



REGULATORY SCENARIO

PRIVACY AND DATA PROTECTION SERIES

1. INTRODUCTION

Since the Brazilian General Data Protection Act (“LGPD”) entered into force in September 2020, the Brazilian privacy and data protection legislation has gone through several developments.

Among the main progressions and developments, we highlight the following:

The recognition of data protection as a fundamental right provided for by the Brazilian Federal Constitution

A structural change in the Brazilian Data Protection Authority (“ANPD”), which has turned from a body subordinated to the Presidency of the Republic into an independent government agency of a special nature

The proposal of a regulatory plan for 2021–2022 and 2023–2024 by the ANPD, the conduction of public hearings and the publication of regulations concerning the following topics:

- **Structure of the ANPD**
- **Regulation on the procedures for monitoring, application of administrative sanctions, and calculation of sanctions**
- **Flexible requirements for small and medium-sized organizations, startups, and individuals**
- **Data subject's rights**
- **Incident communication deadline**
- **Data protection impact assessment**
- **International data transfer**
- **Data Protection Officer**
- **Legal hypotheses for processing personal data**
- **Legal hypotheses for processing children's and adolescent's data**
- **Guidelines and forms issued by the ANPD**
- **Creation of ANPD's Digital Governance Committee**
- **Dosimetry and application of administrative sanctions by the ANPD.**

This material summarizes the main changes observed in the last few years, as well as the expectations for the current and following years.

2. DATA PROTECTION AS A FUNDAMENTAL RIGHT

On February 10, 2022, amendment No. 115/2022 to Brazil's Federal Constitution came into force to include data protection as a fundamental right amongst others in the Brazilian Federal Constitution.

Among the benefits of such a change, the Federal Senate and the House of Representatives will have exclusive jurisdiction to further legislate on privacy and data protection matters in Brazil.

Maintaining jurisdiction at the federal level will benefit the data protection ecosystem with greater uniformity. Individuals will also benefit from the status of data protection as a fundamental right under the Federal Constitution.



3. BRAZILIAN DATA PROTECTION AUTHORITY (“ANPD”)

3.1. ANPD'S OPERATION

While the regulatory landscape on privacy and data protection continues to evolve, ANPD has yet to be active in enforcing the LGPD. In its first years, the ANPD focused on creating a responsive regulation system, establishing cooperation agreements with other government entities, and educational actions. In contrast, the Public Prosecutor's Office, regulatory agencies, consumer protection agencies, and courts have been active in enforcing both the LGPD and sectorial data protection laws at the administrative and judicial levels.

The ANPD has partnered with the National Consumer Secretariat ("Senacon"), the Antitrust Authority ("CADE"), the Internet Steering Committee (via "NIC.br"), the Superior Electoral Court ("TSE"), and other national and international entities for cooperation purposes.

With the enactment of the regulation on monitoring, administrative sanctions, and calculation and application of sanctions in 2022 and 2023, and by becoming fully independent, the Authority is likely to increase the number of enforcement actions in the coming years.

3.2 ANPD'S INDEPENDENCE

The ANPD was initially created under the administrative structure of the Presidency of the Republic. Although technically independent since its creation, its full independence was only achieved with the publication of Provisional Measure No. 1,124 on June 13, 2022, converted into Law No. 14,460, on October 25, 2022, which modified the structure of the ANPD to make it an independent government agency of a special nature.

With this change, the Authority maintained its technical and decision-making autonomy to direct public administration and decentralized administrative and financial management.

The new legislation also provides for structural changes to enable the functioning of the Authority in its new formats, such as rules for requisitioning personnel and transferring assets and personnel from other public administration bodies or entities.



3.3. ANPD'S REGULATORY ACTIONS FOR 2021-2024

Last Updated: February 2023

In early 2021, the ANPD issued its strategic plan and proposed an initial regulatory agenda for 2021-2022 to map and determine the Authority's priority regulatory actions. The LGPD still has many items to be further regulated, some of which were included in this regulatory agenda.

ANPD applied a responsive regulation regime whereby any regulation should come after (a) an open public contribution or public hearing, in which the entities can present important aspects to be regulated, and (b) an open public consultation, in which entities can criticize the regulation draft proposed by the ANPD. Such an approach resulted in many public contributions and hearings conducted during 2021-2022, but only a few regulations were issued.

In the end of 2022, a new regulatory agenda for 2023-2024 was published, describing the main topics that will be addressed by the ANPD in this biennium.

In early 2023, the ANPD established the ANPD's Digital Governance Committee, which will be responsible for deliberating on how the technical actions aimed at services to be provided digitally by the government will be structured.

Below you will find the most important topics and discussions already conducted by the ANPD during 2021-2023, as well as the discussions that are expected to take place until 2024:

Regulatory action	Status	Last update
ANPD's Bylaws	Completed	Issued on March 8, 2021
ANPD's Strategic Planning for 2021-2023	Completed	Issued on January 29, 2021, and amended on May 24, 2022
Regulation of the procedures for monitoring and applying administrative sanctions	Completed	Ordinance No. 1 – Issued on October 28, 2021
ANPD's Regulatory Agenda for 2021-2022	Completed	Issued on January 27, 2021
Flexible requirements for small and medium-sized organizations, startups, and individuals	Completed	Public consultation ended in October 2021. Ordinance No. 2 – Issued on January 27, 2022.
Regulation on the calculation of sanctions and seriousness	Pending	Public consultation ended in September 2022. Ordinance No. 4 – Issued on February 27, 2023



Regulatory action

Status

Last update

Data subject rights

Pending

No public contribution or public consultation was launched. No ordinance was issued on the topic.

Incident communication deadline

Pending

Public consultation ended in March 2021. No public consultation was launched, and no ordinance was issued on the topic.

Data Protection Impact Assessment

Pending

Technical meetings were held in March 2021. No public consultation was launched. No ordinance was issued on the topic.

Data Protection Officer

Pending

Public contribution ended in March 2022. No public consultation was launched, and no ordinance was issued on the topic.

International Data Transfer

Pending

Public contribution ended in June 2022.
*Technical Note No. 20/2022/CGN/ANPD issued. No public contribution was launched. No ordinance was issued on the topic.

Illegal hypothesis basis that allows data processing

Pending

No public contribution or public consultation was launched. No ordinance was issued on the topic.

Illegal hypothesis basis that allows the processing of children's and adolescents' data

Pending

Public contribution ended in November 2022.
*Preliminary Study issued. No public consultation was launched. No ordinance was issued on the topic.



Regulatory action

Status

Last update

ANPD's Regulatory Agenda for 2023-2024

Completed

Public contribution ended in August 2022. Issued on November 8, 2022.

Creation of ANPD's Digital Governance Committee

Completed

Ordinance No. 3 – Issued on January 25, 2023

Dosimetry and application of administrative sanctions

Completed

Ordinance No. 4 – Issued on February 27, 2023

Data subject's rights

Pending

Regulatory process was already initiated

Reporting data incidents and specifying notification period

Pending

Regulatory process was already initiated

International Transfer of Personal Data

Pending

Regulatory process was already initiated

Data Protection Impact Report

Pending

Regulatory process was already initiated

DPO – complementary standards

Pending

Regulatory process was already initiated

Legal cases for personal data processing

Pending

Regulatory process was already initiated

Definition of high risk and large scale

Pending

Regulatory process was already initiated

Sensitive Personal Data – Religious Organizations

Pending

Regulatory process was already initiated

Use of personal data for academic purposes and for carrying out studies by research organization

Pending

Regulatory process was already initiated



Regulatory action	Status	Last update
Anonymization and pseudonymization	Pending	Regulatory process was already initiated
Regulation of the provisions of art. 62 of the LGPD	Pending	Regulatory process was already initiated
Data sharing by Public Authorities	Pending	Regulatory process is expected to begin until the end of 2023
Processing of personal data of children and adolescents	Pending	Regulatory process is expected to begin until the end of 2023
Guidelines for the National Policy for the Protection of Personal Data and Privacy	Pending	Regulatory process is expected to begin until the end of 2023
Regulation of criteria for recognition and disclosure of best practices and rules of governance	Pending	Regulatory process is expected to begin until the end of 2023
Sensitive data – Biometric data	Pending	Regulatory process is expected to begin until mid-2024
Security, technical and administrative measures (including minimum technical security standards)	Pending	Regulatory process is expected to begin until mid-2024
Legal cases for personal data processing	Pending	Regulatory process was already initiated
Artificial intelligence	Pending	Regulatory process is expected to begin until mid-2024
Conduct adjustment term	Pending	Regulatory process is expected to begin until the end of 2024



3.4 ANPD'S ORDINANCES

During 2021–2022, the ANPD published Ordinances No. 1 and No. 2 related to the interpretation of the LGPD. At the beginning of 2023, Ordinances No. 3 and 4 were published, which deliberated on the creation of ANPD's Digital Governance Committee and the dosimetry and application of administrative sanctions.

We briefly detail below the content of such ordinances:

CD/ANPD ORDINANCE Nº 01

Issued on October 28, 2021, the CD/ANPD Ordinance No. 1, regulates the procedures for monitoring and application of administrative sanctions by the ANPD, including monitoring activities (Article 18), orientation activities (Article 27), preventive measures (Article 30), and repressive activities (Article 37). From these topics, the possibility of processing agents presenting a settlement proposal after the establishment of the sanctioning process stands out. Ordinance No. 1 informs the criteria for the application of sanctions.

CD/ANPD ORDINANCE Nº 02

Issued on January 27, 2022, the CD/ANPD Ordinance No. 2, facilitates compliance with the LGPD, reducing the number of obligations applied to small-sized businesses, startups (as defined in the Complementary Law No. 182/2021 – “Startup Act”), profit-making or non-profit legal entities, as well as depersonalized private entities and individuals (“Small-Sized Processing Agents”). The ordinance does not apply to Small-Sized Processing Agents that carry out high-risk processing activities. A processing activity is considered high risk when it meets at least one general (e.g., large scale) and one specific (e.g., use of new technologies, surveillance, etc.) criterion, as defined in the regulation.

CD/ANPD ORDINANCE Nº 03

Issued on January 25, 2023, CD/ANPD Ordinance No. 3 instituted the Digital Governance Committee of the ANPD as a permanent body. The committee will meet quarterly to deliberate on matters related to the implementation of digital government actions and use of information and communication technology resources only within the scope of the ANPD. It should be mentioned that the resolution has internal administrative effects and does not create or establish obligations for the personal data subjects, companies, or other public bodies.

CD/ANPD ORDINANCE Nº 04

Issued on February 27, 2023, CD/ANPD Ordinance No. 4 regulates the dosimetry and the application of administrative sanctions by the ANPD and reinforces its supervisory activity. This regulation is a requirement provided for in article 53 of the LGPD and its main objective is to establish criteria, parameters, and methods for the application of sanctions by the ANPD in case of non-compliance with the LGPD rules, as well as parameters that allow the calculation of the amount of the fines.



3.5. ANPD'S GUIDELINES

In addition to the regulatory actions determined above, the ANPD also issued the following guidelines since its creation:



The guidelines on the definition of controller, processor, and Data Protection Officer (“DPO”) stands out, which clarifies how to define the controller, including joint and independent controllers, processors, sub-processors, and DPO. The definitions established by the ANPD are generally aligned with the concepts of controllers and processors under the General Data Protection Regulation (“GDPR”) in the European Union.

It must also be highlighted that the General Coordination of Inspection of the ANPD released in December 2022 a new form for reporting Security Incident Reports. The controllers of personal data must fill up the document to report any security incidents to the ANPD. The new form is available on the ANPD’s website and began to be implemented on the first day of 2023 to facilitate the recording of communications by controllers and the respective analysis by the ANPD.



4. OUTLOOK FOR 2023

The ANPD has already proposed several actions to regulate open issues in the LGPD and establish the Authority as a fully independent government entity.

Although the issuance of CD/ANPD Ordinances No. 3 and No. 4 in the beginning of 2023, there are a number of other relevant aspects to be discussed and regulated.

Based on the regulatory agenda published by the ANPD for the biennium of 2023–2024, we can expect the discussion of several important topics later this year, such as the regulation of data subjects' rights and regulation of the international transfer of personal data.

It is expected, based on resolutions and guidelines already issued by the ANPD in the last years, that the Authority will continue to align Brazil's general privacy and data protection rules with international standards.

Finally, with the sanctioning process in force and the issuance of the ordinance on the dosimetry and application of administrative penalties, it is expected that the ANPD should increase the number of enforcement actions and imposition of fines gradually in the coming years, starting in 2023.

Our recognitions



Análise
Advocacia (2021)



Chambers & Partners
Brazil (2021 & 2022)



Leaders League
(2021 & 2022)



Transactional
Track Record
(2021 & 2022)



The Legal
500 (2022)

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