

# **BRAZILIAN INSTITUTE OF CONSUMER DEFENSE**

## **TECHNICAL NOTE ON APPROVAL OF THE PERSONAL DATA PROTECTION LAW IN THE BRAZILIAN CHAMBER OF DEPUTIES ON MAY 29, 2018**

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The **Brazilian Institute of Consumer Defense** is a consumer association founded in 1987. It is not for profit. It is independent of companies, governments or political parties. The financial resources for the development of its activities have their origin in the contributions given by its members. Idec also develops projects that receive funding from public bodies and independent foundations, such as the Ford Foundation and the Open Society Foundations. Such support does not compromise the independence of the Institute. Idec is a full member of Consumers International and is part of the National Forum of Civil Entities for Consumer Protection and the Brazilian Association of Non-Governmental Organizations. In 2016, the Institute became a member of the Civil Society Information Society Advisory Council (CSISAC), which represents civil society before the Organization for Economic Cooperation and Development's (OECD) Digital Economy Policy Committee. Idec is also a founding member of the Coalition "Direitos na Rede" in Brazil.

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## Introduction

Discussions surrounding a Personal Data Protection Act in Brazil came to an end in the House of Representatives on May 29th. In a consensus agreement, the Plenary approved the Draft Bill 4060/2012 in the form advanced by Representative Orlando Silva (PCdoB/SP).<sup>1</sup>

The final version of the draft bill is the result of two years of work by the Special Commission for the Treatment and Protection of Personal Data,<sup>2</sup> and was formed by merging two bills: PL 4060/12,<sup>3</sup> by Milton Monti (PR / SP), and the PL 5276/16,<sup>4</sup> authored by former President Dilma Rousseff.

The Special Commission had held eleven (11) public hearings since it was created in August 2016.<sup>5</sup> In October 2016, the work began after Rodrigo Maia, the President of the House of Representatives, appointed members to form the Commission.<sup>6</sup>

The Brazilian Institute of Consumer Protection (Idec)<sup>7</sup> participated in four (4) public hearings of the Special Commission: in December 2016 (on citizens' rights and the functioning of the data protection authority), May 2017 (on objective and joint liability in cases of damages),

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<sup>1</sup> Câmara dos Deputados, “Câmara aprova projeto que disciplina tratamento de dados pessoais”, May 29h, 2018: <http://www2.camara.leg.br/camaranoticias/noticias/POLITICA/558252-CAMARA-APROVA-PROJETO-QUE-DISCIPLINA-TRATAMENTO-DE-DADOS-PESSOAIS.html>

<sup>2</sup> See <http://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-temporarias/especiais/55a-legislatura/pl-4060-12-tratamento-e-protecao-de-dados-pessoais/conheca-a-comissao/membros-da-comissao>

<sup>3</sup> See <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=548066>

<sup>4</sup> See <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2084378>

<sup>5</sup> For a full list of the public hearings conducted by the Commission, see <http://www.camara.leg.br/internet/comissoes/comissoes-especiais/historico/55/pl406012.pdf>

<sup>6</sup> See <http://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-temporarias/especiais/55a-legislatura/pl-4060-12-tratamento-e-protecao-de-dados-pessoais/conheca-a-comissao/criacao-e-constituicao/ato-de-constituicao>

<sup>7</sup> Idec is a non-profit organization created in 1987 in Brazil. The NGO has a program on digital rights for the past eight years and has conducted campaigns on personal data protection. See <https://idec.org.br/dadospessoais>

May 2017 (on data protection in comparative perspective), and May 2018 (on regulatory models for the protection of personal data).

Over the last few months, Idec has worked with entities from the Coalition Rights in the Network<sup>8</sup> to send contributions to the final version of the bill prepared by rapporteur Orlando Silva (PCdoB/SP). In April, the Institute defended prioritizing the personal data law over the vote on the reform of the “Positive Registry” (Credit Reporting Act). According to researchers from Idec, “with strong legislation on personal data and enforceable standards by a different authority than the Central Bank, the positive registry would generate fewer collective risks in its attempt to democratize finances”<sup>9</sup>.

The approval of the Personal Data Law in the House of Representatives is an advance in the control of collective risks and gets closer to the system adopted in the European Union, especially with the enforcement of the “General Data Protection Regulation” (GDPR).<sup>10</sup> After the “Facebook scandal”<sup>11</sup>, in March 2018, public awareness about the need for basic rights and greater control over how personal data are used and shared with third parties has increased in Brazil.<sup>12</sup>

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<sup>8</sup> The Coalition “Direitos na Rede” is a network of more than 20 non-governmental organizations, think tanks and research centers that work in the field of digital rights and Internet access. It was created in June 2016. See <http://direitosnarede.org.br/>

<sup>9</sup> Rafael Zanatta & Teresa Liporace, “O que há de errado com o novo cadastro?”, *Folha de São Paulo*, Tendências e Debates, April 25 2018: <https://www1.folha.uol.com.br/opiniao/2018/04/rafael-zanatta-e-teresa-liporace-o-que-ha-de-errado-com-o-novo-cadastro.shtml?loggedpaywall>

<sup>10</sup> See [https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-does-general-data-protection-regulation-gdpr-govern\\_pt](https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-does-general-data-protection-regulation-gdpr-govern_pt)

<sup>11</sup> For the repercussion in Brazil, see <https://oglobo.globo.com/economia/defesa-do-consumidor/falta-de-lei-de-protecao-de-dados-deixa-brasileiro-mais-exposto-vazamentos-como-do-facebook-diz-especialista-22509331>

<sup>12</sup> Jonas Valente, “Proteção de dados ganha importância na política e economia no Brasil”, Agência Brasil, May 07 2018: <http://agenciabrasil.ebc.com.br/economia/noticia/2018-05/protecao-de-dados-ganha-importancia-na-politica-e-economia-no-brasil>

# 1. What did Idec stand for and what was approved?

Since 2011, Idec has been fighting for approval of a General Data Protection Law in Brazil.<sup>13</sup>

The Institute produced research materials,<sup>14</sup> events,<sup>15</sup> workshops,<sup>16</sup> and position papers for the Congress.<sup>17</sup>

In August 2017, Idec presented at the Seminar of Personal Data Protection of the Internet Steering Committee,<sup>18</sup> **thirteen (13) fundamental points** of a legislation geared to citizens. We analyze in this text how the Personal Data Law passed in the House of Representatives is adequate to these demands.

**(i) concept of personal data should be expansive:** the bill approved by the Board affirms that personal data is any "information related to the natural person identified or identifiable" (article 5, I). This concept allows metadata (device usage data), geolocation, IP address, and other information to be considered as personal data.

**(ii) special protection for sensitive data, including health data, genetic and biometric information:** one of the recent disputes was the inclusion of biometric data as sensitive data. In the text approved in the Chamber, sensitive data includes genetic and biometric data (article 5, II). There is also special protection for information of racial origin, religious beliefs, union membership or political affiliation, and sexual life.

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<sup>13</sup> See [https://www.idec.org.br/email\\_mkt/escandalo-facebook/escandalo-facebook.html](https://www.idec.org.br/email_mkt/escandalo-facebook/escandalo-facebook.html)

<sup>14</sup> Rafael Zanatta, Personal Data Protection and International Data Flows: the case of Brazil, in: UNCTAD, *Data Protection Regulations and International Data Flows*, Geneva, 2016, p. 96-99: [http://unctad.org/en/PublicationsLibrary/dtIstict2016d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/dtIstict2016d1_en.pdf)

<sup>15</sup> See <https://idec.org.br/noticia/protecao-de-dados-pessoais-e-tema-de-seminario-na-usp>

<sup>16</sup> See <https://www.youtube.com/watch?v=PMm8xe3c9t0>

<sup>17</sup> See [https://idec.org.br/ckfinder/userfiles/files/Posic\\_a\\_o%20do%20Idec\\_Dezembro%20de%202016.pdf](https://idec.org.br/ckfinder/userfiles/files/Posic_a_o%20do%20Idec_Dezembro%20de%202016.pdf)

<sup>18</sup> Idec, "Seus dados são você: campanha alerta sobre uso de informações pessoais", *NIC.br*, September 20 2017: <https://www.nic.br/noticia/na-midia/seus-dados-sao-voce-campanha-alerta-sobre-uso-de-informacoes-pessoais/>

**(iii) if anonymised data can be reversed with reasonable technical efforts, they should be considered as personal data:** "anonymised data" are those in which a holder (a person) is no longer identified through technical processes. Article 12 of the draft bill states that anonymised data will be considered personal data if the anonymisation efforts can be reversed "with reasonable efforts."

**(vi) data used for "profiling" deserve special protection to curb discriminatory practices:** the House of Representatives' Draft Bill states in art. 12, §2, that "those used to form the behavioral profile of a particular natural person, if identified, may also be considered as personal data". The Bill also provides, in art. 20, that the data holder has the right to request the review of decisions "taken solely on the basis of automated processing of personal data affecting his interests". If the person is unable to analyze the automated decision-making procedures due to industrial secrecy, the data protection authority "may perform an audit to verify discriminatory aspects in the automated processing of personal data" (article 20, § 2).

**(v) the law should have as its basis "unequivocal consent" and "self-determination regarding information":** The bill states in its art. 2º that the protection of personal data is based on self-determination regarding personal information (the right of people to know and control the flow of the information they generate). According to art. 5, the consent must be free, informed and unequivocal.

**(vi) generic authorization for collection of personal data should be prohibited and a clear explanation of the purpose of collection, treatment and transmission mandatory:** the article 6 of the bill creates a set of principles for data processing, including "the principle of purpose"(Article 6, I), which states that the use of personal data must have "legitimate,

specific, explicit and informed purposes to the data holder." General terms of use are also barred by the "principle of necessity and minimization" (Article 6, III), which states that treatment "must be limited to the minimum necessary for the fulfillment of its purposes, including relevant, proportional and not excessive data." In addition, the law affirms that "generic authorisations for the processing of personal data" (article 8, paragraph 4) are null and void.

**(vii) the personal data protection authority must have a technical character and the capacity to monitor the practices of public administration and the private sector:** the law approved in the Chamber establishes an independent National Data Protection Authority linked to the Ministry of Justice (article 55). It is characterized by "administrative independence, absence of hierarchical subordination, fixed mandate and stability of its members and financial autonomy" (article 55, § 3). The Authority will be managed by a three-member Board of Directors (article 55, § 2) and appointed by decree. Under the Board of Directors, the Authority shall have the National Council for the Protection of Personal Data (article 58), composed of 23 representatives, in accordance with the Model of the Internet Manager. The project establishes the participation of four members from scientific and technological institutions (article 58, VIII) and four members from civil society "with proven expertise in personal data protection" (article 58, II).

**(viii) in case of data collection without consent (for legitimate interest), the authority should have the power to require an impact assessment on the protection of personal data:** the text approved in the Chamber defines "data protection impact assessment" (DPIA) as the "documentation of the responsible describing the methods used to process personal data that may create risks to

civil liberties and fundamental rights, as well as measures, safeguards and risk mitigation mechanisms" (article 5, XVII ). Article 10 establishes that the competent body may request an impact assessment when the "treatment is based on its legitimate interest" (article 10, paragraph 3). In Article 38, this power of the competent body is reaffirmed, even in cases of sensitive data collection. The text determines that the report should contain, at a minimum, a description of the types of data collected , the methodology used for collection and to ensure the security of the information, as well as analysis of the measures, safeguards and mitigation mechanisms adopted by the person responsible (Article 38, sole paragraph).

***(ix) the collection and processing of personal data must comply with the principle of minimization:***

the "minimization principle" has been added to the "necessity principle." Companies need to collect as little data as possible and terms of use with generic permissions are not allowed.

***(x) citizens have basic rights to access, rectify or revoke consent free of charge and to obtain the***

***portability of their personal data:*** Article 18 establishes the basic rights of holders of personal data, including the rights to access the data, correct the data , eliminate the data and take the data elsewhere (portability), "upon express request and complying with commercial and industrial secrets, in accordance with the implementing regulation" (article 18, IV). The issue of how portability will be performed will be discussed when the implementing regulation is developed by the Personal Data Protection Authority.

***(xi) civil liability for damages to data holders in the processing of their data should be strict, joint***

***and several:*** this is one of the most controversial points of the discussion. The solution in the House of Representatives draft bill is the creation of a refined regulation, distinguishing cases in which there is a consumer relationship (e.g., use of an application by a consumer) and cases



in which there is no such relationship (example: use of data between companies). The project establishes two legal figures: the "data controller" (the entity that collects data and supervises it) and the "operator" ( an entity hired to perform a task). The bill provides that, in order to ensure effective compensation to the data holder, the operator is a joint and several guarantor for damages caused by the treatment of data when he "fails to comply with the obligations of the data legislation" or "does not follow the lawful instructions of the data controller" ( article 42, I) . The bill provides for exclusions of liability in art. 43 (example: damage that is solely the fault of the data holder). The processing of data is also considered irregular when "it does not provide the safety that the holder would expect" (article 44). Finally, art. 45 provides that when there is a consumer relationship, the hypothesis of violation "remain subject to the rules of liability" provided in the Consumer Defense Code. In this case, the liability is strict, as advocated by Idec.

***(xii) the industry should implement privacy processes by default in the design phase of technology for collecting and processing personal data:*** although there is no specific rule on "privacy by design," the bill mentions the "principle of prevention" in art. 6 and encourages the private sector to develop best practices for the protection of personal data. In addition to the determination of a responsible data controller (article 41), there is a chapter on security and good practices that requires agents to adopt "technical and administrative security measures, capable of protecting personal data" (Article 46), with a focus on security and data confidentiality.

***(xiii) "data protection impact assessment" should be mandatory when data processing is likely to result in a high risk to citizens, based on objective criteria defined by the data protection authority:***

this last issue was not considered in the regulation. The bill approved in the Chamber provides for impact reports on the protection of personal data and empowers the data protection authority to require them, but does not determine objective cases where they are mandatory, as in the case of Europe's General Data Protection Regulation (e.g., data collection in open geographic areas or creation of behavioral profiles with sensitive data).

## 2. Final evaluation: a strong law that deserves approval

As seen, of the thirteen fundamental points defended by Idec and the Coalition Rights in the Network, the project in the Chamber contemplates twelve of them. It is a very robust bill from the perspective of guaranteeing basic rights to citizens and the adaptation of the Brazilian legal system to a modern data economy capable of allying legal security and guaranteeing fundamental rights.

The fact that the sponsor of the bill mentioned the role of civil society, academics and companies in constructing the final version of the law also strengthens the view that the creation of these rules followed a multistakeholder approach,<sup>19</sup> as required by the Brazilian Civil Rights Framework for the Internet (Law 12.965/14).<sup>20</sup> With the approval of the personal data law, Brazil can complete the “regulatory tripod” for online citizenship: the Brazilian

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<sup>19</sup> On the role of the Brazilian Internet Steering Committee (CGI) in advancing the multistakeholder approach, see Kimberly Anastácio, *Brazil's approach to multistakeholderism: multi-participation in the Brazilian Internet Steering Committee*, Berkman Center for Internet & Society at Harvard University, 2017. Available at: [https://cyber.harvard.edu/sites/cyber.harvard.edu/files/Publish\\_Kimberly%20Anastacio.pdf](https://cyber.harvard.edu/sites/cyber.harvard.edu/files/Publish_Kimberly%20Anastacio.pdf)

<sup>20</sup> Carolina Rossini, Francisco Brito Cruz & Danilo Doneda, *The Strengths and Weaknesses of the Brazilian Internet Bill of Rights: Examining a Human Rights Framework for the Internet*, Global Commission on Internet Governance, Paper Series n. 19, September 2015. Available at: [https://www.cigionline.org/sites/default/files/no19\\_0.pdf](https://www.cigionline.org/sites/default/files/no19_0.pdf)

Freedom of Information Act, the Brazilian Civil Rights Framework and the General Law for the Protection of Personal Data.

The solution to all problems is not on this tripod, but the affirmation of those rights is an important step in balancing our drive for innovation and the guarantee of fundamental rights. After all, as we assert in the Institute, our data is not just merchandise.<sup>21</sup> It is time to think about these rights in a collective way, to guarantee the autonomy of individuals and to avoid discriminatory aspects in a society that is increasingly dependent on computers, algorithms and databases.

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<sup>21</sup> See Idec's campaign "Smile, you're being tracked": <https://www.idec.org.br/vocerastrado/>

# A short timeline of debates on Personal Data Protection Regulation in Brazil



**NOVEMBER 2010**

Opening of the first public consultation promoted by the Brazilian Ministry of Justice on personal data protection regulation.

**JUNE 2012**

Proposition of the first Brazilian bill on data protection, in the Chamber of Deputies (PL4060/2012)

**JUNE 2013**

The Guardian publishes for the first time the content of leaked documents by Edward Snowden, which influences the national debate on cybersecurity.

**AUGUST 2013**

A second bill on data protection is presented in the Senate (PLS330/2013).

**APRIL 2014**

Approval of the Brazilian Civil Rights Framework for the Internet ("Marco Civil").

**JANUARY 2015**

Opening of the 2nd public consultation personal data protection regulation, based on draft bill presented by the Ministry of Justice.

**MAY 2016**

The bill resulting from the public consultation process of the Ministry of Justice is presented to the Chamber of Deputies (PL 5276/2016).

**JULY 2016**

PL 5276/2016 is merged to PL 4060/2012 - which means both begin to be processed together.

**OCTOBER 2016**

The Chamber of Deputies creates Special Commission to discuss the bills 4060/2012 and 5276/2016. Mr Orlando Silva (PCdoB / SP) is the rapporteur.

**MARCH 2018**

The executive power begins to negotiate the text of the Senate draft bill.

**APRIL 2018**

A series of meetings begins to take place in the Chamber of Deputies to negotiate the final text of the bill. Meanwhile, the senate proposes text considering interests of the chief of staff office.

**MAY 21 TO MAY 25, 2018**

Deputy Orlando Silva presents the final version of the draft bill and forwards it to the plenary. The same thing happens with the Senate's draft bill. Both begin to process under an emergency regime.

**MAY 29, 2018**

Draft bill 4060/2012 is approved by the Chamber of Deputies.