

Presidential Provisional Measure No. 869 amends the LGPD: understand the changes

Main Topics	LGPD	Provisional Measure No. 869 (PM)	Our Comments
<b>Academic personal data</b>	The LGPD does not apply to the processing of personal data: (...) b) Academic, in this scenario applying Section 7 and 11 of this Law	The LGPD does not apply to the processing of personal data: (...) b) Academic	This was a contradictory provision that was corrected by the PM.
<b>National Security Databases</b>	Under no circumstances, the entirety of the personal data in a database destined for public safety, national defense, state security or activities related to investigation and suppressing criminal offenses may be processed by a private legal entity.	The provision was revoked by the PM.	The amendment allows private legal entities, controlled by the public administration, to process personal data related to national security matters.
<b>Data Protection Officer</b>	<b>Natural person</b> designated by the controller, who acts as a communication channel between the controller, data subjects and the federal authority.	<b>Person</b> designated by the controller, who acts as a communication channel between the controller, data subjects and the National Data Protection Authority.	The amendment creates a wider scope for the designation of the DPO, which can be a natural person or a legal entity.
<b>Obligation to inform data subjects about processing activities</b>	The controller shall inform data subjects about processing activities based on legal or regulatory obligations or the implementation of public policies	The provision was revoked by the PM.	The controller will no longer have to inform data subjects when processing their personal data to comply with legal or regulatory obligations or to implement public policies.
<b>Sensitive Health Data</b>	The communication or shared use of sensitive health data between controllers with the purposes of obtaining economic advantages is prohibited, except in the case of data portability requested by the data subject.	The communication or shared use of sensitive health data between controllers with the purposes of obtaining economic advantages is prohibited, except for: <ul style="list-style-type: none"> <li>• Data portability requested by the data subject; or</li> <li>• Adequate provision of supplementary health services.</li> </ul>	After much criticism from the health care industry, the PM expands the cases in which controllers can share health data.

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<p><b>Right to have automated decisions reviewed</b></p>	<p>The data subjects have the right to request the revision, <b>by an individual</b>, of automated decisions.</p>	<p>The data subjects have the right to request the revision of automated decisions.</p>	<p>The change no longer requires the review of automated decisions by an individual, so it can be reviewed by automated processes.</p>
<p><b>Transfer of personal data from public to private legal entities</b></p>	<p>Public legal entities shall not transfer personal data to private legal entities, except:</p> <ul style="list-style-type: none"> <li>• In cases of decentralized execution of public activities;</li> <li>• In cases in which the data are publicly accessible.</li> </ul>	<p>Public legal entities shall not transfer personal data to private legal entities, except:</p> <ul style="list-style-type: none"> <li>• In cases of decentralized execution of public activities;</li> <li>• When a data protection officer is designated;</li> <li>• If authorized by law or if the transfer is based on contracts, agreements or similar instruments;</li> <li>• To prevent fraud and irregularities, or to protect and defend the security and integrity of the data subjects; or</li> <li>• In the cases in which data is publicly accessible.</li> </ul>	<p>The PM has softened the previous restrictions for transferring data from public to private entities.</p>
<p><b>Obligation to inform the National Data Protection Authority about the transfer of personal data from public to private legal entities</b></p>	<p>The communication or shared use of personal data from a public legal entity to a private legal entity shall be reported to the National Data Protection Authority and it shall depend on the data subject's consent.</p>	<p>The communication or shared use of personal data from a public legal entity to a private legal entity shall depend on the data subject's consent, except if consent is not required by law.</p>	<p>The provision eliminates the obligation to communicate the National Data Protection Authority when transferring personal data from a public legal entity to a private legal entity.</p>
<p><b>Request of information by the National Data Protection Authority from public entities</b></p>	<p>The federal authority may request, at any time, from public legal entities, specific information on the scope and nature of the data, and other details regarding the processing activity performed, and may issue complementary technical opinions for ensuring compliance with this Law.</p>	<p>The National Data Protection Authority may request, at any time, from public bodies and legal entities, specific information on the scope and nature of the data and other details regarding the processing activity performed and may issue complementary technical opinions for ensuring compliance with this Law.</p>	<p>The amendment creates a wider scope for the application of the law, allowing the National Data Protection Authority to request information from bodies and entities of the public administration.</p>

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<p><b>Creation of the National Data Protection Authority</b></p>	<p>The President due to nonconformity with the legislative process vetoed the creation of the ANPD.</p>	<p>The President enacted the PM and created the National Data Protection Authority ("ANPD").</p>	<p>According to the PM, the ANPD will be an administrative body, connected to the Cabinet of the Presidency.</p>
<p><b>ANPD Autonomy</b></p>		<p>The ANPD shall have technical autonomy.</p>	<p>According to the PM, ANPD will have technical autonomy, but no financial and budgetary autonomy what could jeopardize its independence.</p>
<p><b>ANPD Composition</b></p>		<p>The ANPD is composed by:</p> <ul style="list-style-type: none"> <li>• Board of Directors, the highest management body;</li> <li>• The National Council for Personal Data Protection and Privacy;</li> <li>• Internal Affairs Office;</li> <li>• Ombudsman;</li> <li>• Its own legal department;</li> <li>• Administrative Departments and Specialized Departments for applying the provisions of the LGPD.</li> </ul>	

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<p><b>ANPD Responsibilities</b></p>		<p>The ANPD is responsible for:</p> <ul style="list-style-type: none"> <li>• The protection of personal data;</li> <li>• issuing rules and proceedings;</li> <li>• deliberating, at administrative level, on the interpretation of the Law;</li> <li>• requesting information, at any time, from controllers and processors;</li> <li>• implementing simplified mechanisms, including by electronic means, for receiving and recording complaints;</li> <li>• inspecting and imposing sanctions in the case of noncompliant data processing, through an administrative proceeding;</li> <li>• communicating to the relevant authorities the criminal violations it becomes aware of;</li> <li>• communicating to the internal control departments the noncompliance with the provisions of the Law practiced by bodies or entities of the federal public administration;</li> <li>• spreading in the society the knowledge on the rules and the public policies;</li> <li>• encouraging the adoption of standards for services and products that facilitate data subjects' control over and protection of their personal data;</li> <li>• preparing studies on the domestic and international practices;</li> <li>• promoting actions for cooperation with data protection authorities from other countries;</li> <li>• undertaking public consultations for proposed regulations;</li> <li>• Scheduling hearings for public entities or departments for regulating specific areas of the economic activity, prior to enacting regulations; and</li> <li>• preparing annual management reports on its activities</li> </ul>	<p>The responsibilities are very similar to the responsibilities of the European DPAs</p>
<p><b>The Board of Directors</b></p>		<p>Five directors, including the President Director, with four-year terms, compose the Board of Directors of ANPD.</p>	<p>The members of the Board of Directors will be chosen among Brazilians, with untainted reputation, with higher-level education and high renown in the data protection and privacy field.</p>

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<p><b>The National Council for Personal Data Protection and Privacy Representatives</b></p>		<p>The 23 members of National Council for Data Protection and Privacy will be appointed by the President and will include: six members from the executive branch; one from the Senate; one from the House of Representatives; one from the National Council of Justice; one from the National Council of the Public Prosecutors Office; one from the Brazilian Internet Steering Committee; four from public organizations acting in the data protection field; four from scientific, technological or innovation institutions; and four representatives from the private sector acting in the data protection field.</p>	<p>The participation in the National Council for Data Protection and Privacy is not subject to compensation.</p>
<p><b>The National Council for Personal Data Protection and Privacy Responsibilities</b></p>		<p>The National Council for Personal Data Protection and Privacy is responsible for:</p> <ul style="list-style-type: none"> <li>• proposing strategic guidelines and providing subsidies for the preparation of a Brazilian Policy for Personal Data Protection and Privacy and for the activities of the ANPD;</li> <li>• preparing annual evaluation reports;</li> <li>• suggesting actions to be carried out by the ANPD;</li> <li>• preparing studies and carrying out debates and public hearings on the protection of personal data and privacy;</li> <li>• spreading the knowledge on the protection of personal data and privacy to the population in general.</li> </ul>	<p>As to the responsibilities of the Council, we highlight the following:</p> <ul style="list-style-type: none"> <li>• To propose strategic guidelines for government policies related to personal data and privacy;</li> <li>• To carry out public debates and hearings on the matter.</li> </ul>
<p><b>Administrative Sanctions</b></p>		<p>The application of the LGPD sanctions is the exclusive responsibility of the ANPD, whose jurisdiction will prevail, as regards the protection of personal data, over the correlated jurisdiction of other public entities or bodies. The ANPD will coordinate its activities with the National Body of Consumer Protection of the Ministry of Justice, and with other bodies and entities with punishing and normative jurisdictions related to the matter.</p>	<p>The PM clarifies that the ANPD and no other government authority shall have jurisdiction to enforce the LGPD, which is essential to avoid different interpretations of the law.</p>
<p><b>Adaptation Period</b></p>	<p>The LGPD established an eighteen-month adaption period (February 2020).</p>	<p>The PM extends the adaption period to August 2020.</p>	<p>This additional 6-month period is very important as the lack of the ANPD in the previously approved law impaired many important developments and further regulation of this matter.</p>

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<p><b>Congressional Process</b></p>		<p>The PM was published on December 28, 2018.</p>	<p>The PM is already in effect and will remain effective for 120 days from its publication by which time, Congress must convert it into law or the PM will lose its validity.</p>

## Our partners



**Fabio Kujawski**  
 kujawski@mattosfilho.com.br  
 Tel.: +55 11 3147 2795  
 São Paulo



**Paulo Marcos Rodrigues Brancher**  
 pbrancher@mattosfilho.com.br  
 Tel.: +55 11 3147 4684  
 São Paulo



**Thiago Luís Sombra**  
 thiago.sombra@mattosfilho.com.br  
 Tel.: +55 61 3218 6010  
 Brasília