

Brazil's New GDPR-Inspired Law Could Spur EU Data Deal

By **Ben Kochman**

Law360 (September 7, 2018, 5:03 PM EDT) -- Brazil's first-ever national privacy regime could set up South America's biggest economy to work out a lucrative data-sharing pact with the European Union, despite a presidential veto that axed the agency intended to enforce it, attorneys say.

The General Data Privacy Law, or Lei Geral de Proteção de Dados, approved last month is similar to the EU's sweeping General Data Protection Regulation that went into effect in May. Like the GDPR, Brazil's new law requires that companies pick from a list of ways to legally justify their data collection and applies to any entity doing business in Brazil even if it is based outside the country. It also carries the potential of hefty fines — up to 2 percent of a firm's annual revenue in Brazil, up to 50 million Brazilian reais (just under \$12.5 million as of Friday), per violation.

For now, questions remain about how the new law will be enforced given Brazilian President Michael Temer's veto of the part of the bill that would have created an independent data protection authority to investigate and police complaints. But the law could lead someday to the EU striking a data-transfer deal with Brazil, as it has with other countries it believes can adequately protect EU citizens' personal data. Such a deal can make it much easier for companies to do business between the regions without worrying about legal trouble.

"This is a memo from Brazil to the EU saying we're on par with you when it comes to data privacy," said Jeremy Feigelson, head of Debevoise & Plimpton LLP's cybersecurity and data privacy practice.

Potential penalties under Brazil's law are not nearly as big as under the GDPR, which allows regulators to fine companies up to 4 percent of their annual revenue globally, with no cap. But in other ways the law, set to go into effect in 2020, mirrors some of the GDPR's language. It distinguishes between data "processors" that deal with data on behalf of data "controllers," for example.

"Europe has won the policy battle on data protection," said Behnam Dayanim, a partner at Paul Hastings LLP, who called Brazil's law "yet another example of a global trend of modeling national data protection laws on the European example."

The differences between Brazil's law and the GDPR are subtle. The GDPR largely leaves it up to companies to define a "legitimate interest" for being able to legally process data, while the Brazilian law spells out a couple examples, including fraud protection, as a legitimate interest. Brazil's government has also yet to issue guidance on how regulators will interpret parts of the law.

"It seems to be modeled off of the GDPR, but we don't know yet where the law will differ on the nitty-gritty," said Melanie Ramey, an associate at Covington & Burling LLP.

Some advocates are warning that the law will be toothless without an independent data protection regulator in place to enforce it. President Temer has pledged to send a new bill to the Brazilian Congress to create the data protection authority he vetoed when approving the law in August, but it's unclear when that will happen. The political situation in Brazil is far from stable, with Temer having recently been indicted on federal charges of taking millions of dollars in bribes from JBS, a meat-packing giant.

"You can have a beautiful set of rights, but if you don't have an enforcement authority, you have nothing," said Javier Pallero, Latin America policy head at the digital rights advocacy group Access Now. "As it stands now, this law is useless."

Temer also vetoed other parts of the bill, including a provision that would have allowed judges to order companies to halt all data processing in Brazil if they are found to have violated the law. Such a rule could have allowed judges to in effect shut down a social media company like Facebook that revolves around data collection and processing. Brazilian judges still do have suspension power under a 2014 Brazilian law called Marco Civil, often referred to as the country's online bill of rights.

Even before Brazil enacts an authority to enforce the GDPR-inspired law, companies with the resources might want to consider applying the same data protection procedures worldwide, attorneys say, given not only Brazil's law but also a recently enacted California privacy law and other similar efforts around the world.

"If you're a multinational company, increasingly you have to ask yourself whether following a single global standard is just the simplest and easiest thing to do," Feigelson said.

--Editing by Brian Baresch and Breda Lund.