Privacy Series

4 DPO

VEIRANO ADVOGADOS



This is the fourth chapter of the Data Privacy Series. Click Here to access the chap. 3.



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



DPO

Who is the DPO according to the Brazilian General Data Protection Law ("LGPD")?

The Data Protection Officer (or "Encarregado", in Portuguese), in accordance with the provisions of the LGPD, is the individual or entity appointed by the Controller or Processor to establish communication among the Controller, the Data Subjects and the National Data Protection Authority ("ANPD") (article 5, VIII, of the LGPD). This role is similar to that of the Data Protection Officer ("DPO"), established in the GDPR, which is why the term DPO is frequently used in Brazil, considering that the Brazilian law took inspiration from the European guidelines.

To simplify, the Data Protection Officer is the person responsible for ensuring protection of the Data Subjects' Personal Data (whether they are employees of a company, individuals outside the organization, or both). Thus, the Data Protection Officer can be either an employee of the relevant company or an outsourced service provider – commonly known in Europe as "DPO as a service".

Appointment of the DPO: option or obligation?

Unlike other foreign data protection legislation, the LGPD has not determined under what circumstances an organization must appoint a DPO. Thus, it should be assumed, as a general rule, with the exception for small-sized processing agents (to learn more, click here), that every organization should appoint an individual to take on this role. The small-sized processing agents are only required to provide a channel of communication with the Data Subject to meet the provisions of Art. 41, §2, I of the LGPD.

The LGPD and the GDPR are unanimous in the sense that, if there is an obligation to appoint a Data Protection Officer, it is necessary to document the entire process of assessing the hiring and maintenance of the person that will occupy that position, in compliance with the principle of accountability (as per art. 6, X, of the LGPD). Note that such documentation may be requested by the ANPD at any time and, therefore, must be updated whenever necessary.

DPO vs. "*Encarregado*"

While in Europe the DPO must have a high level of autonomy and independence, with direct access to the company's senior management, partners and the Data Subjects, as well as be bound to confidentiality obligations, being prohibited to accumulate roles that could result in conflicts of interest, as we will further address in item 1.7., below, in Brazil, the Encarregado's attributions are, for the time being, less complex. Therefore, there is not as much rigor in the definition of the requirements for the position.

In view of this, until the ANPD comes up with guidelines aside from the Guidelines for Definitions of Personal Data Processing Agents and the Data Protection Officer, published in May 2021, the appointment of the DPO should be made based on professional skills, in particular, advanced knowledge of data protection and privacy, so that the one occupying the position is able to fulfill the tasks related to data security and protection established by the LGPD.

Finally, we highlight that the European Data Protection Board, on March 15, 2023, reported that this year the designation and position of DPOs will be the subject of the GDPR coordinated enforcement action. Thus, such topics will be discussed by a Coordinated Enforcement Framework (CEF) composed of 26 European data protection authorities.

Thus, we will be looking for further publications on this topic.



Information regarding the "*Encarregado*": to publish or not to publish?

Paragraph 1, article 41, of the LGPD states that: "The identity and contact information of the "Encarregado" shall be disclosed to the public, on a clear and direct basis, preferably in the Controller's website". Therefore, although the does not establish the minimum types of data to be provided, it is understood that, once the "Encarregado" has been appointed, the Data Processing Agent should disclose the details of their appointment, as well as the contact details, such as e-mail and telephone (on their website, for example).

Nevertheless, in one of the first relevant cases regarding the LGPD, when examining *WhatsApp*'s Privacy Policy, the ANPD presented its first guidelines on the topic. Initially, in March 2021, the ANPD expressly mentioned the need for public and accessible disclosure not only of the contact information of the "Encarregado", but also of its "identity".

In their defense, *WhatsApp* claimed that

(i) the purpose of the provision in the LGPD is to ensure the response to Data Subjects' requests;

(ii) making the contact information available would be a common market practice; and

(iii) the disclosure of the identity of the "Encarregado" could bring risks to their privacy and security. Finally, *WhatsApp* provided to the ANPD, on a confidential basis, the identity information of the "Encarregado" appointed by the company.



In view of this, the ANPD accepted the *WhatsApp*'s arguments and understood that it would not be necessary to provide the identity of the DPO in the company's Privacy Policy. Therefore, given that there is, so far, no regulation on the subject, we can assume that simply indicating the contact details of the DPO is enough to meet the requirements of the LGPD.

Duties of the "Encarregado" according to the LGPD

The LGPD provides the following duties to the "Encarregado":

- Accept complaints and communications from the Data Subjects, provide clarifications and take measures;
- Receive communications from the ANPD and taking measures;
- Instruct the employees and contractors of the entity on the practices to be adopted in relation to data protection;
- To carry out any other duties established by the Controller or in supplementary rules; and
- Manage the flow of information to be processed.



It is also recommended that the DPO has some characteristics deemed to be very important for the full exercise of his/her duties:

- Being autonomous and free to provide examples of measures to be taken and take them him/herself;
- Having budgetary autonomy;
- Having direct contact with the company's executive officers;
- Receiving a specific amount as compensation regardless of the company's income, bonus, or goals of any kind;
- Neither holding any concurrent positions nor performing any concurrent duties that may lead to a conflict of interest so as to ensure the compliance to the LGPD to fullest extent.

The regulation on the "Encarregado" is foreseen in Phase I of the Regulatory Agenda for 2023-2024. Thus, in addition to the Guidelines for Definitions of Personal Data Processing Agents and the Data Protection Officer, the ANPD may also provide supplementary rules on the duties of the "Encarregado", including for events when the nomination of a DPO may be waived, according to the type and size of the company and the amount of data processing operations, as mentioned above.



Eligibility Criteria for the Position of "*Encarregado*"

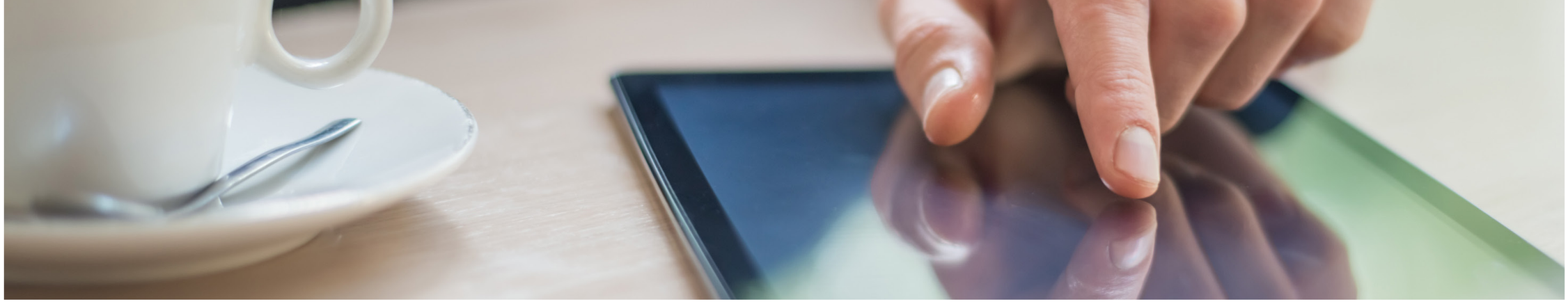
Initially, prior to LGPD, the DPO should be a natural person; however, the term "natural" was removed from the LGPD, which enabled both individuals and legal entities to be appointed as "Encarregado".

In addition, the LGPD does not determine the requirement for the "Encarregado" to have legal-regulatory knowledge, as foreseen in the GDPR, which states that the Data Protection Officer should be appointed based on his/her professional skills and expertise on data protection legislations.

This requirement was vetoed in the Provisional Measure (MP no. 869/2018) that gave rise to LGPD, because it "would go against the public interest as it is an excessively strict requirement, resulting in an unnecessary interference from the Government towards the discretion to recruit employees in the production sector and it would stand against the fundamental rights (article 5, XIII, Brazilian Federal Constitution), for restricting the free exercise of the occupation to a point it interferes in its essentiality".

Although not required to have, necessarily, legal and regulatory knowledge, it is important that the "Encarregado":

a. is accessible externally and internally, in view of its obligation to receive representations from Data Subjects and the ANPD, and to assist the data Controller's employees in acting within the provisions of the LGPD;



b. if not located in Brazil, counts on the company's internal structures/ procedures capable of allowing the effectiveness of the "Encarregado"'s communication with the Data Subjects and the ANPD, which shall be done in Portuguese, as well as has the availability to come to Brazil, if necessary;

c. is familiar with the personal data protection legislation in force and processing practices, as well as is able to comply with the requirements set forth in the LGPD, proportionally to the complexity of the operation of the Processor or Controller that indicated such "Encarregado";

d. is a multidisciplinary professional (or company, or committee), who knows and is able to interpret the privacy legislation in force, discuss with governmental bodies, understand the technology and information security issues, discuss issues involving compliance, governance, and corporate rules, and know the company's operations;

e. has the independence and capacity to perform its functions without excessive burden or conflict of interest, even if it acts as a DPO for more than one company; and

f. is always attentive to anything new concerning his/her area of operation as the ANDP may issue specific administrative rules that must be complied with by the "Encarregado", the Controller, and the Data Processor.

We recommend that these skills be pursued as well:

» Knowledge about risks on data processing, technology, cybersecurity, especially concerning data protection laws and measures;

» Knowledge about software and data specifics, such as whether they are structured or not and how they are stored;

» Knowledge about the use of the personal data within the company;

» Ability to assess risks and impact;

» Resourcefulness and good communication to be the "middleperson" between the company, the Data Subjects and ANPD; and

» Ability to interact with various areas of the company.

Conflict of Interest in the Position of "Encarregado"

The GDPR, unlike the LGPD, expressly states that the DPO may also act in other roles and positions, provided that this concurrent performance does not result in a conflict of interest. However, until recently, no guidelines had been provided on the criteria for conflict of interest.

In February 2023, the Sixth Chamber of the Court of Justice of the European Union (CJEU) published a decision (click here) setting out the first directions on what would be considered a conflict of interest under the GDPR. The ruling stemmed from the case in which the German-based company X-FAB dismissed its DPO on the grounds that his role as chairman of the works council was incompatible with the position of DPO. The DPO, in turn, sued for reinstatement and the case was referred to the CJEU.

Based on the provisions of Article 38(6) of the GPDR, which states that the DPO may perform other tasks and duties, and the Controller or Processor, as the case may be, shall ensure that such tasks and duties do not result in a conflict of interest, the CJEU ruled that a conflict of interest may exist where the DPO is entrusted with tasks and functions that result in determining the purposes and methods for the processing of personal data. Furthermore, according to the CJEU, such an analysis should be conducted on a case-by-case basis considering the applicable law, the organizational structure of the Processing Agent and its internal policies.



Thus, even though the LGPD does not expressly mention it - and the ANPD has not pronounced itself on the subject -, it is possible that this same approach will be adopted in Brazil. This because, as mentioned above, it is recommended that the "Encarregado" has the independence and ability to observe and ensure the company's compliance with applicable law without facing any obstacles.

Liability Regime Applicable to the "*Encarregado*"

The LGPD does not provide that the "Encarregado" shall be deemed liable if the company fails to comply with the data protection requirements. The "Encarregado" cannot be deemed personally liable as the Controller and the Processor are the ones in charge of ensuring and proving their activities are undertaken according to the regulations.

Even though the terms of the LGPD do not provide any specific liability regime, we must highlight that the "Encarregado" may be held personally liable based on the Civil Code if she/he acts unlawfully, causing damages and losses, according to articles 186, 187, and 927 of the Civil Code (Law No. 10,406/2002).



VEIRANO ADVOGADOS

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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For more updated information please contact us.