Privacy Series

10 INTERNATIONAL TRANSFER OF PERSONAL DATA

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This is the tenth chapter of the Data Privacy Series. Click here to access the chapter 9.



In 2023, the Brazilian General Data Protection Law (Law No. 13,709/2018 or "LGPD") celebrates 5 years of its publication - now also including the possibility of the application of administrative sanctions by the ANPD since August 2021. The Brazilian National Data Protection Authority ("ANPD") has been active in fostering discussions and disseminating concepts, practices and principles of privacy and data protection, through the publication of several materials for awareness and regulation of the LGPD since its creation.

Veirano Advogados has been following and participating in discussions regarding these issues. For this reason, our Data Protection & Privacy team has prepared the Privacy Series, in which we will periodically publish on different topics related to privacy, bringing not only LGPD concepts, but also ANPD publications on the subject, relevant considerations, among other contents.



International data transfers became a key instrument for the development of the digital economy that knows no borders. In this context, understanding how Brazil regulates this topic and what are the trends in the regulation of the mechanisms that enable such transfers is of utmost importance.

In this edition of the Privacy Series, our Data Protection & Privacy Team prepared a series of questions and answers on international data transfer in Brazil. We hope you enjoy it and are happy to answer any questions you may have on the subject.

WHAT IS IT?

According to the LGPD, international transfer of personal data consists of the transfer of personal data to a foreign country or international organization of which the country is a member. That is, it is the case in which personal data is shared with companies or servers (databases) located outside the territorial limits of Brazil. By definition, every international transfer implies in shared use of data. See, below, some examples:

- Contracting data storage in the cloud, whose database is located in the United States. In this case, every time a data is stored by the company, there will be an international transfer because the data will be retained in the database located in the United States.
- Recruitment of expatriates. In this case, the company will conduct the recruitment process from abroad or via recruitment companies located abroad, but there will be an exchange of e-mails and, consequently, personal data of candidates transiting between the foreign country and Brazil.

Important! When the personal data subject to processing come from outside the Brazilian territory and are not the object of communication, shared use of data with Brazilian processing agents, or the object of international transfer of data with a country other than the country of origin, the LGPD will not apply, provided that the country of origin of the data provides a degree of protection of personal data adequate to the provisions of the LGPD. In other words, the mere transport of personal data through the Brazilian territory (or data passthrough) does not characterize an international transfer of data.

WHEN AM I ALLOWED TO TRANSFER DATA ABROAD?

According to the LGPD, the international transfer of personal data is only permitted in the following cases:

- To countries or international organizations that provide a degree of protection of personal data adequate to that provided for in the LGPD.
- When the controller offers and proves guarantees of compliance with the principles, the data subjects' rights and the data protection regime provided for in the LGPD, in the form of specific contractual clauses for a given transfer, standard contractual clauses, global corporate standards, stamps, certificates and codes of conduct regularly issued.
- When the transfer is necessary for international legal cooperation between public intelligence, investigation and prosecution bodies, in accordance with the instruments of international law.
- When the transfer is necessary for the protection of the life or physical safety of the data subject or a third party.
- When the National Data Protection Authority ("ANPD") authorizes the transfer.
- When the transfer results from a commitment made in an international cooperation agreement.
- When the transfer is necessary for the execution of a public policy or legal assignment of the public service.
- When necessary for the fulfillment of a legal or regulatory obligation by the controller, for the performance of a contract or preliminary procedures related to a contract to which the data subject is a party, at the request of the data subject or for the regular exercise of rights in judicial, administrative or arbitration proceedings.
- When the data subject provided his/her specific and highlighted consent to the transfer, with prior information on the international character of the operation, clearly distinguishing it from other purposes.



The mechanics established by the LGPD is very similar to that provided for in the European Data Protection Regulation ("GDPR"), which generally authorizes international data transfer in the following circumstances:

- Country or international organization adequacy decision issued by the European Commission. In Latin America, only Uruguay and Argentina received data protection adequacy decisions by the European Commission.
- Adoption of adequate safeguards through:
  - Specific contractual clauses for a given transfer;
  - Standard Contractual Clauses (SCCs)
  - Binding Corporate Rules (BCRs); or
  - Regularly issued stamps, certificates, and codes of conduct.
- If none of the above apply, the controller may transfer personal data internationally from the exemptions provided for in the GDPR, which include legal bases such as contract enforcement and the exercise of the right of defense in legal proceedings.

HOW DO I KNOW IF A COUNTRY OR INTERNATIONAL ORGANIZATION HAS THE SAME LEVEL OF DATA PROTECTION AS THE LGPD?

It will be up to the ANPD to say. In any case, the LGPD conditions the process of verification of the level of data protection of the foreign country or international organization by the ANPD to the analysis of the following aspects:

- The general and sectorial norms of the legislation in force in the destination country or international organization;
- The nature of the data;
- Compliance with the general principles of personal data protection and the rights of data subjects provided for in the LGPD;
- The adoption of security measures provided by regulation;
- The existence of judicial and institutional guarantees for the respect of personal data protection rights; and
- Other specific circumstances regarding the transfer.

CAN I TRANSFER PERSONAL DATA ONLY TO ADEQUATE COUNTRIES ACCORDING TO THE LGPD?

No. As pointed out, there are a number of hypotheses that authorize the international transfer of data. One is even the guarantee of compliance with the principles, the data subject's rights and the data protection regime provided for in the LGPD (a situation very similar to the adequate safeguards provided for in the GDPR) by means of specific contractual clauses for a given transfer, standard contractual clauses, binding corporate rules, stamps, certificates and codes of conduct regularly issued.

The definition of the content of standard contractual clauses, as well as the verification of specific contractual clauses for a given transfer, binding corporate rules, stamps, certificates and codes of conduct, will be carried out by the ANPD within the regulatory process foreseen in the Regulatory Agenda for the biennium 2023-2024. In any case, the evaluation of these mechanisms should consider the minimum requirements, conditions and guarantees for the transfer that comply with the rights, guarantees and principles of the LGPD.

In addition, when reviewing contractual clauses, documents or binding corporate rules submitted to the ANPD for approval, additional information or verification diligence may be requested regarding the processing operations, where necessary. The ANPD may also appoint certification bodies under its supervision to carry out this approval process on its behalf.

Once the regulations that will provide for the content and form of these mechanisms for ensuring compliance with the LGPD for international transfer have been approved, should the controller decide to change the chosen mechanism, it will be mandatory to communicate such decision to the ANPD.

WHEN WILL THE MATTER BE REGULATED?

The regulation on international transfer of personal data is is highly expected, due to the significant impact on commercial activities in various sectors and the doubt about how the provisions of the LGPD will be interpreted by the regulator. The topic concerning the international transfer of personal data is one of the 20 actions planned in the ANPD's Regulatory Agenda for the 2023-2024 biennium.

According to the ANPD, the Regulatory Agenda is the planning instrument that aggregates the priority regulatory actions of the authority in the biennium, aiming to provide greater publicity, predictability, transparency, and efficiency for the regulatory process of the authority, enabling its monitoring by society and bringing greater legal certainty in the relationship with the regulated agents.

Important! This topic was already part of the regulatory process started during the Regulatory Agenda for the 2021-2022 biennium, approved by Administrative Rule no. 11, dated January 27, 2021. Therefore, the regulation of the mechanisms for international data transfer is included in Phase 1 of the Regulatory Agenda for the 2023-2024 biennium.

The proposal to conduct a survey of subsidies for the regulation of the international transfer of personal data, under the terms of articles 33 and 35 of the LGPD (Technical Note No. 20/2022/CGN/ANPD), was presented on May 17, 2022, and the public consultation ended on June 30, 2022. Only the publication of the final version of the regulation by the ANPD is pending.

See below the ANPD's position on the subject so far:

International data transfer mechanisms became key instruments for the development of the digital economy, and also for ensuring the effective protection of personal data across borders. The implementation of various data protection regulations around the globe reveals the general concern about cross-border data flows. However, the great diversity of data protection models brings with it the need for an effort at convergence and interoperability among these different systems in order for such flows to be permitted.

In this sense, the standard contractual clauses (SCC) have been the mechanism of international transfer of data most used worldwide, also functioning as a tool of convergence between different systems. This is because this mechanism allows the compatibility, via a contractual instrument, of the data protection rules of different jurisdictions, especially those of the country that exports the personal data. Furthermore, the SCCs can be considered an off-the-shelf instrument and less expensive to implement than others. As such, they are an option for small and medium-sized enterprises.



Click here and access the full text of the ANPD Regulatory Agenda for 2023 – 2024 in Portuguese.

Click here and access the full text of the Technical Note No. 20/2022/CGN/ANPD in Portuguese.

WHAT IS THE MARKET PRACTICE IN BRAZIL?

The ANPD cannot require processing agents to comply with the rules set out in the LGPD on international data transfer until specific regulations are issued.

- Nevertheless, as good practice and in observance of principles such as security, prevention, accountability and responsibility, we recommend the following:
- The processing agent should assess and map, before anything else, whether its business model implies data transfer outside the Brazilian territory (cross-border data flows);

- If so, if the processing agent is part of an international group of companies, adopt the international transfer format already adopted by the group, to the extent applicable and that does not conflict with the LGPD;
- If possible, and feasible within the structure of the data controller in relation to its international practices, especially in case it operates in the European territory subject to the GDPR, adopt in an adapted manner the appropriate safeguards provided for in the GDPR by means of specific contractual clauses for a given transfer, standard contractual clauses, binding corporate rules, etc.

Such measures will certainly be considered as good practice by the ANPD and will benefit the processing agent in eventual inspection proceedings until the definitive regulation is published.





The Veirano Experience has a holistic, multidisciplinary, and business-oriented approach. In order to cover all the needs related to Compliance with LGPD, our Data Protection & Privacy team have developed several project formats, which comprise different scopes of work and meet specific demands of each client, whether national or international:

1. Full Compliance

With the performance of a multidisciplinary team, this project is aimed for clients whose goal is to identify and assess all ongoing processing activities within the company and based on that, identify vulnerabilities and structure an action plan for the creation of an effective privacy and data protection program based on legal, procedural, information security, and corporate governance pillars.

2. DPO as a Service

In this model, we take on the role of Data Protection Officer (DPO) on behalf of the client. To this end, we allocate a professional to perform the activities of managing and monitoring the client's data protection and privacy program.

3. M&A Legal Assistance

Designed to assist clients in the legal due diligence of merger and acquisition transactions, in order to identify relevant legal issues (red flags) and mitigate potential risks related to data protection and personal data security issues of the target company.

4. LGPD Pocket

A “pocket” advisory service for the adequacy of the activities and/or products developed by the company, regardless of its size or field of business, considering a reduced number of deliverables.

5. LGPD on Demand

LGPD On Demand is aimed at organizations that wish to have multidisciplinary advisory service on legal, information security, and corporate governance issues, with specific and timely action related to the protection of personal data.

6. LGPD Legal Helpdesk

The Helpdesk is designed to assist clients with LGPD legal consultations and demands within a monthly package of hours, either before, during, or after the initial compliance process.

7. Task Force For Security Incident Assessment And Reporting (VA Cybersecurity)

Specific and multidisciplinary legal advice in aspects related to the suspicion or occurrence of a security incident, in accordance with the most updated instructions from the ANPD and other applicable laws and regulations.

8. Representation in Administrative and Judicial Actions Involving Data Protection

Representation of clients in any administrative and/or judicial actions or potential actions involving data protection.

9. Analysis of Administrative and Judicial Decisions on Data Protection Matters

Periodic monitoring of decisions rendered in judicial and administrative proceedings involving the company or not, in order to present the authorities’ understanding and the impacts for the company or economic sector to the client in a summarized format.

10. Development and Updating of a Data Protection Impact Report

The ANPD may request from the controller to prepare a personal data protection impact report ("RIPD" or DPIA). Our team has expertise on the subject and can assist the company with the preparation and updating of the RIPD.

11. Development of Workshops

Development and application of training about the main concepts related to privacy and data protection to train its employees.

12. Playbook for Negotiating Commercial Contracts

Creation of playbooks for the negotiation of commercial contracts, to facilitate and speed up internal processes of commercial, technical, and legal teams.

13. Handbook to Reply the Data Subjetcs

Development of materials to assist the companies in prompt answering the data subjects' requests, as well as in the procedure to be followed by the company when answering the data subject, according to the business model developed by the company.

14. International Data Transfer

We help clients to understand the context of the international transfer, adapt it to the applicable legal basis, assess data localization requirements, add contracts, draft and review intra-group data sharing agreements, and generally respond to queries related to the harmonization of foreign with Brazilian regulations.

15. Privacy and Data Protection Auditing

We conduct audits to evaluate the company's level of maturity, presenting recommendations for risk mitigation.

16. Development and Review of Documents Pursuant to the Financial Sector

Our team has expertise in drafting security policies in accordance with the Central Bank's specific information security regulations, and in answering questions on the subject.

We are at your disposal in case of any questions or in the need of any additional information.



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This material was last updated on June 7, 2023 and published on June 9, 2023.
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