

## **Technical note produced by the Prosecution Services which fight cybercrimes regarding noncompliance with the Brazilian internet regulations**

The State Prosecution Services which compose the National Group against Criminal Organizations (GNCOC - “Grupo Nacional de Combate às Organizações Criminosas”) and the Brazilian Federal Prosecution Service come to the general public to share their concerns over the fact that investigations of cybercrimes have been jeopardized by foreign corporations which render their services in Brazil and fail to comply with local regulations.

### **Compliance with orders to provide data and jurisdiction**

The Internet Civil Rights Framework (MCI - “Marco Civil da Internet”) is an innovative regulation which stems from democratic debate and was enacted in order to protect the privacy of internet users, and to regulate under what circumstances corporations are to provide data, especially those whose business is to render services in connection with social networking and the transmission of messages online. MCI sets forth that internet services rendered in Brazil must comply with Brazilian legislation. By doing so, the MCI ensures that Brazilian judicial orders will produce their expected legal effects and that citizens' privacy will be protected (Articles 10, 11, and 12, along with Article 5, XXXV of the Brazilian Federal Constitution).

As the MCI set forth that such data shall only be provided through the issuance of a judicial order, it also meant to provide a higher level of protection to internet users (which it actually did), taking into consideration the many risks these users are exposed to when they are online.

Additionally, Article 11 of MCI stipulates that companies which render services in Brazil to Brazilians must abide by Brazilian law regarding information shared or provided through the internet (including collection, storage, maintenance or handling of registration, personal and communication data), even when said companies don't have branches in the country.

Similarly, Decree No. 8771/16 (which regulates MCI) establishes that such obligations exist also in relation to providing such data to the Brazilian authorities whenever one is requested to do so.



While providing internet data to the Brazilian authorities, one must abide by the Brazilian procedural law, and communicate directly with the Brazilian authorities. This means that a mutual legal assistance request is not necessary when it comes to such matters. Corporations such as Facebook and WhatsApp have constantly argued that they are only compelled to comply with judicial orders issued by their own home countries, as their main offices are not located in Brazil.

Article 15 of MCI lays down that the internet service providing company<sup>1</sup> is compelled to keep records of access to their programs, in a confidentially controlled and safe environment for at least six months. However, such corporations refuse to keep these records for six months (some don't keep them at all), or they delete them before that. As a result, these companies have consistently been violating Brazilian judicial orders, which hinders or renders it impossible to require damages in court for the commission of cybercrimes.

### **Cryptographic pattern**

The deployment of the cryptographic pattern in P2P data transmissions is of high complexity and involves, on the one hand, adopting a security policy for the protection of messages and of the users' privacy and, on the other hand, making it harder for evidence to be obtained in the interest of civil and criminal investigations. Nevertheless, corporations usually argue that, as they employ a cryptographic pattern, it is impossible for them to comply with orders to supply communication records, stored data and meta-data (which is not cryptographic).

### **Penalties**

Article 12 of MCI reinforces that Brazilian judicial orders must be complied with as regards the supply of internet data. Foreign companies whose services are rendered to Brazilians usually argue that Brazil has no jurisdiction to compel them to supply internet data, as these companies tend not to have branches in the country. Pursuant to Article 12 III, non-complying companies may be forced to suspend their services in Brazil for a given period of time if other measures are not enough in order to comply with MCI's provisions.

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<sup>1</sup> This concept is broad enough to include service providers such as Facebook and WhatsApp.



## **Companies must start to comply**

In accordance with its mission, the Brazilian Prosecution Service has attempted to negotiate the terms of such cooperation with foreign companies for obtaining internet data. In spite of that effort, the outcome has been absolutely derisive. Facebook and WhatsApp, among other companies, claim to cooperate fully and effectively with Brazilian authorities, which couldn't be further from the truth. Moreover, they don't provide any other venues through which they could immediately supply data in compliance with Brazilian judicial orders.

Since such companies simply don't comply with Brazilian legislation, their services are deemed to be unfit for the Brazilian market.

## **Cybercrimes**

As the internet helps connect the globe virtually, an unwanted consequence of its ubiquity is that it also contributes for the increase of cybercrimes and other crimes, such as drug trafficking (both internally and internationally), the dissemination of child pornography, racism, hate crimes, theft and fraud and terrorism. The development of cooperation between internet-service-providing companies, the Brazilian Prosecution Service and the police are fundamental so as to prevent or hamper the commission of the aforementioned crimes.

## **Brazilian Prosecution Service's mission**

Because of all the above mentioned, the State Prosecution Services which compose the National Group against Criminal Organizations (GNCOC - “Grupo Nacional de Combate às Organizações Criminosas”) and the Brazilian Federal Prosecution Service reaffirm that they intend to comply with their constitutional duty of providing clear and objective information to the society so as to clarify the problems which have been faced in the fight against cybercrimes. Such crimes may be satisfactorily solved should internet-service-providing companies start to comply with Brazilian legislation. These companies must cooperate effectively with the Brazilian authorities, or else criminal investigations and trials may continue to be jeopardized by such noncompliance.



The consequences and risks posed by the misuse of the internet and the difficulties arising from the violation of Brazilian legal provisions (especially the MCI) are self-evident. Only a well-informed society may help debate towards striking a balance between privacy and freedom of expression, between individual safety and public security through State action, as it strives to provide justice for all, as is its constitutional duty.

