

FCR Law

Fleury, Coimbra
& Rhomberg Advogados

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Data Protection in Brazil

Main Aspects and Latest Developments

September | 2020

Philippe Jeffrey

Bio



Philippe Jeffrey is the Head of the Canadian Desk at FCR Law and advises Canadian companies doing business in Brazil in several topics of Brazilian tax and corporate legislation. Philippe is an international tax advisor originally from Quebec and former PwC Brazil Tax Partner. He has 20 years of combined tax and management experience in assisting foreign and Brazilian multinational companies with their domestic and cross border transactions in Brazil, Latin America, Europe and set-up of international tax structure (financing, IP, trading, holding).

In addition, Philippe has extensive experience with domestic transactions in Brazil, tax due diligence reviews, as well as tax compliance reviews, transfer pricing and local trade and customs issues.

Qualifications and memberships

- ✓ Law degree from the University of Ottawa (Canada)
- ✓ Completed the Master's Program in Tax at the University of Sherbrooke (Canada)
- ✓ Member of the Quebec Bar Association

Languages

- ✓ French
- ✓ English
- ✓ Portuguese

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 **Philippe Jeffrey**

Introduction

Our Firm

✓ **Team: 40 Lawyers**

✓ **Main Practice Areas:** FCR Law / Corporate Law and Contracts 
FCR Law / Tax 
FCR Law / Labor 

✓ **International Expertise:**

FCR Law / Canadian Desk – Philippe Jeffrey

FCR Law / US' Taxation Expertise – Eduardo Fleury

FCR Law / German Desk – Marcelo Coimbra and Lukas Rhomberg

FCR Law / Language Fluency: English, German, French, Spanish and Portuguese

✓ International Recognition:



Fleury, Coimbra & Rhomberg Advogados has experience dealing with inbound and outbound transactions for clients with multi-jurisdictional enterprises. Tax litigation is also a strength. **Eduardo Fleury** and **Philippe Jeffrey** are recommended.



Client feedback:

“Excellent work. **FCR Law** has an in-house lawyer familiar with our jurisdiction’s tax structures. This particular expertise facilitated the entire planning process.”

Renata Armonia

Bio



Renata Armonia is a partner at FCR Law and has broad experience in matters involving contracts, corporate and labor law. She has participated as an advisor in many M&A transactions supporting clients in corporate restructuring, cross-border mergers and acquisitions, inbound and outbound investments and other ventures involving national and international companies. Renata provides legal assistance to multinational and local companies with a particular emphasis on drafting and negotiating contracts, including infrastructure projects. She is specialized in advanced corporate matters, involving shareholders agreements negotiation and disputes.

Qualifications and memberships

- ✓ Law degree from the Pontifícia Universidade Católica- SP
- ✓ Master program in Corporate law – Fundação Getúlio Vargas
- ✓ Master program in Civil Procedures Law, Corporate Law and M&A and Specialist in Intellectual Property and Data Protection - IICS

Languages

- ✓ English
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 [Renata Armonia](#)

Bruno Guilhem

Bio



Bruno Guilhem is Head of Innovation, Startups & PMEs at FCR Law. His expertise comprises tax, corporate and contracts aspects linked to the legal framework applicable to innovative business in Brazil.

Bruno also advises companies and startups on topics related to personal data protection, specifically on the fundamentals of the new legislation and compliance measures to be implemented.

Qualifications and memberships

- ✓ Law Degree from the University Mackenzie and International Relations Degree from University of São Paulo (USP)
- ✓ Specialist in Law applied to Startups (INSPER)
- ✓ MBA Tax Management (FIPECAFI)
- ✓ Pos-graduate Diploma in Business (FGV)

Languages

- ✓ English
- ✓ German
- ✓ Portuguese

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 Bruno Guilhem

Natália Dantas

Bio



Natália Dantas is an associate at FCR Law. Her practise is focused on corporate and business law, with an emphasis on the drafting and negotiation of national and international contracts, company acquisition operations (M&A) and due diligence, and corporate reorganization. She is also specialized in Data Protection Law and has supported clients in understanding and applying the new legislation.

Qualification and memberships

- ✓ Bachelor of Laws from the Pontifícia Universidade Católica of Minas Gerais (PUC/MG);
- ✓ Postgraduate lato sensu in Civil Procedural Law - PUC/MG;
- ✓ Postgraduate lato sensu in LL.C of Business Law from Insper; and
- ✓ Postgraduate lato sensu in LLM of Corporate Law from Insper.

Languages

- ✓ English
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 **Natália Dantas**

Brazilian General Data Protection Law (LGPD) **Main Aspects**

LGPD

Overview

FCR Law /

LGPD

1) Objective: to protect fundamental privacy rights of individuals and to assure the protection of personal data.

2) Scope: individual and companies engaged in processing personal data in Brazil or in processing personal data with the purpose of offering goods/services to individuals in Brazil.

5) Processing authorization: only in cases expressly allowed by LGPD.

4) Personal Data Processing: any activity involving personal data.

3) Principles: transparency, security, adequation, relevance, necessity, access, data quality, precaution, non-discrimination and accountability.

6) Supervision: Data Protection National Agency - **ANPD**.

7) Data Subject Rights: access, rectification, exclusion, portability, etc.

8) Data Controller and Processor responsibilities: keep records, protection, DPO - Data Protection Officer, losses and damages.



Penalties

- Fine up to 2% of annual gross revenue in Brazil, limited to BRL 50 million per infraction.
- Public Disclosure of the infraction (reputation risk).
- Block or exclusion of personal data.

Enters into force in September/2020 (to be confirmed) | Administrative Penalties: August/2021

Who is subject to the new legislation?

APPLICATION SCOPE



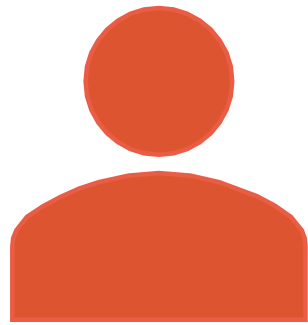
Data Processing

- ✓ **Data Processing in Brazil**
- ✓ **Goods/Services offered to individuals in Brazil**
- ✓ **Personal data collected in Brazil**

Exceptions

- LGPD is not applicable to data processing carried out exclusively for certain purposes, such as: academic research, public security, national defense, among others.
- Personal data from international sources may also be excluded from LGPD if not shared with data processing agents in Brazil, to the extent that the source-country provides an adequate level of protection to personal data.

DATA PROCESSING AGENTS



CONTROLLER



Natural or legal entity, public or private, who:

- Takes all decisions regarding the processing of personal data;
- Determines the purposes and means of processing personal data;
- Assesses the framework of legal treatment bases;
- Can be held directly responsible for LGPD violations; and
- Responsible for ensuring compliance with the rights of the data subject.

Natural or legal entity, public or private, who:

- Carries out the processing of personal data on behalf of the controller;
- Can be held jointly liable for violations it may cause to LGPD.



PROCESSOR

Is there a DPO under the Brazilian legislation?

Data Protection Officer

Person in charge according to the legislation: he/she is the person appointed by the controller and processor to act as a communication channel between the controller, the data holders and the National Data Protection Authority (ANPD).



The **DPO** activities consist of:

- Accept complaints and communications from holders, provide clarifications and take action;
- Receive communications from the national authority and take action;
- Guide the entity's employees and contractors about the practices to be taken in relation to the protection of personal data; and
- Perform the other duties determined by the controller or established in complementary rules.

Principles for the Processing of Personal Data

Transparency: clear and accurate information to data subjects.



Purpose: legitimate purposes, must be known to the data subject before any treatment.



Security: use of technical measures and able to protect personal data.

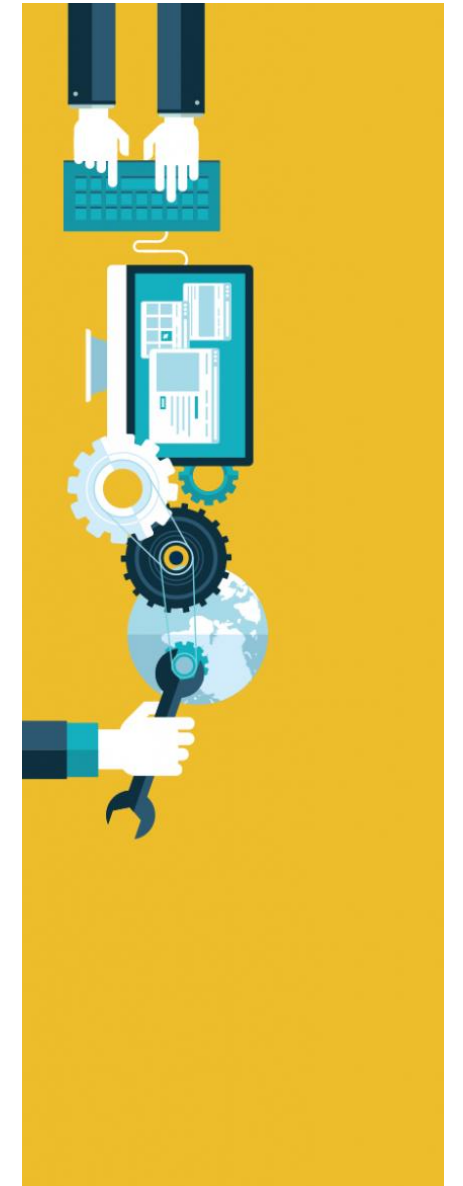


Necessity: use of strictly necessary data.

The objective of the LGPD is not to harm or hinder the processing of data. The idea is to protect the rights of holders and guide treatment agents.

Data processing is **only** allowed in the following cases:

- a. with the consent of the owner;
- b. for the fulfillment of a legal obligation by the controller;
- c. by the public administration for the implementation of public policies;
- d. for carrying out studies by a research body;
- e. when necessary for the performance of the contract;
- f. for exercise of proper rights in judicial, arbitration or administrative proceedings;
- g. for the protection of the life of the owner or third party;
- h. for the protection of health by health professionals or health authorities;
- i. when necessary to meet the controller's legitimate interests; or
- j. for credit protection.



What is legitimate interest?

- ✓ **Legitimate interest of the Controller releases the owner consent of the data processing. (!)**

BUT the issue is not that simple. The controller's legitimate interest must be demonstrated as follows:

The data must support and promote the activities of the controller;

- a. Offers must benefit the owner, respecting their legitimate expectations;
- b. Data processing must respect fundamental rights and freedoms.

Conditions for treatment based on legitimate interest:

- a. Use of personal data strictly necessary for the intended purpose;
- b. Transparency of its legitimate interest.

Burden of data processing based on legitimate interest:

The National Data Protection Authority (ANPD) may request a report on the impact of personal data protection in the context of these operations.

Note: legitimate interest for data processing must be used on a residual basis.

✓ **The following personal data is considered sensitive:**

- racial or ethnic origin
- religious belief
- political opinion
- membership of a union or organization of a religious, philosophical or political character
- health information
- sexual orientation
- genetic or biometric data



- ✓ **The treatment of this information is possible **only if there is specific consent** from the owner (or his/her legal representative)**

Exceptions:

- to comply with legal obligation
- shared processing of data necessary for the implementation of public policies
- for studies by research body
- regular exercise of rights (including in contract) and legal proceedings
- life protection
- protection and protection of health (by health professionals)
- prevention of fraud and security of the holder

Forbidden:

- data sharing for economic use
- use of sensitive personal data by processors of private health care plans and the processing of health data for the practice of risk selection when contracting

- ✓ **Data Processing termination cases:**
 - Purpose of data processing is reached
 - Data is no longer necessary or significant to the purpose
 - Processing timeframe expires
 - Request by the data subject
 - Request by the ANPD, in case of breach of the Law
- ✓ **Upon termination of data processing, the relevant personal data shall be erased.**
 - ✓ Exceptions: fulfil legal obligation, for research purposes, transfer to third parties (if allowed by LGPD) or if data is anonymized

What are the rights of data subjects?

✓ Rights of Data Subjects

- Main rights: access, rectification, exclusion, data portability, confirmation and consent withdrawal.
- Rights may be exercised free of charge not only by the data subject, but also by public entities engaged in consumer protection activities (e.g.: PROCON).
- **As a controller/processor, what should I most care about?**
 - Confirmation of existence and access to Personal Data shall be provided to the requesting Data Subject:
 - **Immediately after the request:** simplified report with basic information.
 - **Up to 15 days as of the request:** full report, containing data source, processing criteria, processing purposes, among other records.

International Transfer of Personal Data



- ✓ Assumptions listed in Article 33:
- ✓ Destination countries with a degree of protection appropriate to the LGPD, assessed by the ANPD;
- ✓ Specific and prominent consent of the holder;
- ✓ Guarantees offered by the controller: *i)* specific contractual clauses; *ii)* global corporate standards; *iii)* standard contractual clauses; and *iv)* certificates, seals and codes of conduct;
- ✓ International cooperation agreement;
- ✓ Regarding international legal cooperation for the purposes of research and for the execution of public policy;
- ✓ Protection of the life or physical safety of the holder or third parties; and
- ✓ When authorized by the ANPD.

- ✓ **The controller must inform the national authority and the data subject the occurrence of a security incident, informing:**

I - a description of the nature of the affected personal data;

II - information about the involved owners;

III – information about technical and security measures used to protect the data

IV - the risks related to the incident;

V - the reasons for the delay, in case the communication was not immediate; and

VI - the measures that have been or will be adopted to reverse or mitigate the effects of the loss.

The national authority may determine:

I - wide dissemination of the fact in the media; and

II - measures to reverse or mitigate the effects of the incident.



For penalties purposes, the national authority (ANPD) will consider the technical measures adopted to ensure the protection of personal data, as well as contingency plans.

Good practices and governance

The LGPD encourages controllers and processors to implement privacy governance programs that briefly:

1. Demonstrate the controller's commitment to adopting internal processes and policies that ensure compliance with standards and good practices regarding the protection of personal data



2. Have the objective of establishing a relationship of trust with the holder, through transparent action and that ensures participation mechanisms of the holder;



3. Be applicable to the entire set of personal data that are under your control;



4. Count on incident response and remediation plans; and



5. Be constantly updated based on information obtained from continuous monitoring and periodic evaluations.

What are the administrative sanctions?

✓ Penalties

- Warnings
- Fines up to 2% of gross revenue of the legal entity/group/conglomerate in Brazil, limited to **BRL 50 million per infraction**
- Daily fines
- Public disclosure of the infractions (reputation risk)
- Block / exclusion of Personal Data linked to the infractions
 - Penalties may be reduced if the offender can prove good faith, adoption of damage mitigation systems and procedures, implementation of best practices, etc.
- **Important: LGPD may also be enforced by courts, which may impose compensation for damages underlying unlawful data processing.**

What is the role of the national agency?

✓ ANPD

- Imposes administrative penalties
- Supervises compliance with the legislation
- Establishes further regulations, technical details and procedures to be implemented
- Interprets the data protection legislation
- Receives complaints about unlawful data processing

✓ Structure

- Encompasses both public and private representatives.
- Board members are selected by the President.

LGPD **Latest developments**

Round 1

✓ Law 13,709

- **Section 65:**

This Law shall enter into force after 18 months as from its official publication

- **Timeline A:**

August 2018

February 2020



18 months

Is it applicable in Brazil right now?

Round 2

✓ Law 13,709 (as amended by Law 13,853)

▪ Section 65:

This Law shall entry into force:

I – on December 28th, 2018: National Data Protection Agency (ANPD)

II – after 24 months as from its official publication date.

▪ Timeline B:

August 2018

December 2018: ANPD

August 2020



Is it applicable in Brazil right now?

Round 3

✓ **Law 13,709 (as amended by Provisional Measure 959)**

▪ **Section 65:**

This Law shall entry into force:

I – on December 28th, 2018: National Data Protection Agency (ANPD)

II – on May 3rd, 2021 – remaining sections.

▪ **Timeline C:**

August 2018

December 2018: ANPD

May 2021



Is it applicable in Brazil right now?

Round 4

✓ **Law 13,709 (as amended by Law 14,010)**

- **Section 65:**

This Law shall enter into force:

I – on December 28th, 2018: National Data Protection Agency (ANPD)

I-A – on August 1st, 2021: Administrative Penalties

II – on May 3rd, 2021 – remaining sections (as amended by PM 959).

- **Timeline D:**

August 2018

December 2018: ANPD

May 2021

August 2021:
Penalties



Is it applicable in Brazil right now?

Final Round (?)

✓ Law 13,709 (after Section 4 of PM 959 was rejected by Senate)

- **Section 65:**

This Law shall enter into force:

I – on December 28th, 2018: National Data Protection Agency (ANPD)

I-A – on August 2021: Administrative Penalties

II – after 24 months as from its official publication date.

- **Timeline E – Final (?):**

August 2018

December 2018: ANPD

September 2020

August 2021:
Penalties



✓ Current scenario:

- **ANPD:** currently in force.
- **Administrative penalties:** August 1st, 2021.
- **LGPD:** in force after the President decides about Provisional Measure 959 (up to September 17, 2020).

(Alternate ending: agreement to postpone LGPD to January 1st, 2021 by means of another Provisional Measure to be proposed by the President)

- ✓ ANPD was created by law in **December 2018**.
- ✓ **Only in August 27, 2020:** administrative structure was defined.
- ✓ **Important roles:** regulation, supervision, penalties, etc.
- ✓ **If legislation takes effect in 2020:** undefined aspects (general rules), no administrative enforceability (but courts may already apply the law)

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