions in general requires the adoption of internal structures, especially in light of dreaded sanctions. For example, a significant amount of organizational planning is required in order to observe documentation requirements³⁷² or uphold data subjects’ rights.³⁷³

The only “hard” organizational requirement in the LGPD is the appointment of a Data Protection Officer (DPO) in Art. 41, which, pending the possibility of a waiver for small companies not yet passed by the ANPD and as mentioned in § 3, applies to every controller³⁷⁴ of data. The DPO may be either

³⁶⁸ Magali Eben and Robertson, Viktoria H S E, ‘Digital Market Definition in the European Union, United States, and Brazil: Past, Present, and Future’ [2021] *Journal of Competition Law & Economics* 1

³⁶⁹ Conselho Administrativo de Defesa Econômica - Português (Brasil), ‘Conselho Administrativo de DEFESA Econômica (CADE)’ (2021) <<https://www.gov.br/pt-br/orgaos/conselho-administrativo-de-defesa-economica>> accessed 1 April 2022.

³⁷⁰ Coutinho and Kira, ‘Competition Policy and Personal Data Protection in Brazil: New Challenges and Continuing Concerns’ (n 367)

³⁷¹ See Global Compliance News, ‘Brazil: SENACON and ANPD sign technical cooperation agreement to protect consumer data’ (2021) <<https://www.globalcompliancencnews.com/2021/05/09/brazil-senacn-and-anpd-sign-technical-cooperation-agreement-to-protect-consumer-data-02042021/>> accessed 1 April 2022; DataGuidance, ‘Brazil: ANPD and CADE sign technical cooperation

agreement’ (2021) <<https://www.dataguidance.com/news/brazil-anpd-and-cade-sign-technical-cooperation>> accessed 1 April 2022; Tauil & Chequer Advogados, ‘Brazil: CADE and INPI Sign Technical Cooperation Agreement’ (15 June 2018) <<https://www.tauilchequer.com.br/en/perspectives-events/publications/2018/06/brazil-cade-and-inpi-sign-technical-cooperation-ag>> accessed 1 April 2022; Autoridade Nacional de Proteção de Dados, ‘Após esforço interinstitucional, WhatsApp se compromete a atender às recomendações sobre sua política de privacidade’ (21 August 2021) <<https://www.gov.br/anpd/pt-br/assuntos/noticias/apos-esforco-interinstitucional-whatsapp-se-compromete-a-atender-as-recomendacoes-sobre-sua-politica-de-privacidade>> accessed 1 April 2022

³⁷² See *supra* Section C IV 1 c.

³⁷³ See *supra* Section C III 3 b.

³⁷⁴ As defined in Art. 5 VI LGPD. Note that operators (Art. 5 VII LGPD) are not obliged to appoint a DPO.

a natural person or legal entity.³⁷⁵ The DPO's responsibilities are set out in § 2, whereby the DPO is the key figure for implementation of compliance, communication with the ANPD, adopting measures and internal education concerning data privacy. The identity and contact information of the DPO must be made public (§ 1).

b. Regulated Self-Regulation

Industry associations.

Concerning the public sector, Art. 32 LGPD allows the ANPD to suggest the adoption of standards and good practices for personal data processing to public authorities. Additionally, the Secretariat of Digital Government provides some guidance for implementation of LGPD for federal agencies and entities.³⁷⁶

Self-regulation by industry associations, however, is addressed by Art. 50 LGPD, whereby “soft law” provisions may be formulated by “controllers and processors, (..) individually or by associations (...)”. Additionally, Art. 52 § 1 IX lists the “adoption of good practices and governance policy” as one of the parameters to be considered by the

ANPD whenever it may impose a sanction, incentivizing the adoption of such provisions.³⁷⁷

As a result, in an effort to embrace that spirit along with a privacy by design approach³⁷⁸, some private corporations and/or their related associations have created³⁷⁹ or are in the process of creating³⁸⁰ guidelines concerning personal data processing.³⁸¹

c. Supervisory Authorities

Data protection authorities; competition authorities; economic oversight authorities.

The central supervisory authority for personal data processing regulation is the ANPD, responsible for enforcing the LGPD provisions. Its establishment was a turbulent process – initially intended to be an agency outside the executive structure in order to be highly independent, the original provisions in the LGPD from 2018 regarding its establishment were vetoed by President Temer,³⁸² who instead created the ANPD with a Provisional Measure (*Medida Provisória*)³⁸³ as part of the executive under the office of the presidency.³⁸⁴ This provisional measure was

³⁷⁵ See wording in Art. 5 VIII LGPD; Paulo M. R. Brancher, Ana Carolina Heringer Castellano, ‘Data Protection Authority Registration and Data Protection Officer Requirements for Data Controllers: Brazil’ (2021)

<[https://uk.practicallaw.thomsonreuters.com/w-026-4354?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-026-4354?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 1 April 2022.

³⁷⁶ Secretaria de Governo Digital, ‘Guias operacionais para adequação à LGPD’ (2021) <<https://www.gov.br/governodigital/pt-br/seguranca-e-protecao-de-dados/guias-operacionais-para-adequacao-a-lei-geral-de-protecao-de-dados-para-privados>> accessed 1 April 2022.

³⁷⁷ See also *supra* Section C IV 2 a.

³⁷⁸ The relation between best practices and a privacy by design framework, widely identified by authors such as Danielle Carvalho Barbosa, ‘Boas práticas e governança na LGPD’ [2021] DONEDA 371, has not been ignored by the Brazilian legislator, given that Art. 46 § 2 demands observance of the latter and, more importantly, Art. 49 provides for mandatory alignment with the former.

³⁷⁹ See, in the scope of private healthcare providers, Confederação Nacional de Saúde, ‘Código de Boas

Práticas - Proteção de Dados para Prestadores Privados de Saúde’ (2021) <http://cnsaude.org.br/wp-content/uploads/2021/03/Boas-Praticas-Protecao-Dados-Prestadores-Privados-CNSaude_ED_2021.pdf> accessed 1 April 2022.

³⁸⁰ In the telecommunications sector, Associação Brasileira de Comércio Eletrônico, ‘LGPD’ (2020) <<https://lgpd.abcomm.org/>> accessed 1 April 2022.

³⁸¹ Diogo Luís Manganelli de Oliveira, ‘Códigos de Boas Práticas e a LGPD’ (2021) <<https://www.migalhas.com.br/depeso/342329/codigos-de-boas-praticas-e-a-lgpd>> accessed 1 April 2022.

³⁸² Luiz Guilherme Silveira Franco, ‘Sancionada a lei geral de proteção de dados do Brasil, com veto à autoridade nacional de proteção de dados (ANPD)’ (2018) <<https://www.migalhas.com.br/depeso/286117/sancionada-a-lei-geral-de-protecao-de-dados-do-brasil-com-veto-a-autoridade-nacional-de-protecao-de-dados--anpd>> accessed 1 April 2022.

³⁸³ (n 34).

³⁸⁴ Art. 55-A LGPD: “Hereby created, without increase in expenses, is the National Data Protection Authority (ANPD), an entity of the federal public administration, as part of the Presidency of the Republic.”

then converted into law, with Articles 55-A to 58-B of the LGPD dealing with the ANPD. It should be noted that Art. 55-A § 1 and § 2 LGPD see its founding as part of the presidency as a transitional measure to be assessed in the future, likely a compromise resulting from the controversy regarding its nature. The more detailed organizational structure of the ANPD was then regulated by presidential decree in 2020.³⁸⁵

The structure of the ANPD is broadly set out in Art. 55-C LGPD, which lists its main subsections, the Board of Directors (I), the National Council for the Protection of Personal Data and Privacy (II), the Office of Internal Affairs (III), the Ombudsperson (IV), the legal advisory body (V), as well as generally providing for “administrative units and special units necessary for the application of the provisions of this law [LGPD]” (VI).

The board of directors, the “highest governing body”,³⁸⁶ comprised of 5 directors, is dealt with in Art. 55-D to 55-E LGPD. Its responsibilities are set out in Art. 26 of the organizational decree regarding the ANPD.³⁸⁷

The National Council for the Protection of Personal Data and Privacy (CNPd) consists of 23 representatives from different areas of government, but also data protection experts

as well as science and industry specialists, which were only recently appointed.³⁸⁸ It has a mainly advisory function as set out in Art. 58-B LGPD and Art. 14 of the organizational decree.

However, despite being *the* Data Protection Authority, the ANPD is not the only relevant state actor in the field of enforcing data protection law in Brazil.³⁸⁹ While the ANPD is responsible for administering administrative sanctions under the LGPD,³⁹⁰ other public sector institutions can enforce data protection law through collective litigation, particularly Public Ministries and consumer protection agencies,³⁹¹ with the ANPD cooperating³⁹² and taking a coordinating role. In fact, most action concerning data protection in Brazil has thus far been taken by consumer protection organizations SENACON and PROCON(s) via litigation rather than via the ANPD’s administrative sanctioning powers.³⁹³ Furthermore, CADE has acted (in cooperation with the ANPD) on competition-related issues relating to data protection.³⁹⁴

d. (Specific) Criminal Prosecution

Specific prosecutors for informational crimes; (situational/special) investigators.

Concerning criminal prosecution, it should first be noted that the ANPD itself is not

³⁸⁵ (n 39).

³⁸⁶ Art. 55-C I LGPD.

³⁸⁷ See also Autoridade Nacional de Proteção de Dados, ‘Conselho Director’ (2021) <https://www.gov.br/anpd/pt-br/composicao-1/copy_of_conselho-diretor-1> accessed 1 April 2022.

³⁸⁸ ‘Conselho Nacional de Proteção de Dados Pessoais e da Privacidade’ (2021) <<https://www.gov.br/anpd/pt-br/composicao-1/conselho-nacional-de-protecao-de-dados-pessoais-e-privacidade-cnpd>> accessed 1 April 2022.

³⁸⁹ See on institutional pluralism as a feature of Brazilian public administration more generally Kevin Davis, ‘Institutional Modularity in Anti-corruption Enforcement: South American Experiences’ (1 December 2021) <<https://verfassungsblog.de/institutional-modularity-in-anti-corruption-enforcement/>> accessed 1 April 2022

³⁹⁰ See *infra* Sections C IV 3 a-d.

³⁹¹ Renata Lima and Carlos Salgado, ‘LGPD: condenações judiciais já são aplicadas em diversas esferas do Direito’ (02.08.2021) <<https://www.conjur.com.br/2021-ago-02/opiniao-lgpd-condenacoes-sao-aplicadas-diversas-esferas>> accessed 4 April 2022; See also *supra* Section C IV 1 e.

³⁹² See Global Compliance News (n 371); DataGuidance (n 371); Tauil & Chequer Advogados (n 371); Autoridade Nacional de Proteção de Dados (n 371)

³⁹³ Benjamin Slinn and others, ‘Data Protection Day - Key developments and looking ahead to 2022’ (27 January 2022) <<https://www.lexology.com/library/detail.aspx?g=d020bda2-d72a-4cf8-b087-eb6e17f04d45>> accessed 1 April 2022

³⁹⁴ *Supra* Section C IV 2 e.

responsible for the prosecution of data-related crimes³⁹⁵, other than other special regulatory agencies,³⁹⁶ but rather has the obligation to refer crimes of which it becomes aware to the competent authorities as listed in Art. 55-J XXI. These are generally federal and state police as well as public prosecutors.³⁹⁷

In the Federal Administration, this falls under the attribution of the Federal Police and the Federal Public Ministry, both of which have specific functional branches within their internal structure responsible for the investigation and the prosecution of crimes involving digital assets or means. The Federal Police, for example, has special divisions devoted to investigate informational crimes, such as the Cybercrime Enforcement Division and the Cyberterrorism Section.³⁹⁸ The Federal Public Ministry contains the Cybercrime Support Group within the Criminal Prosecution Division.³⁹⁹ This

corresponds with the large prevalence of cybercrime in Brazil.⁴⁰⁰

e. Procedural Aspects

Investigation powers; equipment of controlling institutions.

As the ANPD has only just begun with the enforcement of the LGPD, a complete picture of their enforcement activity has yet to emerge.⁴⁰¹ In the time since its establishment, the ANPD has, in accordance with its regulatory agenda,⁴⁰² published two resolutions, one dealing with the investigation and administrative sanctioning procedure,⁴⁰³ the other containing rules for small processing agents,⁴⁰⁴ and three ordinances.⁴⁰⁵ Amongst these, the guidelines on enforcement give a more detailed view⁴⁰⁶ of the ANPD's investigation powers⁴⁰⁷ as well as of responsibilities of the parties that are subject to regulation.⁴⁰⁸

³⁹⁵ This mirrors the fact that the LGPD contains no criminal provisions.

³⁹⁶ Andrey Borges de Mendonça, 'The Criminal Justice System in Brazil: A Brief Account' (2014) <https://www.academia.edu/40023947/The_Criminal_Justice_System_in_Brazil_A_brief_account> accessed 1 April 2022.

³⁹⁷ *ibid.*

³⁹⁸ Estrutura, 'Divisão de Repressão aos Crimes Cibernéticos da Polícia Federal and Setor de Ciberterrorismo' (2020) <<https://www.gov.br/pf/pt-br/acao-informacao/institucional/estrutura/view>> accessed 1 April 2022.

³⁹⁹ Ministério Público Federal. (n.d.), 'Grupo de Apoio sobre Criminalidade Cibernética - GACC' (2021) <<http://www.mpf.mp.br/atuacao-tematica/ccr2/coordenacao/comissoes-e-grupos-de-trabalho/combate-crimes-cirbneticos>> accessed 1 April 2022.

⁴⁰⁰ Kshetri and DeFranco (n 14).

⁴⁰¹ See also *infra* C IV 3 e.

⁴⁰² Presidência de República, 'Agenda Regulatória para o Biênio 2021-2022: PORTARIA Nº 11, DE 27 DE JANEIRO DE 2021 - DOU' (28 January 2021) <<https://www.in.gov.br/en/web/dou/-/portaria-n-11-de-27-de-janeiro-de-2021-301143313>> accessed 1 April 2022

⁴⁰³ Presidência de República, 'Regulamento do Processo de Fiscalização e do Processo Administrativo Sancionador no âmbito da Autoridade Nacional de Proteção de Dados: RESOLUÇÃO CD/ANPD Nº 1, DE 28 DE OUTUBRO DE 2021 - DOU - Imprensa Nacional' (29 October 2021) <<https://www.in.gov.br/en/web/dou/-/resolucao-cd/anpd-n-1-de-28-de-outubro-de-2021-355817513>> accessed 1 April 2022

⁴⁰⁴ Presidência de República, 'Regulamento de aplicação da Lei nº 13.709, de 14 de agosto de 2018, Lei Geral de Proteção de Dados Pessoais (LGPD), para agentes de tratamento de pequeno porte: RESOLUÇÃO CD/ANPD Nº 2, DE 27 DE JANEIRO DE 2022 - DOU - Imprensa Nacional' (28 January 2022) <<https://www.in.gov.br/en/web/dou/-/resolucao-cd/anpd-n-2-de-27-de-janeiro-de-2022-376562019#wrapper>> accessed 1 April 2022

⁴⁰⁵ Autoridade Nacional de Proteção de Dados, 'Publicações da ANPD' (2 March 2022) <<https://www.gov.br/anpd/pt-br/documentos-e-publicacoes>> accessed 1 April 2022

⁴⁰⁶ GRC World Forums, 'Brazil's LGPD Sanctions Regime: A Deep Dive Into the ANPD's New Regulations' (10 November 2021) <<https://www.grcworldforums.com/privsec-latam/brazils-lgpd-sanctions-regime-a-deep-dive-into-the-anpds-new-regulations/3244.article>> accessed 1 April 2022

⁴⁰⁷ Presidência de República (n 403), Articles 15-49

⁴⁰⁸ *ibid.*, Art. 5

However, due to the inter-institutional nature of public-sector data protection enforcement in Brazil, one must not only consider the ANPD, but also the Public Ministries, Public Defenders and consumer protection agencies.⁴⁰⁹ In fact, most action concerning data protection in Brazil has thus far been taken by consumer protection organizations SENACON and PROCON(s) via litigation rather than via the ANPD's administrative sanctioning powers.⁴¹⁰

3. Enforcement

a. Intervention concerning Data Processing

Restriction and prohibition of data processing.

The restriction of and prohibition of data processing as an enforcement act features in Art. 52 LGPD, which lists (in order of increasing severity)⁴¹¹ the administrative sanctions the ANPD can apply versus data processing agents.⁴¹² Of these, items V, X, XI and XII allow the ANPD to intervene concerning the actual handling of the data. Item V allows the ANPD to order “blocking of the personal data to which the infraction refers to until its rectification”, with blocking defined in Art. 5 XIII as temporary suspension of processing. Additionally, the ANPD can order “partial suspension of the operation of the database related to the infraction” (X) and suspension of processing related to the infraction (XI), both for up to six months. The strongest intervention possibility, however, is contained in item XII, which allows for “partial or total prohibition of activities related to data processing”. In consideration of the harsh effect such orders

can have, § 6 requires a prior sanction under items II – VI.

Art. 48 § 2 II LGPD additionally allows the ANPD to order measures to reverse or mitigate effects of security incidents concerning personal data.

While not strictly an intervention, the ANPD can, with respect to public bodies, “issue a statement with applicable measures to stop the violation” in case of a violation of LGPD under Art. 31.

b. Interventions Concerning Business Models

Competition and economic authorities; government monopolies.

LGPD and Brazilian data protection law in general do not highlight regulation of certain business models as a regulatory approach.

A provision that could relate to certain business models can be found in Art. 11 § 3 LGPD, which explicitly allows the ANPD to prohibit or regulate “communication or shared use of sensitive personal data between controllers for the purpose of obtaining an economic advantage”.

However, the Antitrust Law⁴¹³ can be applied to data-driven markets, with a key difficulty in this area being the quantification of market sizes and shares based on data rather than monetary dominance. Effectivity of competition regulation with impact on data protection is still to be seen, hinging on the quality of future cooperation between CADE⁴¹⁴ and the ANPD.⁴¹⁵

⁴⁰⁹ See *supra* the previous section.

⁴¹⁰ Slinn and others (n 393)

⁴¹¹ Cintia Rosa Pereira de Lima, Newton De Lucca, ‘O Brasil está pronto para AS sanções administrativas previstas na LGPD?’ (2021) <<https://www.migalhas.com.br/coluna/migalhas-de-protecao-de-dados/349699/brasil-esta-pronto-para-as-sancoes-administrativas-previstas-na-lgpd>> accessed 1 April 2022.

⁴¹² Discussed *infra* C IV 3 c.

⁴¹³ ‘Law 12.529/2011’ <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/112529.htm> accessed 1 April 2022.

⁴¹⁴ Conselho Administrativo de Defesa Econômica - Português (Brasil) (n 369).

⁴¹⁵ See Diogo R Coutinho and Beatriz Kira, ‘Competition Policy and Personal Data Protection in Brazil: New Challenges and Continuing Concerns’ (2021)

c. Sanctions for Data Processors

Prohibition orders concerning business activities; company sanctions; revenue-based sanctions.

The central LGPD norm listing the administrative sanctions available for ANPD enforcement is Art. 52.⁴¹⁶ The first is a “warning, with an indication of the time period for adopting corrective measures” as the least severe option (item I). The second, listed in item II, is a “simple fine of up to two percent of a private legal entity’s, group or conglomerate revenues in Brazil, from the prior financial year, excluding taxes, up to a total maximum of 50 million reais per infraction”. It should be noted that revenues in Brazil, rather than worldwide revenues, are the basis of the calculation. Additionally, Art. 52 § 4 LGPD allows the ANPD to use the revenue of the entire company or company group as a basis for calculation in case it does not have the information for the specific area of business or in case of missing information. Furthermore, Item III allows for a daily fine rather than a one-time one. § 3 of the article, by listing all other enforcement options, makes clear that fines cannot be applied to public entities. Item IV of Art. 52 LGPD gives the ANPD the option to “name and shame” offenders, allowing “disclosure and publicization of the infraction once it has been duly ascertained and its occurrence has been confirmed”. This is functionally similar to Art. 48 § 2 I LGPD, which, despite not technically a sanction, allows for broad disclosure of security incidents in media. The other

sanctions in item V and items X-XII allow the ANPD to suspend or prohibit certain data processing operations as the harshest option.⁴¹⁷

Art. 52 § 1 LGPD provides guidance for the application of sanctions, listing criteria to be considered in its items I – XI. Of these, the severity of the infraction (I) and proportionality to the severity (XI) are central, but several items are related to the quality of data governance and internal procedures,⁴¹⁸ allowing for mitigative action by the offending party.

Art. 52 § 2 LGPD deals with the relationship to “administrative, civil and criminal sanctions” under the CDC, affirming full applicability of these. As a consequence, processors must also be aware of enforcement under the CDC, especially with regard to collective action.⁴¹⁹ Especially notable in this context is the Brazilian possibility of Public Civil Action,⁴²⁰ whereby certain public authorities, especially the Public Ministries, can sue for damages on behalf of diffuse rights and interests and thus in the public interest,⁴²¹ leading to quasi-sanctions parallel to fines under the LGPD.⁴²²

d. Sanctions for Individual Actors

Directors’ liability; individual criminal sanctions.

Penalties for individual actors are primarily possible in situations where data processing agents are natural persons, a possibility explicitly referenced in Art. 5 VI and VII LGPD.⁴²³ Interestingly though, and in

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3879452> accessed 1 April 2022.

⁴¹⁶ It should be noted in this context that Art. 65 LGPD provides for a delay in applicability of Articles 52 – 54 and thus for the sanctions until August 1, 2021.

⁴¹⁷ See *supra* Section C IV 3 a.

⁴¹⁸ Item VII: „cooperation of the offender”; Item VIII: “repeated and demonstrated adoption of internal mechanisms and procedures capable of minimizing the damage (...)”; Item IX: “adoption of good practices and a governance policy”; Item X: “the prompt adoption of corrective measures”.

⁴¹⁹ See Art. 81 et seq. of the CDC.

⁴²⁰ Portuguese: *Ação Civil Pública*. For a detailed overview of Brazilian collective action, see Gidi (n 132).

⁴²¹ See Art. 81 I CDC for a definition.

⁴²² See for example Rodrigo L Cristiane Manzueto, ‘Primeira Ação Civil Pública com base na LGPD: Sentença com Aplicação Retroativa da Lei’ (2021) <<https://www.tauilchequer.com.br/pt/perspectives-events/publications/2021/03/the-first-public-civil-action-based-on-lgpd-judicial-decision-with-a-retroactive-enforcement-of-the-law>> accessed 1 April 2022.

⁴²³ See previous section C IV 3 c.

contrast to the CDC,⁴²⁴ LGPD does not provide for criminal sanctions regarding individuals. Other criminal provisions related to privacy, personal data and information may however be relevant in certain circumstances.

Art. 932 III Civil Code provides that companies are generally civilly liable for employee misconduct. Company directors may however be liable for damages caused as a result of a violation of data protection regulations, as Art. 158 II of the Stock Corporation Act⁴²⁵ explicitly names violations of laws as a situation where such liability may arise.⁴²⁶ Owners of companies can also be affected, with Art. 28 of the CDC and Art. 50 of the Civil Code allowing for disregard of the corporate veil in situations of abuse.⁴²⁷

e. Procedural Aspects

Priority of data regulation enforcement; equipment of enforcers; shaming impact of breaches.

As the ANPD has only recently been set up and enforcement has formally begun only on August 1, 2021, it is currently difficult to analyze the practical procedures of

enforcement. Furthermore, the financial state of the Brazilian government as a consequence of Covid-19 measures could negatively affect the equipment for enforcement,⁴²⁸ and the ANPD may not be ready for enforcement for quite some time.⁴²⁹ Recent developments, such as swift regulatory action versus WhatsApp⁴³⁰ and the fact that regulation on small enterprises is still in the public consultation stage,⁴³¹ allow for speculation that, for the time being, large, international corporations are being targeted rather than smaller, local companies.

Insights for the future of ANPD regulation can, however, be gained by looking at the regulatory agenda published in early 2021,⁴³² which categorizes future action into three priority phases, with these to be finished by the end of 2021, 2022 and 2023 respectively. Amongst the highest priority are internal regulations, regulations for small businesses and for the application of sanctions – all of which have been implemented by early 2022.⁴³³

⁴²⁴ Art. 61–80 of the CDC.

⁴²⁵ ‘Law 6.404/1976 - Lei das Sociedades Anônimas’ <http://www.planalto.gov.br/ccivil_03/leis/l6404consol.htm> accessed 1 April 2022.

⁴²⁶ To be enforced by the company, see Art. 159 of the Stock Corporation Act.

⁴²⁷ See the overview in American Chamber of Commerce for Brazil, ‘How to understand managers and Investors liability in Brazil’ (2020) <<https://www.amcham.com.br/howtobr/howto-publications/sectorial-information/law/how-to-understand-investors-and-managers-liability-in-brazil>> accessed 1 April 2022.

⁴²⁸ Coutinho and Kira (n 415).

⁴²⁹ See Cintia Rosa Pereira de Lima, Newton De Lucca (n 411).

⁴³⁰ Autoridade Nacional de Proteção de Dados, ‘Após Esforço Interinstitucional, WhatsApp se compromete a atender às recomendações sobre sua política de privacidade’ (2021) <<https://www.gov.br/anpd/pt-br/assuntos/noticias/apos-esforco-interinstitucional-whatsapp-se-compromete-a-atender-as-recomendacoes-sobre-sua-politica-de-privacidade>> accessed 1 April 2022.

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⁴³¹ Autoridade Nacional de Proteção de Dados, ‘ANPD Abre CONSULTA pública E Inscrições PARA Audiência Pública SOBRE norma De APLICAÇÃO da LGPD para microempresas e empresas de pequeno porte’ (2021) <<https://www.gov.br/anpd/pt-br/assuntos/noticias/anpd-abre-consulta-publica-e-inscricoes-para-audiencia-publica-sobre-norma-de-aplicacao-da-lgpd-para-microempresas-e-empresas-de-pequeno-porte>> accessed 1 April 2022.

⁴³² Autoridade Nacional de Proteção de Dados, ‘No Dia DA PROTEÇÃO De dados, Anpd publica AGENDA REGULATÓRIA bianual DA autoridade PARA 2021-2022’ (2021) <<https://www.gov.br/anpd/pt-br/assuntos/noticias/no-dia-da-protecao-de-dados-anpd-publica-agenda-regulatoria-bianual-da-autoridade-para-2021-2022>> accessed 1 April 2022.

⁴³³ Autoridade Nacional de Proteção de Dados (n 405); See also *supra* Section C IV 2 e.

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br/assuntos/noticias/apos-esforco-interinstitucional-whatsapp-se-compromete-a-atender-as-recomendacoes-sobre-sua-politica-de-privacidade> accessed 1 April 2022.

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