THE DATA AND THE VIRUS
REPORT #1

In the past 10 days, Brazil has seen a major dispute over interpretations around the sharing of personal data by telephone operators with the government in the context of the COVID-19 pandemic. Below, you can see a summary of these movements.

Federal government and georeferencing data collection: back and forth

What you need to know...

- There was a movement among telecommunications companies for the shared use of cell phone georeferencing data to combat the pandemic;
- It was disclosed that the data would be anonymized and aggregated, without individual identification;
- The federal government opposed and eventually vetoed the initiative;
- The Ministry of Science, Technology, Innovations and Communications (MCTIC) and the Federal Attorney General's Office manifested themselves in the sense that there would be no legal impediment to the practice.

On March 27, 2020, a video was published by the Ministry of Science, Technology, Innovations and Communications (MCTIC), in which minister Marcos Pontes announced a partnership between the Ministry and the five largest Brazilian telecommunications companies (Algar, Claro, Oi , Tim and Vivo) for the shared use of georeferencing data from cell phones of Brazilians, with the purpose of controlling agglomerations and assessing the effectiveness of quarantine measures. After the disclosure by the Ministry, Sinditelebrasil manifested itself explaining that the data would be shared in a public cloud, in an aggregated and anonymized way, so that people could not be identified. The following day, it was reported that the President of the Republic, Jair Bolsonaro, contacted minister Marcos Pontes, requesting ‘’prudence’’ and that the tool should only be used after further analysis by the government. The promotional video was then deleted. On March 30, after ANATEL's request, MCTIC stated that, from a reading of the General Data Protection Law and other legislation, there is no obstacle to data sharing, if it is anonymized and aggregated, and if safeguards such as minimization and purpose limitation are guaranteed. The following day, in response to the Ministry's request, the Legal Counsel of the Federal Attorney General gave an opinion on the controversy. In the opinion, AGU agrees with the initial opinion of the Ministry and states that, if anonymized and aggregated, there is nothing in the Brazilian legal system that can hinder the conclusion of these agreements. Despite technical opinions, the solution does not appear to have been implemented and, on April 13, it was again reported that the presidency had vetoed the initiative, alleging risks to citizens' privacy. In a later manifestation, Minister Marcos Pontes stated that the federal states have autonomy and can maintain their own agreements with telephone operators, as does the state of São Paulo. On April 16, InternetLab held a live with the theme "is geolocation surveillance?", In which it pointed out the differentiation between disease surveillance and surveillance of people, and the need for the use of data by the State for control purposes / monitoring of COVID-19, without, however, violating the right to the protection of personal data and without characterizing the

surveillance of specific people. The live also explains the different ways of using geolocation data, such as the use of aggregated data for statistical purposes, in which there is no user identification, and the use of identifiable geolocation data, anonymized or not, for monitoring purposes. contact tracing.

State of São Paulo: Intelligent Monitoring System (SIMI / SP) generates reactions

What you need to know...

- The government of São Paulo has implemented a monitoring system by georeferencing, with the support of telephone operators, in order to contain agglomerations in the state;
- The measure was challenged through several judicial actions;
- In a class action that was presented before TJ-SP, the state was obliged to present, in 10 days, the terms of partnership with operators;
- In the STJ, it was considered that there are no objective elements that can justify the paralysis of the system;
- A citizen of São Paulo obtained, by a writ of mandamus, a decision favorable to his exclusion from the system.

If, at the federal level, the mere disclosure of an initiative to use georeferencing to monitor agglomerations generated a series of political and legal controversies, in São Paulo, which effectively implemented the measure, it would be no different. On April 9, the state governor, João Dória, announced the implementation of the Intelligent Monitoring System (SIMI) for the monitoring of cell phones with the support of four telephone operators: Claro, Oi, Tim and Vivo. In the announcement, it was said that the data would be anonymized. A few days later, a Class Action in the Justice of São Paulo was presented by a group of lawyers who claimed, in summary, that the terms of the partnership between government and companies had not had due publicity, with the publication in the Official Gazette of the State of São Paulo, in addition to the lack of prior consent by the population that would be screened. Thus, it was requested, in a preliminary injunction, the abstention, by the government and companies, of the shared use of georeferencing data, as well as the presentation of the terms of the partnership in question. On the 16th, Judge Renata Barros Souto Maior Baião issued a decision partially complying with the lawyers' request, in the sense that the government should provide, within 10 days, the terms of the partnership, since only with its advertising would it be possible to determine whether the system violates the rights of the citizens involved. In addition to the class action, the legality of the state government's initiative was also questioned in a Habeas Corpus at the Superior Court of Justice (STJ), in which both the issue of privacy and the limitations on mobility caused by social isolation measures in itself were discussed. Minister Laurita Vaz, in a decision of April 16, 2020, understood that there were no objective elements in the petition to justify the suspension of the program, in addition to the fact that Habeas Corpus was not the appropriate way to discuss issues such as the violation of the right to privacy through the use of georeferencing. Also on the 16th, returning to the São Paulo Court of Justice, a preliminary injunction was partially granted to a citizen, who, alleging imminent violation of privacy and the right to come and go, requested his exclusion from the Simi-SP monitoring system. A second writ of mandamus that appears to follow the same pattern was filed at the São Paulo Court of Justice

on April 20 and is pending a decision. There is no more information because the process is under secrecy.

LGPD postponement: proposals and positioning of the Federal Public Ministry (MPF)

What you need to know...

- There are bills to postpone the entry into force of the LGPD;
- In response, the Federal Prosecutor's Office (MPF) released a technical note in which it stands against the postponement.

In discussions on the legitimacy of measures for sharing personal data between Public Administration and private entities, references to the principles of the General Data Protection Law (LGPD) are common. The fact that the law has not yet come in to force is even mentioned in some manifestations as an extra difficulty in interpreting the controversies that are being debated. Aggravating this situation, new proposals to postpone the LGPD have arisen due to the COVID-19 pandemic, on the grounds of companies' difficulties in adapting and the absence of the National Data Protection Authority. In response to the proposals, the Federal Prosecutor's Office (MPF), through the Federal Attorney for Citizens' Rights (PFDC) and the Criminal Chamber, issued on April 14, a technical note against the postponement. The document refers specifically to PLS 1179/20, which deals with an Emergency and Transitional Legal Regime for Private Law legal relations in the period of the coronavirus-19 disease pandemic and includes a provision for postponement of the LGPD in its art. 25. The bill passed the Senate on April 13. In the note, the prosecutors state that the LGPD guarantees greater transparency in the use of data, which should also be limited to one purpose (in this case, to combat the pandemic). They also argue that the law favors the flow of commercial data, including internationally, so as to benefit, and not harm, companies in Brazil. Finally, they claim that other laws, even more complex than the LGPD, had shorter deadlines for entry into force, so the delay would not be justified.

Direct Actions of Unconstitutionality are proposed against a Provisional Measure that gives personal data to Brazilian Institute of Geography and Statistics (IBGE)

What you need to know...

- The government issued a Provisional Measure that obliges telecommunications companies to share data such as names, cell phone numbers and addresses of their entire registration base;
- According to ANATEL, in February there were 226.6 million active cell lines in the country;
- The OAB and 3 political parties filed lawsuits in the Federal Supreme Court questioning the constitutionality of the measure;
- The reporting rapporteur of the actions requested urgent clarifications from IBGE and ANATEL.

On April 17, a Provisional Measure was published in the Official Gazette that obliges telephone operators to supply their registration bases with the name, telephone number and address of users to the Brazilian Institute of Geography and Statistics (IBGE), in order to allow the continuation of the National Household Sample Survey Continuous (PNAD Continuous). The Provisional Measure provides that the data will be manipulated only as long as the current public health emergency period lasts and that it should be discarded no later than 30 days after the end of the state of emergency. The measure also prohibits the IBGE from sharing data with other public bodies and companies and provides for the release, by the institute, of a data protection impact report. A few days after its enactment, 4 direct actions of unconstitutionality (ADIs) were presented before the Supreme Federal Court by the Federal Council of the Brazilian Bar Association (OAB) and three political parties - PSOL, PSB and PSDB.

What OAB says

OAB argued that the Provisional Measure in question determines the violation of telephone confidentiality, has a generic and imprecise scope, does not present the concrete purpose of using the data, does not present reasons of urgency and relevance, or its necessity, does not present security mechanisms to minimize the risk of leakage and, finally, deals with the impact report after using the data and not prior to sharing. It asks for the recognition of informative self-determination as a fundamental right, and the declaration of unconstitutionality, in full, of the Provisional Measure.

What PSOL says

In its Direct Action of Unconstitutionality, PSOL argues that the Provisional Measure violates the fundamental right to data protection (through the emanation of the right to privacy) and that the requirements of relevance and urgency are absent, as well as the demonstration of purpose, need and adequacy of data sharing. It requires the immediate suspension of effects of the measure and, in relation to the merits of the case, the declaration of unconstitutionality.

What PSB says

PSB, in its Direct Action of Unconstitutionality, requests the suspension of the efficacy of Articles 2 and 3 of the Provisional Measure and also that the provisions be declared unconstitutional. The party argues that in addition to the vices regarding its constitutionality, the Provisional Measure also fails to adhere to the principles of data protection, such as the principle of purpose limitation, which, in the case of the contested articles, is described in a very broad way; and the principle of necessity, since without a clear definition of the purpose, it is not possible to measure which data and how much data is actually needed.

What PSDB says

PSDB submits in its petition only requests for suspension of efficacy and declaration of unconstitutionality of article 2 of MP 954, given the lack of reasonableness and proportionality of the provision. The collection of the name, telephone and address of all citizens implies, according to the

party, the violation of intimate life and confidentiality of data, concerning the right to privacy. In this line, it argues that the Provisional Measure does not indicate any element of urgency to justify the activity of IBGE, and in the absence of a specific purpose, the need to confront the right to privacy cannot be verified.

Statement from IBGE

On April 20, IBGE issued a statement clarifying that it has always adhered to the best international practices, in addition to a series of internal codes of conduct, and that all data used is kept confidential. It also claimed that the Provisional Measure respects the LGPD.

Request for clarification

Supreme Minister Rosa Weber, rapporteur of the 4 actions, determined on April 21 that both IBGE and ANATEL should provide, within 48 hours, specific information on the terms of data sharing and the meaning of statistical production during the COVID-19 period.

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