Privacy Series

9 ADMINISTRATIVE PENALTIES

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This is the ninth chapter of the Data Privacy Series. Click here to access the chap. 8.



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.



Today, personal data protection has become not only a competitive advantage, but also a crucial aspect for global businesses. In light of that, it is important to keep in mind that non-compliance with the Brazilian General Data Protection Law (Law 13,709/2018 or "LGPD") and the occurrence of a possible breach of personal data in your company can be a huge obstacle to obtaining new customers and suppliers, as well as for continuing ongoing business.

This is the reason why the LGPD, in its article 52, listed the types of penalties that a data processing agent may suffer from the National Data Protection Authority ("ANPD") if it fails to comply with the normative provisions brought by the LGPD:



- Warnings
- Disclosing of the incident
- Data elimination
- Simple fine, of up to 2% of the income of the private legal entity group conglomerate in Brazil, in its last fiscal year, limited, in total, to R$ 50,000,000.00 per violation
- Personal data blocking
- Partial or total suspension of activities related to data processing
- Partial suspension of the operation of the database to which the violation refers for 6 months, extendable
- Suspension of the personal data processing activity to which the infraction refers for 6 months, extendable
- Daily fine limited to 50 million Brazilian reais
- DAMAGE TO COMPANY'S REPUTATION!

For a better understanding about the penalties that may eventually be applied by the ANPD, it is important to understand what each one of them means. The LGPD itself had already regulated the penalties, but it was with the publication of the Regulation on Dosimetry and Application of Administrative Penalties, approved by Resolution CD/ANPD No. 4 ("Dosimetry Regulation"), that the concepts, previously not clearly defined, were regulated for the better understanding of the processing agents and the data subjects. Below, we highlight some of them:



Violation

According to the Dosimetry Regulation, there are two kinds of "violation": **(i)** the "*violation per se*", which has the meaning related to the general non-compliance with the obligations provided by the LGPD and the regulations issued thereunder, and **(ii)** the "*perpetual violation*", related to the violation extended over time, through action or omission of the violator related to the same normative device.



Elimination of personal data

The penalty of elimination of personal data consists in the exclusion of data or a set of data stored in a database, regardless of the procedure applied.



Publicizing

The publicizing penalty consists in the disclosure of the violation by the violator himself, after its occurrence has been duly ascertained and confirmed.



Warning and Corrective Measures

Pursuant to the Dosimetry Regulation, the ANPD may apply a warning to the violator **(i)** whenever the breach is considered mild or medium and does not characterize a specific recurrence (as further detailed in the section below) or **(ii)** when there is the need to impose corrective measures. Corrective measures are understood as those "*determined by the ANPD with the purpose of correcting the violation and bringing the offender back into full compliance with the LGPD and the regulations issued by the ANPD and shall be applied jointly with the warning sanction*".



Blocking

According to Article 5, XIII, of the LGPD, together with the Dosimetry Regulation, the "blocking" of personal data consists of the "temporary suspension of any processing operation with the personal data to which the violation relates, through their safekeeping, until the regularization of the conduct by the violator". The blocking of the data, therefore, will be executed to the extent of the data that is the object of the infringement and only until the infringement is duly regularized.

It is also important to note that blocking is also, and especially, one of the rights safeguarded to the data subject, as provided in Article 17, IV, of the LGPD.



Partial Suspension of Database Operation

The referred penalty consists of the suspension of database operation in non-compliance with the LGPD. Furthermore, in accordance with the Dosimetry Regulation, the penalty of partial suspension of the operation of the database will be applied for a maximum period of 6 (six) months, extendable for an equal period, until the regularization of the processing activity by the controller, taking into consideration the complexity for regularization and the classification of the violation.



Suspension of the Exercise of Activity for Personal Data Processing

The penalty in question is aimed at suspending the exercise of activity for processing of the personal data to which the violation refers, in order to ensure compliance with legal and regulatory standards and will be applied for a maximum period of 6 (six) months, extendable for an equal period.



Partial or Total Prohibition of the Exercise of Activities Related to Data Processing

The sanction of prohibition of the exercise of activities related to the processing of personal data consists of the partial or total impediment of personal data processing operations and may be applied in cases in which: **(i)** there is a recurrence of an infraction punished with partial suspension of the operation of the database or suspension of the exercise of the personal data processing activity; **(ii)** processing of personal data occurs for illicit purposes, or without support in a legal basis; or **(iii)** the offender loses or does not meet the technical and operational conditions to maintain the adequate processing of personal data.

Given the complexity of the administrative penalties, the ANPD has published several resolutions and other materials in order to further regulate the matter in question, as well as to ensure all parties involved in data processing, whether the controller, the operator, the DPO and the data subjects themselves, a more balanced and effective process on the enforcement of the violations provided in the LGPD.

Below, we have separated a brief summary of the content of the main documents prepared by the ANPD on this topic:

1) Resolution CD/ANPD No. 1

On October 28, 2021, the ANPD's Board of Directors approved the Regulation on the Inspection Procedure and the Sanctioning Administrative Procedure on the Resolution CD/ANPD no. 1/2021 ("Regulation on the Inspection Procedure and the Sanctioning Administrative Procedure").

The purpose of said regulation is to set guidelines on the inspection procedure, including monitoring, guidance, and preventive action as well as rules to comply with in the scope of the ANPD's sanctioning administrative procedure. As provided by law, the first monitoring cycle will start in January 2022.

The expected result is that ANPD manages to:

I. Plan and support the inspection activities with relevant information;

II. Assess whether the processing agents are complying with the provisions on personal data protection.

III. Consider the regulatory risk as a function of the attitude of the regulated agents, in order to allocate resources and adopt actions compatible with such risk, preventing and correcting irregular practices, as well as fostering a culture of personal data protection.

2) Resolution CD/ANPD No. 4

On February 27 of this year, the ANPD published the long-awaited Dosimetry Regulation, as mentioned at the beginning of this Chapter.

The Dosimetry Regulation aims to establish parameters and criteria for the application of the penalties provided in articles 52 and 53 of the LGPD, and also amend and bring new provisions for the administrative sanctioning process provided in Regulation on the Inspection Procedure and the Sanctioning Administrative Procedure, providing greater legal security and transparency to the parties involved.

Among the main provisions of the Dosimetry Regulation, we highlight:

I. The criteria for classifying violations as mild, medium or severe, as well as the parameters for applying pecuniary and non-pecuniary sanctions based on such criteria;

   i.i. The violation will be considered medium when it significantly affects the interests and fundamental rights of the data subjects;

   i.ii. The violation will be considered severe when the criteria for a medium violation have been met, cumulatively with the



configuration of one or more of the following requirements: (i) large-scale data processing; (ii) economic advantage as a result of the committed violation; (iii) risk to the lives of the data subjects; (iv) existence of processing of sensitive personal data or of children, adolescents or the elderly; (v) processing of personal data not supported by one of the legal hypotheses provided for in Article 18 of the LGPD; (vi) processing with illicit or abusive discriminatory effects, as well as (vii) adoption of irregular practices by the violator.

i.iiii. Finally, the violation will be considered mild when it does not configure any of the hypotheses foreseen for medium and severe violations.



II. The provision of an opportunity, during the investigation phase, for the regulatory agency or entity to which the controller is subject to manifest about possible consequences of the imposition of sanctions in relation to the exercise of regulated activities developed by the controller, especially in the provision of public services;

III. The methodology for defining the base amount for fines, ensuring proportionality between the seriousness of the agent's conduct and the sanction to be applied;

IV. The implications in the context of the sanctioning process, in the event the preventive measures set forth in art. 32 of the Regulation No. 1 of the ANPD are not adopted by the processing agent(s);

V. The duty of the ANPD to provide, in the event of a decision determining an obligation to do or not to do, the term for execution, the conditions for measurement, and the amount of the simple fine or daily fine in the event of non-compliance with the law, including for small processing agents, as defined by Resolution CD/ANPD No. 2, of January 27, 2022, for which the period granted for the payment of the fine will be double that granted to the other processing agents;

VI. The mitigating circumstances that will be considered by the ANPD when calculating the amount of the simple fine, such as the cessation of the violation, the implementation of a good practices and governance program, or the repeated and proven adoption of internal mechanisms and procedures capable of minimizing or reverting the damages to the data subjects;

VII. The attribution to the technical staff of the ANPD to prepare, in the event of an administrative appeal, an analysis of the general assumptions of admissibility of the appeal, of the granting of the suspensive effect and of the merit of the request, in addition to other information deemed relevant, to be sent with the decision to the Board of Directors; and

VIII. The application of the provisions of the Dosimetry Regulation to administrative proceedings in progress as of the date it comes into force.

IX. The publicization of the violation, after its occurrence has been duly ascertained and confirmed, as provided in articles 20 and 21 of the Dosimetry Regulation.



With the publication of the Dosimetry Regulation, the ANPD has the capacity to fully exercise its sanctioning powers with respect to agents that violate the LGPD, provided, of course, that the right to full defense, adversarial proceedings, and due process of law is respected by means of administrative proceedings.

3) Draft Legislative Decree that intends to suspend the rule of application of administrative penalties of the LGPD to cases prior to the entry into force of the rule

Draft Legislative Decree ("PDL") No. 66/2023, presented last March 8, intends to suspend article 28 of the Dosimetry Regulation, which provides that "*the provisions contained in this Regulation also apply to administrative processes in progress at the time of its entry into force*".

If the PDL is approved by the National Congress, the administrative penalties provided for in the LGPD would no longer be retroactive and, therefore, applicable from August 1, 2021, the date on which the LGPD penalties came into force, but only from 24 February 2023, when the Dosimetry Regulation was published. The PDL has not yet been put to a vote.

According to the Congressman who presented the PDL, article 28 in discussion would constitute a retroactive punishment, which is not allowed by the principle of retroactivity of the most beneficial administrative sanctioning rule provided for in the Brazilian Federal Constitution. Likewise, the aforementioned article would flagrantly violate the constitutional principle of legality, which states that *"no one is obliged to do or refrain from doing anything except by virtue of the law*".

According to the PDL's justification, processing agents could not know what technical and administrative measures they should adopt before the publication of the Dosimetry Regulation. Therefore, penalizing processing agents before the parameters and criteria were released by the ANPD would be illegal and unconstitutional.

It is worth noting that, on July 30, 2021, the ANPD had already clarified on its website that the penalties provided for in the LGPD are applicable to facts occurring after August 1, 2021 or with respect to offenses of a continuing nature initiated before such date. To learn more, click here.

It should be emphasized that, as of the publication date of this Chapter, the PDL was still in its way through the House of Representatives, awaiting analysis by the legislative body.

Read the full text of the PDL.

4) List of administrative proceedings initiated by the General Inspection Office ("CGF")

On March 23, 2023, the ANPD published the updated list of administrative proceedings initiated by the General Supervisory Office ("CGF") (available in Portuguese here). All the published proceedings are still in evidentiary stage and, therefore, have not reached any final decision from the ANPD.

In total, the ANPD initiated 8 (eight) administrative sanctioning proceedings under the Regulation of the Regulation on the Inspection Procedure and the Sanctioning Administrative Procedure and the Regulation of Dosimetry, 7 (seven) of which involve the Public Sector. According to the information submitted by the ANPD, most of the administrative proceedings involve non-compliance with the rules of the LGPD" and/or failure to comply with requests from the ANPD.

In particular, the conducts listed below are those that appear most frequently in the administrative proceedings, demonstrating the urgency in the adequacy of public and private sector companies to the LGPD rules:

I. Lack of appointment of the Data Protection officer;

II. Absence of security incident communication;

III. Absence of proof of legal hypothesis for processing personal data;

IV. Absence of registry of personal data processing operations;

V. Failure to send Data Protection Impact Assessment to the ANPD;

VI. No communication to data subjects about security incidents; and

VII. Failure to adopt security measures capable of protecting personal data from security incidents.

After the conclusion of the investigation, the documents of the process will also be disclosed, as well as the applicable sanctions, in case of conviction. On this matter, the ANPD pointed out that the publication of documents and other data from the proceedings shall not to be confused with the sanction of publication provided for in the LGPD, as advised by the ANPD's attorney.



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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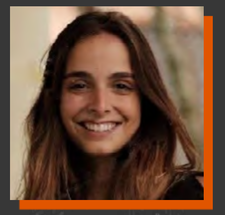
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