Inclusive Digital Economy Kit

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CASE STUDY

Brazil: Multi-stakeholder politics of national privacy laws

Policy and regulation

Data protection and privacy laws in Brazil were inadequate for Brazil's growing digital society and economy. Lack of a specific data protection legislation left citizens vulnerable to data and privacy breaches, and brought legal uncertainty for firms handling data. A congressional special committee was created to draft a new national data protection and privacy bill. To accommodate divergent views and achieve consensus on various provisions of this bill, the committee took a multi-stakeholder engagement approach to finalise the Lei Geral de Proteção de Dados (LGPD) bill. The LGPD bill passed unanimously in the Congress in 2018, supported by over 80 stakeholder groups and this demonstrated the strength of this approach. More dialogues between government, firms and civil society groups are now being pursued to address the public concerns over independence of the law's regulator and lack of adequate safeguards against excessive state surveillance.

The problem

Brazil's data protection and privacy laws were inadequate for it's growing digital economy. The federal law governing the internet – Marco Civil da Internet (Civil Rights Framework for the Internet) (MCI) – was a principle-based law that provided a basic civil rights framework covering some but not all key areas of personal data protection and privacy.[1] It lacked clear regulations and procedures on consent, collection, processing, and storage of personal data. There was also no independent regulator with the necessary technical expertise to enforce the law. As such, there wasn't adequate legal guidance on addressing problems concerned with discrimination and the rights of data subjects.

In addition to the MCI, Brazil also had over forty other laws at the federal level covering personal data protection and privacy across different sectors of the economy. This multitude of laws made compliance difficult for firms operating across sectors. This brought legal uncertainty for firms, public sector organisations and civil society organisations and made the country less competitive in an increasingly data driven global economy.[2]

Solution

With public interest on data privacy and protection increasing, the National Consumer Secretariat (SENACON) – a department in the Ministry of Justice responsible for Brazil's consumer protection policy – published a draft data protection and privacy bill in 2015 after an

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online public consultation with firms, public organisations, civil society and NGOs.[3] A Congressional Special Committee on Data Protection – made up of parliamentarians – was then set up In August 2016 to analyse the draft bill as well as alternative data protection bills drafted by parliamentarians. Over a period of 2 years, the Committee organized multiple dialogues with various stakeholder groups, achieved consensus on the provisions of the law and produced a national data protection bill that became the Lei Geral de Proteção de Dados (LGPD). LGPD passed both houses of the Congress and was sanctioned by the President in August 2018. It will come into effect in August 2020.[4]

The core principles of data processing set forth by LGPD – addressing lawfulness, non-discrimination, fairness, accountability and transparency of personal data use – are inspired by the EU's General Data Protection Regulation (GDPR). Unlike the original MCI law, LGPD is also rule-based in that it includes specific regulations and procedures on consent, collection, liability, processing and storage of citizen data by any individual or organisation. LGPD tied together the various pre-existing multi-sectoral legal norms under a national law and provided all the same fundamental data subject rights which GDPR guarantees. The law applies to firms in and outside Brazil that process data from Brazilian citizens. The law has "extraterritorial effect, in that it only permits cross-border data transfers to countries that provide adequate data protection as deemed by the national data protection authority.[5]

Reaching a consensus on the new law, however, was a long and difficult process. The congressional committee which led the process sought to accommodate diverse views from the beginning of the process by adopting a multi-stakeholder approach to draft the bill.[6] The committee appointed a rapporteur to lead the process, moderate the discussions, manage disagreements and build consensus. Professor Zanatta – a law professor who worked on the bill – commented: "Different groups disagreed and even attacked each other publicly, but the multi-stakeholder dialogue provided a platform to reach a political consensus and take the legislation forward." After almost two years the law was finalised and the bill passed in both the houses (Chamber of Deputies and Senate) of the Congress unanimously in 2018, supported by over eighty stakeholder groups.

The biggest challenge the committee faced was getting the Executive to support the bill. The government changed three times during the drafting period, resulting in limited involvement of the Executive while drafting the bill. The Executive vetoed nine provisions of the 2018 bill, the most important of which was the article creating a national Data Protection Authority (DPA) – which was responsible for monitoring and enforcing the law. The Executive initially cited a lack of funds to pay for the DPA but following criticism from various stakeholder groups subsequently issued a Provisional Measure – a two-month temporary law – in December 2018 creating the DPA with reduced powers. After this the government changed again.

More stakeholder consultations were then conducted by another parliamentary committee to review the Provisional Measure. The rapporteur of the committee – who helpfully hadn't changed – led negotiations between Congress and Ministry of Economy under the new government to finalize a semi-autonomous DPA sitting under the Presidency, but subject to review by Congress after two years. In the end, the Provisional Measure passed Congress in May 2019 with about 176 amendments after several rounds of consultations.[7]

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Risks

A multi-stakeholder approach can design a robust legal framework to regulate Brazil's digital economy, but this can be undone during implementation if the Executive is not on board. A DPA controlled by the Presidency leaves the LGPD law open to abuse and the risk that breaches by the government offices may go un-investigated by the regulators. Further, civil society groups are concerned that the new law gives the government power to order surveillance – eg accessing data and data trails – without court orders, third-party review or citizen consent. These challenges are similar to what other developing countries drafting a national data protection law, like India, are facing. However, in Brazil, the initial 2015-2018 dialogues between various actor groups created an environment conducive for further negotiations and the spirit of multi-stakeholderism has carried forward. Professor Zanatta adds, "The focus of the discussions today has shifted from consumption markets to building safeguards against potential abuse of sensitive data by the state. Various groups are now working together to propose regulatory structures that can ensure this and see to it that the LGPD is enforced equitably."

Lessons

While global consensus on data protection is still emerging, Brazil's experience with LGPD (adapted from EU's GDPR) provides some lessons on incorporating diverse viewpoints. Governments must be patient and encourage coalitions around data protection and privacy issues – the broader the coalition, the more is the advocacy power to deliver a strong data law. They should create space for multiple stakeholder engagement from the initial stages of drafting and may do so through public hearings and technical forums. To facilitate the multi-stakeholder consultations, governments should look to appoint a rapporteur with a good working relationship with different stakeholder groups and capability to build political consensus. And for their part, all the stakeholders need to be creative in negotiating and building consensus on different provisions of a national data protection law.

This case study benefited from inputs from Mr. Rafael Zanatta.

***Mr. Zanatta** is a law Professor, researcher and activist who previously worked with Brazil's main consumer protection association, Idec. He is a consumer protection advocate and worked closely with Brazil's civil society groups on the LGPD.*

Endnotes

1. Stanford (2014). *Marco Civil da Internet - Brazilian Civil Rights Framework for the Internet.* [online] Available at: https://wilmap.law.stanford.edu/entries/marco-civil-da-internet-brazilian-civil-rights-framework-internet [Accessed 8 Sep 2019]
2. Financier (2019). *The Brazilian general data protection law.* [online] Financier Worldwide Expert Briefing. Available at: https://www.financierworldwide.com/the-brazilian-general-data-protection-law#.XYD7_yhKjIU [Accessed 8 Sep 2019]

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3. Pereira, F. and Advogados, Veirano. (2016). *Privacy and data protection: recent developments in Brazil.* International Bar Association, Sao Paulo.
4. Coos, A. (2019). *All You Need to Know about Brazil's New Data Protection Law* [online] Endpoint Protector Blog. Available at: https://www.endpointprotector.com/blog/about-brazils-new-data-protection-law/ [Accessed 08 Sep 2019].
5. One Trust (2018). *What is the Brazil General Data Protection Law (LGPD)?* [online] Available at: https://www.onetrust.com/what-is-the-brazil-general-data-protection-law-lgpd/ [Accessed 08 Sep 2019]
6. Rosa, F. R. (2016). *The Brazilian Multi-stakeholderism on Internet Governance*. Working Paper, School of International and Public Affairs, Columbia University.

7. Battilana, C., & Waksman, M (2019*). Provisional Measure That Amends The General Data Protection Law Follows Proceedings In The National Congress Of Brazil*. Tozzini Freire Advogados Mondaq.

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