Privacy Series

1 LGPD: OVERCOMING CHALLENGES AND WHAT TO EXPECT IN 2023

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In 2023, the Brazilian General Data Protection Law (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 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.



Since its entry into force on September 18, 2020, the General Data Protection Law has come a long way, but there are still several legal issues that permeate the protection of personal data that still need further refinement.

1. Brazilian Data Protection Authority

Among the main changes promoted since the enactment of the LGPD, we highlight the change in the legal nature of the National Data Protection Authority ("ANPD"), which represented an important step in the process of adapting Brazil to international data protection standards.

Originally created as an entity, part of the Federal Public Administration and linked to the Presidency, the National Data Protection Authority ("ANPD") was recently transformed into an autarchy of special nature by Provisional Measure 1.124/2022, converted into Law 14.460/2022. Based on such status, the ANPD has become an effectively autonomous entity, without hierarchical subordination, with technical and decision-making autonomy and with its headquarters and jurisdiction in the Federal District.



2. Regulamentation of Specific LGPD Topics

The ANPD is currently carrying out all of its inspection and sanctioning functions, except for the application of fines, which was the subject of discussion in public consultation (as mentioned below), and has already issued the following resolutions: (i) Resolution CD/ ANPD No. 1/2021, which approves the Regulation of the Inspection Process and the Sanctioning Administrative Process, which aims to establish the procedures inherent to the inspection process, comprising the activities of monitoring, guidance and preventive action by the ANPD, and the rules to be observed in the scope of the sanctioning administrative process; and (ii) CD/ANPD Resolution N° 2/2022, which approves the LGPD Enforcement Regulations for Small Processing Agents, which provides for the application of the LGPD for micro and small businesses, as well as for incremental or disruptive business initiatives that declare themselves as startups or innovation companies.

In order to provide guidance to the agents on the subject of personal data protection, ANPD, alongside with several entities and authorities, has already published and updated several guidelines and technical documents on its official website. The documents cover a variety of topics, some of which we highlight on the folowing page:

Data Protection and Data Leakage, Processing Of Personal Data by the Public Power, Guideline on the Application of the Brazilian General Data Protection Law (LGPD) by Processing Agents in the Electoral Context, Information Security Guidance for Small-Sized Processing Agents, Guidance for the Definitions of the Processing Agents and of the Data Protection Officer, Guide on How to Protect Personal Data and, most recently, the Guide on Cookies and Personal Data Protection.

Nevertheless, there are still several LGPD provisions pending clarification and/or regulation by the ANPD.

In this regard, in August of 2022, the ANPD has opened four public consultations for civil society contributions on the following regulations: (i) Elaboration of the Regulatory Agenda for the Biennium 2023-2024; (ii) Regulatory Resolution on the Application of Administrative Penalties; (iii) Processing of High-Risk Personal Data; and (iv) Resolution on the Processing of Children and Adolescents' Personal Data

2.1. ANPD's Regulatory Agenda for the biennium 2023-2024

Aiming to confer, in the words of the ANPD itself, greater publicity, predictability, transparency, and efficiency to its regulatory process, as well as to bring greater legal security in the relationship with the processing agents, the agency has published in the Presidency's portal a Call for Subsidies with the main topics pending regulation to be classified by society in order of priority and relevance.

Among the topics presented, we highlight the following: (i) processing of children and adolescents' data; (ii) progressive adequacy of databases; (iii) petition by data subjects; (iv) sensitive personal data - biometric data; (v) security, technical and administrative measures, including minimum technical security standards; (vi) data sharing by public authorities; and (vii) technical opinions or recommendations regarding the exceptions provided for in Article 4, III, of the LGPD (non-applicability of LGPD when the processing is carried out exclusively for purposes of public security, national defense, state security or investigation and prosecution of criminal offenses).

Thus, after the contributions made by society, the ANPD approved its Regulatory Agenda for the Biennium 2023-2024 at the end of 2022. Overall, 20 initiatives are foreseen in the Agenda that were classified into phases, by priority order, being Phase 1 related to items whose beginning of the regulatory process was initiated in the previous biennium, Phase 2 related to items whose beginning will occur within 1 year; Phase 3 related to items whose beginning will occur within 1 year and 6 months and Phase 4 whose beginning will occur within 2 years.

Click here and access ANPD'S Regulatory Agenda for the Biennium 2023-2024

2.2. Resolution On The Application Of Administrative Penalties

The Resolution on the Application of Administrative Penalties seeks to promote the effectiveness of the LGPD through a methodology for the application of the sanctions provided, as well as to ensure that the decisions made by it are effective, isonomic, transparent, objective and consistent. The definition of this regulation is the main pending issue before the ANPD begins to apply fines.

Among the most relevant points of the draft proposed by the agency, we highlight: (a) the classification of infractions between warnings and fines, the publicizing of the infraction, the suspension of personal data processing activities, among others, (b) the establishment of criteria and parameters for the definition of sanctions such as the gravity and nature of the act, degree of damage and the cooperation and good faith of the offender, (c) the classification of the gravity of the infractions as light, medium or serious; and (d) the methodology for application and form of calculation of the fine sanctions, respecting the maximum limits established by the LGPD.

2.3. Resolution on High-Risk Personal Data Processing

This consultation stems from the provisions of Article 4 of the Regulation on the Application of the LGPD to Small-Sized Data Processing Agents (Resolution CD/ANPD No. 2, of 2022), which provides for the criteria for defining when the processing performed is of high risk to the data subjects. Although the Regulation relaxes some of the obligations provided for in the LGPD, Small-Sized Data Processing Agents who carry out high-risk processing will not be able to benefit from this differentiated legal regime.

In light of the information above, the ANPD is elaborating a guideline to assist small data processors in the evaluation of their personal data processing, as a complement to the Information Security Guideline for Small Data Processors, already published on October 04, 2021.

2.4. Regulation on the Processing of Children and Adolescents' Personal Data

The consultation on the Processing of Children and Adolescents' Personal Data stems from a context of legal uncertainty due to the lack of definition of the applicable legal hypotheses for personal data processing, constituting a controversial topic among professionals and scholars in the field. Given the importance of this topic, the LGPD has reserved a specific section for the personal data processing of children and adolescents, establishing that such processing must be carried out in the best interests of these data subjects.

To this end, the ANPD has prepared a preliminary study on the legal hypotheses applicable to the personal data processing of children and adolescents. In this study, the agency addressed especially the mandatory collection of consent from legal guardians for the processing of children's personal data, as well as its implications.



3. What to Expect in the Future?

Recent surveys indicate that most Brazilian companies are not compliant with the LGPD. At the same time, incidents involving personal data continue to grow in the country, placing Brazil among the countries at the highest total number of data incidents.

Although the ANPD has shown that it is aware of the need to invest time and effort in raising awareness about the relevance of personal data protection, rather than a more sanctioning and repressive stance at first, it does not mean that companies should not commit to compliance with the LGPD. Besides the fact that LGPD has a transversal application, several agencies such as the Public Ministry, CADE, the National Consumer Secretariat - SENACON and PROCONs, have invoked it in administrative and judicial representations.

Data protection and information security have never been more important topics, meaning that compliance with data protection legislation has become one of the most important market assets.

Until the first half of 2023, it is still expected:

- Surveillance of compliance with the LGPD and its regulations by the General Inspection Coordination, which can occur retroactively as of August 1st, 2021;
- Increased awareness of data subjects regarding their rights under the LGPD and, with it, an increase in requests directed to companies and the ANPD to exercise rights;
- Ongoing increase in the number of cyber attacks and security incidents, such as data leaks, due to the progressive growth in the volume of personal data circulating in digital environments and platforms;

Regulation by the ANPD on:

- The dosimetry and application of administrative penalties;
- Rights of the data subjects;
- Information Security Incident reporting and notification deadline specification;
- International transfer of personal data and the mechanisms for data transfer, including defining the content of Brazilian standard contractual clauses ("SCCs"), among others;
- Data Protection Impact Assessment (DPIA) for cases where the processing poses a high risk to ensuring the general principles of personal data protection; and
- The definition and duties of the DPO, including cases of exemption from the need to appoint one, in accordance with the nature and size of the entity or the volume of data processing operations.

Although enormous challenges lie ahead for the full implementation and proper enforcement of the LGPD, the advances in these last four years have brought the certainty that privacy and the protection of personal data are rights that are here to stay.

In light of these advances, it is expected that the gaps in LGPD will soon be filled, bringing greater legal certainty to companies seeking to be adequate, and more effective protection for personal data subjects in a global scenario of increasingly data-driven economies.



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.