



LGPD AND ITS EXTRATERRITORIAL APPLICABILITY – Case analysis from the perspective of FacilitaPay as an international payment facilitator.

Written by FacilitaPay's Legal Team. May 2023.

PREAMBLE

As of August 2021, Brazil's General Data Protection Law, the LGPD applies to entities around the world, not just in Brazil.

This is since regardless of size, turnover or sector, a person or entity must comply to the LGPD if it performs:

- Processing of personal data in Brazil, or
- Processing of personal data of persons located in Brazil, or
- Or offers goods or services to Brazilian consumers.

Considering this, FacilitaPay has prepared this text to help your company understand the commercial and legal impact of being under this very important Law.

INTRODUCTION – REASONS FOR APPLICABILITY

At the outset, let's dive into the reasons why this legislation is applicable to operations in Brazil, even if you are physically situated outside and not registered within such jurisdiction.

For all purposes, personal data is considered to be collected in the national territory if the data subject is in the national territory at the time of collection, excluding from the scope of the standard the processing of personal data coming from outside the national territory, which are not subject to communication, shared use of data with Brazilian processing agents or subject to international data transfer with a country other than the country of origin, on condition that the country of origin provides a degree of protection of personal data adequate to that provided by the Brazilian law.

The reason for the application of the LGPD beyond the limits of the Brazilian territory lies in the international and globalized character that the transfer of data has, being strongly linked to the fulfilment of international services.

The nonexistent physical barriers for e-commerce and the decentralized structure of the Internet generates an infinite amount of information crossings between several jurisdictions in a matter of moments, and there is no way to demand the real protection of this data except with the provision of extraterritoriality.

It is the application of the rule beyond the Brazilian territorial limits that will prevent the violations to data of any person located in Brazil, and therein lies the sustaining the power of access and control of the information conferred.

SO, WHAT ARE THE APPLICABLE RULES FOR INTERNATIONAL DATA TRANSFER BY THE LGPD?

Since the LGPD provides a relatively strong set of protections for individuals' personal data, it prohibits organizations from transferring personal data to third parties outside of Brazil unless presented the appropriate safeguards.

There are nine hypotheses by which you may transfer personal data to third parties outside Brazil:

1. When the third party is located in a country that is considered to have adequate standards of data protection comparable to those provided for in the LGPD;
2. When compliance with the data processing principles and Data Subject rights of the LGPD is ensured, in the form of:
 - a) Specific contractual clauses for data transfer
 - b) Standard contractual clauses
 - c) Global corporate rules within a corporate group
 - d) A certificate or code of conduct
3. When the transfer is necessary for legal cooperation.

4. When the transfer is necessary to protect the life or someone's physical safety;
5. When the transfer has been authorized by the National Data Protection Authority;
6. When the transfer results in a commitment made through international cooperation;
7. When the transfer is necessary for the execution of a public order;
8. If the person has been informed of the international nature of the transfer and has given his or her consent;
9. When the transfer is necessary to satisfy the requirements of a "legal obligation", "contract" or "legal rights" requirements for the processing.

AND WHICH GOVERNMENT AGENCY IS RESPONSIBLE FOR CONTROLLING ADMINISTRATIVE PRINCIPLES OF THE LGPD?

The National Agency for Data Protection (ANPD) is the competent government agency that aims to ensure compliance with the regulations related to Data Protection, in addition to being responsible for oversight, this body also applies fines and sanctions coming from the violation of this law.

It has the main objectives of ensuring, implementing and supervising compliance with the LGPD.

SANCTIONS

Failure to comply with the rules of the LGPD can lead to serious consequences, which include the suspension and/or deletion of the data processed and significant fines.

It is important to point that the sanctions are applied according to the specific case, always observing all the peculiarities of the incident, together with the severity, the nature of the data that was affected, the good faith of the offender, considering also the advantages that were earned by them, in addition to their economic condition and factors such as recidivism, the degree of damage, cooperation and last but not least, the adoption of protection measures and mechanisms that demonstrate the offender's concern to mitigate the damage and data protection.

The administrative sanctions provided for by the law are in article 52 of the LGPD, which are:

A warning, with indication of the deadline for adoption corrective measures;

Fines, of up to 2% (two percent) of the turnover of the private legal entity, group or conglomerate in Brazil in its last fiscal year, excluding taxes, limited, in total, to R\$ 50,000,000.00 (fifty million reais) per violation;

Daily fine, observed the total limit above;

Publication of the infraction after it has been duly ascertained and confirmed;

Blocking of the personal data to which the infringement refers until its regularization;

Deletion of the personal data to which the infringement refers;

Partial suspension of the operation of the database to which the infringement refers for a maximum period of 6 (six) months, extendable for an equal period, until the regularization of the processing activity by the controller;

Suspension of the exercise of the processing activity of the personal data to which the infraction refers for a maximum period of 6 (six) months, extendable for an equal period;

Partial or total prohibition of activities related to data processing.

TREATMENT AGENTS

The main agents of the LGPD of Brazil are categorized as the "controller" and the "processor".

A "controller" is a public or private entity that "has the competence to make decisions regarding the processing of personal data". When a company collects email addresses for members of its mailing list, it is the controller of that personal data.



A "processor" is a public or private entity that "processes personal data on behalf of the controller."

In the case of relationships in which FacilitaPay acts as a Fintech Service Provider, it qualifies as a processor, acting in a Brazilian jurisdiction complying with the demand for *cross-border* facilitation of payments from the entities it represents locally, notwithstanding the exchange closing and remittance occurring through partner banking institutions.

Both agents have responsibility for any harmful incident that may occur in the data processing. However, this responsibility is measured according to the attributions of each agent, which leads us to seek to be increasingly prepared to deal with any situation, refining daily our data processing policies, which leads us to the question:

WHAT DOES FACILITAPAY DO TO ENSURE AND PRESERVE COMPLIANCE WITH THE LEGISLATION BY YOU AND YOUR CUSTOMERS AND EMPLOYEES?

FacilitaPay builds its internal and external relations from the perspective of privacy by *design*, modulating its projects primarily by the concepts of data privacy, and mitigating any hypotheses in which the data may be exposed, or accessed without permission.

Our contracts contain specific clauses that address the theme of the principles and requirements of the LGPD, in addition to our *on-boarding* having an exclusive stage dedicated to the collection of consent and manifestation of our clients to the requirements of the legislation, authorizing us to operate the treatment within the limits of our contractual functions.

Our internal operations constantly preserve the suitability and administration of data from both customers and end users, including CPFs, CNPJs and other identifiers obtained in the exchange's operations, payment, and usual remittances, always in a way that respects, in a rigid way, the purpose proposed at the time of collection.



The life cycle of the data is always observed, and after its purpose is discarded as described in the contract, preserving its confidentiality.

Therefore, FacilitaPay's in-house legal department wholeheartedly tackles this basal legislation, and is always available to answer any questions from our customers, employees, and associates.