


LEGITIMATE INTEREST
AS A BASIS FOR THE
PROCESSING OF
PERSONAL DATA

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The technological advances that societies have been experiencing, with an emphasis on the advent of the Internet and, more recently, the Internet of Things (IoT)¹, has caused a real revolution in the way not only in which we relate, but also how our personal data is handled. Just remember that currently companies that hold large amounts of data, such as Amazon, Facebook, Google, and Netflix, are among the most highly valued in the world. This scenario, in which data became a kind of highly valued currency, further fostered discussions that resulted in the approval of Federal Law No. 13,709/18, also known as the General Personal Data Protection Law, or simply the LGPD.

¹ Internet of Things is the set of objects used in everyday life that, through their internet connection, sensors, software and other technologies, allow the exchange and availability of users' data.

The topic "protection of personal data" is not new in the legal world. As Doneda teaches:² "The Data Protection Act of the German Land Hesse, of 1970, is identified as the first piece of normative legislation that deals specifically with this subject, and debates that took place in the second half of the 1960s (driven mainly by the practices experienced during the great international conflicts, especially the Second World War) were extremely rich and fundamental in defining the profile of this discipline that, according to estimates, today it is already present in a concrete way in more than 140 countries."

It is undeniable that technology facilitates work and leaves renders tasks less complex that previously consumed hours or even months to be performed. It is also

indisputable that algorithms provide a customization of services and information that facilitates our tasks and proves to be extremely comfortable. On the other hand, the pandemic caused by the new coronavirus accelerated the process of virtualization of life and, consequently, the sharing of professional and personal information.³

Despite the benefits brought about by this new reality, it is necessary to draw limits around the way personal data is handled, at risk of living in true anarchy on the subject. And that is exactly what the LGPD does. Arising from Bill No. 4,060/12, the LGPD gives the holder of personal data the right to request of processing agents – the controller and the operator (Article 5,

² DONEDA, Danilo. "Historical Overview of the Protection of Personal Data". In fashion: *Personal Data Protection Treaty*. Rio de Janeiro: Forensics, 2021.

³ For further discussions on the topic, see GASSER, Urs. *Recoding Privacy Law: Reflections on the Future Relationship Among Law, Technology, and Privacy*. Harvard Law Review. Available in: <https://harvardlawreview.org/2016/12/recoding-privacy-law-reflections-on-the-future-relationship-among-law-technology-and-privacy/>.



subsection IX, LGPD) – information about their data processed by them. According to Article 5, subsection V of the law, a holder is any “individual to whom the personal data subject to processing relates”.

The law also conceptualizes in its Article 5, subsection X, the term data processing as “every operation carried out with personal data, such as those related to the collection, production, reception, classification, use, access, reproduction, transmission, distribution, processing, archiving, storage, deletion, evaluation, or control of information, modification, communication, transfer, dissemination, or extraction”. The provision's description is exemplary, and not exhaustive, so we must understand processing to mean any operation performed with the personal data from its collection until its deletion.

We are experiencing in Brazil an important moment not only legally speaking, but also economically, since the LGPD, inspired by the European Union General Data Protection Regulation (GDPR) impacts on all companies that in any way process personal data.

Non-compliance with the law may result in considerable administrative sanctions,⁴ ranging from simple warning (article 52, I), to a simple fine limited to R\$ 50 million per infraction (article 52, II), to partial or total prohibition on the processing of personal data (article 52, XII).

In this new scenario, companies may be confused about how and in what cases they can process personal data, as such information is often crucial to the continuity of their business.

⁴ According to the changes imposed by Law No. 14,010/20, the penalties provided for in the LGPD will enter into force on 1/8/2021.



ATTENTION TO CONSTRAINTS ON THE HANDLING OF PERSONAL DATA

Processing agents must always consider the foundations of the law that are provided for in Article 2, which serve as a basis for interpreting and guiding their conduct. Respect for privacy, information self-determination, freedom of expression, communication and opinion, inviolability of intimacy, honor and image, economic and technological development and innovation, free enterprise, free competition, consumer protection and human rights, and the free development of personality, dignity and the exercise of citizenship by individuals should not be, under any circumstances, disregarded by professionals in the area when acting within the dictates of the LGPD.

The LGPD provides in Article 7 for the scenarios in which the data may be processed. The vast majority of them do not present greater challenges and are therefore of direct applicability. However, one item in particular, subsection IX, requires reflection on the part of processing agents, since it cannot be used generically to justify the processing of personal data.

An example is the case of a car dealership that holds various information on customers in its database. In the name of legitimate interest, it may contact one of these customers to provide information about a new offer or service. However, that item cannot be interpreted as a generic basis for the processing of personal data.

The grounds for applying subsection IX are provided for in Article 10 of the LGPD. Thus, legitimate interest may serve as a justification for the processing of personal data when it:



Supports and promotes the controller's activities.



Protects the holder's regular exercise of a right or provide services that benefit him or her.



There are other purposes interpreted as legitimate.

As Bioni says:⁵ "The normative architecture of legitimate interest in the LGPD denounces it. If, on the one hand, it presents itself as a new and potentially more flexible legal basis for the processing of data, on the other hand it imposes an argumentative burden on those who use it."

It is therefore found that the processing of data on the basis of legitimate interest has constraints. Processing agents may not use it if these conditions are not present. Thus, any interpretation that Article 7, subsection IX, may be used as a general statement of reasons to justify the processing of personal data should be rejected.

⁵ BIONI, Bruno Ricardo. "Legitimate Interest: general aspects from a bondi view". In fashion: *Personal Data Protection Treaty*. Rio de Janeiro: Forensics, 2021. *Proteção de Dados Pessoais*. Rio de Janeiro: Forense, 2021.

EUROPEAN SCENARIO IS A REFERENCE

As the issue is new in Brazil and the National Data Protection Authority (ANPD) has not yet spoken on the subject, the discussion regarding legitimate interest in data processing is supported by the European scenario, in which the GDPR has already been applied since 2018 and which has had guidelines on the subject since 1995, with Directive No 95, of October 24 of that year.

In accordance with Article 7, letter f, of that document, the processing of personal data by Member States of the European Union may occur only if processing is "necessary for the purposes of legitimate interests pursued by the controller or by third parties to whom the data is provided, except where such interests are outweighed by the interests of fundamental rights and freedom of information of the data that require protection in accordance with Article 1". The GDPR establishes in article 6, 1, the legal scenarios for the processing of personal data, and legitimate interest is also provided for in letter f.



The [recital 47](#) the GDPR describes what is meant as legitimate interest: "The legitimate interests of controllers, including those of persons responsible to whom personal data may be communicated, or third parties, may constitute a legal basis for processing, provided that the interests or fundamental rights and freedoms of the data subject do not prevail, taking into account the reasonable expectations of the data subjects based on the relationship with the data controller". The document also presents examples of legitimate interest, such as direct marketing and prevention of fraud.

The issue is so important that Article 29 Working Party (independent European working group dealing with issues relating to the protection of personal data and privacy by May 25, 2018) draft Opinion 06/2014 which it presented, in addition to guidance on the concept of legitimate interest, the so-called weighting test – or balancing test – in which processing agents, after verifying that there are legitimate interests in the specific case, must balance these interests with those of the individual.

WEIGHTING TEST

In this article, the idea is not to discuss the steps of the weighting test, but only to point them out in order to improve the understanding of the topic. The test consists of seven steps:

- 1 Check what the legal grounds for the processing of personal data are.
- 2 Qualify the interest as "legitimate" or "illegitimate".
- 3 Determine whether processing is necessary to serve the interest pursued.
- 4 Establish a temporary balance.
- 5 Establish a final balance.
- 6 Demonstrate compliance and ensure transparency.
- 7 Ensure the existence of a mechanism that allows reassessment of the test, if the holder comes to oppose the processing of his personal data.

The LGPD does not present a procedure for the weighting test to be performed. Thus, as long as the ANPD is silent on the subject, establishing guidelines on how the test should be applied, the companies' actions on the subject are free.

However, it is necessary to consider that Article 10 of the LGPD should be duly observed, with an emphasis on paragraph 3, which provides for the possibility for the ANPD to request, at any time, a Personal Data Protection Impact Report (RIPD). This report is "documentation from the controller containing a description of the processes for the processing of personal data that may create risks to civil liberties and fundamental rights, as well as measures, safeguards, and risk mitigation mechanisms", as conceptualized in Article 5, subsection XVII, of the LGPD.

Brazilian entrepreneurs, therefore, need to work with the idea that processing personal data based on legitimate interest requires a detailed analysis and justification of the specific case in which it is intended to be applied, and Article 7 cannot be seen as a generic justification for the processing of such information.

Companies that want to justify the creation of behavioral and consumer profiles of their customers based on legitimate interest act inappropriately. For example: a pharmacy cannot, on the basis of the personal information it processes, create a health profile of its customers and then target them to advertise certain products, sometimes controlled products, and supplements, not least because, under Article 11 of the LGPD, the processing of sensitive data, such as health data, cannot be done on the basis of legitimate interest.

In addition, it is necessary to be attentive to the national scenario on the subject. In March of this year, the ANPD entered into with the National Consumer Bureau (Senacon) a Technical Cooperation Agreement, in which both entities commit to "(...) promoting joint actions on matters of mutual interest (...)". Section b, item b, states that "it shall be incumbent on the ANPD to clarify, in the event of doubt, the (its) position (...) interpretation, and application of rules on the protection of personal data which in some way affect the interests of consumers".

Thus, there is nothing to preventing the ANPD from provoking at the outright an opinion on the subject of "legitimate interest in the processing of personal data". Processing agents should be properly prepared and familiar with the subject.

The decision by a company on the use of any of the scenarios provided for in Article 7, i.e. justification for the processing of personal data, should be joint. Therefore, it is very important that there be participation by the information technology sector (IT) and people who have decision-making power, since the final decision is ultimately also a business decision that can cause positive or negative impacts, depending on how this processing will be carried out.



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