



# The Legal 500 Country Comparative Guides

## Brazil

# DATA PROTECTION & CYBER SECURITY LAW

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This country-specific Q&A provides an overview of data protection & cyber security law laws and regulations applicable in Brazil.

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## BRAZIL

# DATA PROTECTION & CYBER SECURITY LAW



**1. Please provide an overview of the legal and regulatory framework governing data protection and privacy in your jurisdiction (e.g., a summary of the key laws, who is covered by them, what sectors, activities or data do they regulate, and who enforces the relevant laws). Are there any expected changes in the data protection and privacy law landscape in 2022-2023 (e.g., new laws or regulations coming into effect, enforcement of any new laws or regulations, expected regulations or amendments)?**

The Brazilian Federal Constitution (“CF/88”) sets forth the core principles of privacy and data protection. According to the CF/88, privacy, private life, honor, and image of individuals are inviolable, and the right to be compensated for economic and moral damages resulting from violation thereof is ensured. In February 2022, Constitutional Amendment No. 115 changed the Brazilian Constitution to insert in the list of article 5º, expressly, the data protection as a fundamental right.

Brazil enacted, in August 2018, the General Data Protection Act (Law No 13,709/2018 – “LGPD”), which most of its provisions came into force in September 2020, following legislative and executive discussions on the issue. The articles that provide for the administrative sanctions applicable to non-compliance agents came into force in August 2021, through Law No. 14,010/2020.

LGPD provides a wide regulation for data protection, including collection, storage, registration, monitoring, processing, and disclosure of personal data processing agents. The LGPD requires that personal data processing activities comply with several principles, such as purpose, transparency, security, free access by the data subject, prevention of damages, and non-discrimination.

The National Data Protection Authority – “ANPD”, the

body responsible for interpreting and enforcing compliance with the LGPD has already been formed and is operating in the Brazilian jurisdiction. At the end of January 2021, the ANPD made public its initial regulatory agenda, through Decree No. 11, which placed as a priority an educational and regulatory agenda, with the provision of important issues in the privacy and data protection scenario such as small and medium-sized enterprises, rights of data subjects, administrative sanctions, communications on data breaches, among others.

Up to this moment, the ANPD has issued two fascicules: one about data protection and the other about data breaches, aimed to raise the public’s awareness about the main concepts brought by the LGPD. The ANPD has also issued some guidelines, the first being the Guideline of Definitions of Personal Data Processing Agents and Data Protection Officer, explaining and bringing examples of these two figures defined by LGPD. The following is the Guideline on How to Protect Your Data, aimed at the data subjects to explain the importance of the matter.

The third one is the Guideline on Information Security for Small-Sized Processing Agents, which regulates the applicability of certain aspects of the LGPD on small-sized processing agents, such as the information security measures to be taken, administrative measures and other topics. The ANPD has also issued a Guideline on the Application of LGPD on Processing Agents in the electoral context, to provide orientation on how to process personal data aiming at preserving data subjects’ rights and the integrity of the electoral process, without obstructing the communication between candidate and citizen, which is necessary for the democratic process. Last, ANPD published the Guideline on Data Processing by Public Agents to establish objective parameters, capable of providing legal certainty to transactions with personal data carried out by public entities and bodies.

ANPD also updated its communiqué on data breaches,

which includes provisions such as the concept of a data breach, actions that must be taken by the controller, recommendations for information in data breach notifications, recommended deadline for communication, a model form of notification to ANPD, among others. Regarding the processing of personal data by small-sized processing agents, Resolution N. 2 of 27<sup>th</sup> January 2022 brings light to the aspects of the LGPD such as the waiver of a Data Protection Officer (“DPO”) depending on the company’s size, high-risk processing of data and the annual revenue, among other dispositions that intend to softening some requirements of LGPD, such as deadlines for a reply to data subjects.

Currently, one of the most important sectoral laws is the Brazilian Civil Rights Framework for the Internet (Law No. 12.965/2014, the “Internet Law”) which establishes principles, guarantees, rights, and obligations for the use of the Internet in Brazil. Besides, Decree No. 8,771 of May 11, 2016, which regulates the Internet Law, sets forth the rules related to the request of registration data by public administration authorities, as well as the security and confidentiality of records, personal data, and private communications.

There are other sectorial laws and regulations concerning rights to privacy and data protection, including, but not limited to:

- Civil Code (Law No. 10,406/2002) grants general privacy rights to any individual and the right to claim against any attempt to breach such rights by any third party;
- Consumer Code (Law No. 8,078/1990) provides for the principles of transparency, information, and quality of data on its provisions;
- Positive Credit Registry Act (Law No. 12,414/2011) permits databases of ‘positive’ credit information (i.e., fulfillment of contracted obligations) but prohibits the registry of excessive information (i.e., personal data which is not necessary for analyzing the credit risk) and sensitive data;
- Complementary Law No. 166/2019 that amends the Positive Credit Registry Act, authorizing the inclusion of natural persons and legal entities in positive registration databases, without their prior request;
- Telecommunications Act (Law No. 9,472/1997) grants privacy rights to consumers about telecommunications services;
- Wiretap Act (Law No. 9,296/1996) establishes that interception of communications can only occur by court order upon request by police authorities and the Public Prosecutor’s Office

- for purposes of criminal investigation or discovery in criminal proceedings;
- Bank Secrecy Act (Complementary Law No. 105/2001) requires that financial institutions (and similar entities) hold financial data of individuals and entities in secrecy, except under judicial order issued for purposes of investigation of any illegal acts or discovery in criminal proceedings;
- Resolution 3/2009 of the Internet Steering Committee in Brazil (CGI.br), establishes principles for ensuring privacy and data protection on the use of the internet in Brazil, mainly regarding activities developed by internet service providers;
- Resolution 124/2006 of the National Supplementary Health Agency imposes a fine on health insurance companies up to BRL 50,000 for the breach of personal information related to the health conditions of a patient;
- Law No. 13,989/2020. Provides for the use of telemedicine during the COVID-19 crisis. The law for the use of telemedicine after the pandemic context is already being studied by the Federal Council of Medicine that intends to elaborate an ethical, technical, and safe law to provide adequate practice of telemedicine in Brazil, considering the privacy and data protection for both parts (patients and doctors).
- Resolution of the Brazilian Central Bank No. 1 of 2020. Establishes the Pix payment arrangement (a system created by the Brazilian Central Bank that operate instant payments) and approves its Regulation that provides for the need to obtain formal consent from users for the registration of keys and use of the instant payment method.
- Joint Resolution of the Brazilian Central Bank and the National Monetary Council No. 1 of 2020. Provides for the implementation of Open Banking, which brings privacy and data security as one of the goals of Open Banking, and also imposes obtaining formal consent from users;
- National Monetary Council Resolution No. 4,865 and Brazilian Central Bank Resolution No. 29 of 2020. Establish the guidelines for the operation of the Controlled Test Environment for Financial and Payment Innovations (Regulatory Sandbox) and the conditions for the supply of products and services in the context of this environment within the National Financial System. Both resolutions bring privacy as one of the objectives and guidelines of the Regulatory

Sandbox.

- Law No. 14,129/2021. Provides for principles, rules, and instruments for Digital Government and the increase of public efficiency, and foresees data protection and privacy as a governmental principle, mentioning the compliance with LGPD.
- National Monetary Council Resolution No. 4,883 of 2021. Provides for the cybersecurity policy and the requirements for contracting data processing and storage and cloud computing services to be observed by institutions authorized to operate by the Brazilian Central Bank.
- As of April, the Supreme Federal Court portal will offer a new method of collecting court fees, through the PagTeseuro digital platform, run by the National Treasury Secretariat of the Special Secretariat for Finance. With the novelty, the jurisdictional has the option of making the payment by Pix and by credit card, which are added to the existing modality of Federal Tax Liability Payment Form ("GRU") compensation. PagTeseuro was established by Decree 10,494/20 as a digital platform for payment and collection of amounts to the National Treasury Single Account;
- Brazilian Health Regulatory Agency ("ANVISA"). Resolution 68/2022 for the software as medical devices, establishes that patients' data will be processed in accordance with data protection laws, only for the purposes set out in the resolution and as necessary for the evaluation of data on safety and efficacy of the product.

## **2. Are there any registration or licensing requirements for entities covered by these laws and, if so, what are the requirements? Are there any exemptions?**

The Brazilian data protection legislation, including LGPD, does not require any prior licensing or registration for data processing activity. On the other hand, companies are required to get licenses/authorizations to be issued by the competent regulatory agencies as regard, for example, the provision of telecommunication, banking, health, and other regulated activities/services. Those are the so-called regulated service sectors.

## **3. How do these laws define personal data or personally identifiable information (PII) versus special category or sensitive PII?**

## **What other key definitions are set forth in the laws in your jurisdiction?**

The LGPD defines:

- Personal data as information regarding an identified or identifiable natural person;
- Sensitive information such as personal data concerning racial or ethnic origin, religious beliefs, political opinions, membership of trade unions or religious, philosophical or political organizations, data concerning health or sex life, genetic or biometric data, when related to a natural person.

Other key definitions are:

- Data subject: a natural person to whom the personal data object of processing refers;
- Data controller: a natural person or legal entity, of public or private law, responsible for making decisions about the processing of personal data;
- Data processor: a natural person or legal entity, of public or private law, that processes personal data in the name of the controller;
- Data protection officer: a person appointed by the controller and the processor, who acts as a channel of communication between the controller and the data subjects and the ANPD;
- Processing agents: data controller and data processor;
- Processing: any operation carried out with personal data, including, but not limited to, those concerning collection, production, reception, classification, use, access, reproduction, transmission, distribution, processing, filing, storage, deletion, assessment or control of information, modification, communication, transfer, dissemination or extraction;
- ANPD: agency of the public administration responsible for supervising, implementing and monitoring compliance with the LGPD.

## **4. What are the principles related to, the general processing of personal data or PII - for example, must a covered entity establish a legal basis for processing personal data or PII in your jurisdiction or must personal data or PII only be kept for a certain period? Please outline any such**

## principles or “fair information practice principles” in detail.

Every processing activity of personal data shall observe good faith and the following principles, according to article 6 of LGPD: i) purpose; ii) adequacy; iii) necessity; iv) free access; v) quality of the data; vi) transparency; vii) security; viii) prevention; ix) non-discrimination; and x) accountability.

Also, the LGPD establishes in article 7 that the processing of personal data shall only be carried out in the following cases:

- By means of the data subject’s consent;
- For compliance with the legal or regulatory obligations by the controller;
- By the public administration for the processing and shared use of data required for the implementation of public policies;
- For the conduction of studies by research entities, ensuring, whenever possible, the anonymization of personal data;
- When necessary for the performance of a contract or preliminary proceedings related to a contract to which the data subject is a party, at the request of the data subject;
- For the regular exercise of rights in judicial, administrative or arbitral procedures;
- For the protection of the life or physical safety of the data subject or a third party;
- For the protection of health, in procedures carried out by health professionals or sanitary entities;
- When necessary to serve the legitimate interests of the controller or of third parties, except in the event of the prevalence of fundamental rights and liberties of the data subject, which requires protection of the personal data;
- For credit protection including provisions of relevant legislation.

According to article 15 of the LGPD, the termination of data processing will occur: (i) when the purpose of the processing is achieved; (ii) end of the processing period; (iii) fulfillment of legitimate request by the data subject; (iv) determination by the ANPD, when a violation of the LGPD occurs.

Moreover, the storage of personal data after the processing is authorized for the following purposes, provided by article 16 of LGPD:

- Compliance with a legal or regulatory obligation by the controller;

- Study by a research entity, ensuring, whenever possible, the anonymization of the personal data;
- Transfer to third parties, provided that all legal requirements set forth in the LGPD are complied with;
- Exclusive use of the controller, with forbidden access to third parties, and provided the data has been anonymized.

In addition, sectoral legislation, such as the Consumer Code, National Tax Code, Labor Legislation, among others, provides different rules regarding data storage.

Specifically for internet applications, the Internet Law establishes that application service providers must keep records of internet access (*i.e.*, the set of information regarding the date and time of use of a particular internet application from a particular IP address) applications under secrecy, in a controlled and safe environment, for a minimum term of six months and in the provision of internet connections, the autonomous system administrator shall keep records of the connection logs under secrecy for at least one year.

## 5. Are there any circumstances where consent is required or typically used in connection with the general processing of personal data or PII?

Consent is one of the legal bases provided in the LGPD to process personal data and has specific rules for its use. When we are processing personal data, consent must be a free, informed and unambiguous manifestation by the data subject for a specific purpose, given in writing or by another means that demonstrates his/her manifestation of will. On the other hand, the processing of sensitive personal data requires specific and highlighted consent, for specific purposes.

If consent is provided in writing, the contractual clause must appear highlighted from the other contractual clauses. Additionally, to process child and adolescent data as well, at least one of the parents or the legal guardian shall give his/her specific and highlighted consent.

Also, one of the mechanisms that allow international transfers is the specific and highlighted consent given by the data subject, with prior information about the international nature of the operation, being clearly distinct from other purposes.

In cases where the processing of personal data is based on consent, LGPD establishes that the consent can be

revoked at any time by the data subject, using an express, free and facilitated procedure.

Finally, the LGPD also determines that the data subject can require the erasure of personal data processed with the data subject consent, unless the processing occurs under the following conditions, per article 16, of LGPD:

- compliance with the legal or regulatory obligations by the data controller;
- studies by a research body, subject to the anonymization of personal data, whenever possible;
- transfer to third parties, subject to compliance with data processing requirements; or
- for exclusive use by the data controller, with no access by third parties and provided such data is anonymized.

### **6. What are the rules relating to the form, content and administration of such consent? For instance, can consent be implied, incorporated into a broader document (such as a terms of service) or bundled with other matters (such as consents for multiple processing operations)?**

Article 5, XII, LGPD, typifies what the form of consent should be, establishing that the manifestation must be free, informed, and unequivocal, whereby the data subject agrees with the processing of his/her personal data for a specific purpose, as mentioned in the question 5.

Therefore, consent must be:

- Free - the data subject cannot be obliged to give his consent, and it cannot be established automatically, as in a checkbox already selected.
- Informed - the data subject must understand exactly what he is consenting to, the information must be passed on in a complete, transparent and simple way.
- unequivocal- there can be no doubt about acceptance by the data subject, companies should strive to ensure this understanding.

Moreover, article 8, from LGPD, establishes that consent must be provided in writing or by another means that demonstrates the data subject's manifestation.

At last, the LGPD does not specify in which type of document consent must be provided, but, §4°, from

article 8, specifies that consent shall refer to specific purposes, and generic authorizations for processing of personal data are null and void. So, as a good practice, the recommendation is that it be incorporated into a specific document or in a highlighted form, so the data subject can have a complete understanding of the document, in compliance with the requirements of the LGPD.

### **7. What special requirements, if any, are required for processing sensitive PII? Are there any categories of personal data or PII that are prohibited from collection?**

According to the LGPD, it is not prohibited to collect and process sensitive personal information. However, the processing of sensitive personal data may only occur if the data subject or his/her legal representative consents, in a specific and highlighted way, for such specific purposes. Without the data subjects' consent, the processing of sensitive personal data must follow one of the legal basis listed below, whenever it is indispensable:

- For compliance with the legal or regulatory obligations of the controller;
- By the public administration for the processing and shared use of data required for the execution of public policies;
- For the conduction of studies by research entities, ensuring, whenever possible, the anonymization of personal data;
- When necessary for the performance of a contract or the regular exercise of rights in judicial, administrative or arbitral procedures;
- For the protection of the life or physical safety of the data subject or a third party;
- For the protection of health, in procedures carried out by health professionals or by health entities;
- For the guarantee of the prevention of fraud and safety of the data subjects, in processes of identification and authentication of registration in electronic systems, observing the data subject rights, and except in the event of the prevalence of fundamental rights and liberties of data subjects that require protection of personal data.

### **8. How do the laws in your jurisdiction address children's personal data or PII?**

According to the Child and Adolescent Statute (Law 8,069/1990 - "ECA"), children and adolescents have a peculiar condition of being in development. In this sense,

the LGPD gives them stricter data protection rules and determines that the processing of personal data belonging to children and adolescents shall be done in their best interest, pursuant to the rules below and applicable legislation.

Accordingly, article 14 of LGPD set forth the following rules to process children's and adolescents' personal data:

- The processing of children's and adolescents' personal data requires specific and highlighted consent of at least one of the parents or the legal guardian;
- When processing data based on consent, controllers shall keep public the information on the types of data collected, the way it is used and the procedures for exercising the rights established in the LGPD;
- Children's and adolescents' personal data may be collected without consent when it is necessary to contact the parents or legal guardian, used only once and without storage, or for the children's and adolescent's protection. Under no circumstances shall the data be transferred to third parties without the proper consent;
- Data controllers shall not condition the participation of data subjects in games, internet applications or other activities to the provision of personal information beyond what is strictly necessary for the activity;
- The controller shall make all reasonable efforts to verify that the legal guardian for the child or adolescent has given the consent, considering the available technologies;
- Information on the processing of children's and adolescents' data shall be provided in a simple, clear and accessible manner, taking into account the physical-motor, perceptual, sensory, intellectual and mental characteristics of the user, with the use of audiovisual resources when appropriate, to provide the necessary information to the parents or legal guardian and appropriate to the understanding of the child or adolescent.

**9. Does the law include any derogations, exclusions or limitations other than those already described? Please describe the relevant provisions.**

The LGPD does not apply to the processing of personal data, according to its article 4°:

- Carried out by a natural person for strictly personal and non-economic purposes;
- Carried out exclusively for journalistic, artistic, or academic purposes;
- Carried out exclusively for purposes of public safety, national defense, state security, or activities of investigation and prosecution of criminal offenses;
- Originated from outside the national territory and which are not the object of communication, shared use of data with Brazilian processing agents or subject to the international transfer of data with another country that is not the country of origin provided that the country of origin has a level of personal data protection suitable for the provisions of LGPD.

**10. Does your jurisdiction impose requirements of 'data protection by design' or 'data protection by default' or similar? If so, please describe the requirement and how businesses typically meet the requirement.**

The LGPD establishes that processing agents shall adopt security, technical and administrative measures able to protect the personal data from unauthorized access and accidental or unlawful situations during the design phase of the product or service until its implementation.

The concept of privacy by default is implicit in the LGPD as companies are subject to the following principles, among others:

- Purpose: processing for legitimate, specific and explicit purposes, previously informed to the data subject, with no possibility of subsequent processing incompatible with these purposes;
- Necessity: limitation of the processing to the minimum necessary to achieve its purposes, covering data that are relevant, proportional and non-excessive in relation to the purposes of the data processing.
- Accountability: demonstration by the processing agents of the adoption of effective measures capable of proving compliance with the rules of personal data protection and its enforcement, including the effectiveness of such measures.

Business typically meet these requirements through an adequacy program, where they need to: i) keep records

of personal data processing operations carried out by them; ii) prepare a Data Protection Impact Assessment (“DPIA”), with a description of the types of data collected, the methodology used for collection and for ensuring the security of information and the analysis by the controller regarding the adopted technical and administrative measures, safeguards and mechanisms of risk mitigation; and iii) adopt good practices of privacy and be transparent.

The ANPD may provide for minimum technical standards to render applicable the provisions of LGPD, taking into consideration the nature of the information processed, specific data processing characteristics and the available technology, in particular in the case of sensitive personal data.

**11. Are owners or processors of personal data or PII required to maintain any internal records of their data processing activities or to establish internal processes or written documentation? If so, please describe how businesses typically meet these requirements.**

Both the controller and the processor must keep records of the personal data processing operations they carry out (article 37 of LGPD), especially when based on legitimate interest. Also, it is highly recommendable to the controllers and processors to have an updated data mapping, to present a Data Protection Impact Assessment (DPIA) whenever required, complying with the principle of accountability.

This topic was addressed by the ANPD in the Guideline of Definitions of Personal Data Processing Agents and Data Protection Officer, which it confirms the responsibility of both processing agents (controller and processor) to keep records of personal data operations.

This subject may be complemented by the LGPD Good Practices Guideline that will be issued by ANPD or in the Guidelines for the Rights of data subjects, both part of phase three of ANPD’s regulatory agenda, to be conducted in the first semester of 2022.

**12. Do the laws in your jurisdiction require or recommend having defined data retention and data disposal policies and procedures? If so, please describe these data retention and disposal requirements.**

The LGPD determines, in article 15, that the termination

of the processing shall take place when (i) in the event of verification that the purpose has been achieved or the data are no longer necessary or relevant to achieve the specific purpose; (ii) in the event of the end of the processing period; (iii) in case of data subject’s notice to exercise his/her rights, including the right to revoke consent; or (iv) in the event of a decision of the ANPD, in case of violations of the LGPD.

Moreover, in article 16, LGPD specifies that personal data shall be erased after the end of their processing, except if (i) necessary to comply with the legal or regulatory obligations by the controller; (ii) for purposes of studies by a research body, subject to the anonymization of the personal data, whenever possible; (iii) to transfer to third parties, subject to compliance with data processing requirements, and; (iv) for exclusive use by the data controller, with no access by third parties and provided such data is anonymized.

Finally, these matters may be the object of further regulation by the ANPD. In the meantime, companies are adopting the best practices and observing compliance with the principles brought by LGPD in its article 6º.

**13. When are you required to, or when is it recommended that you, consult with data privacy regulators in your jurisdiction?**

There is no legal provision requiring or recommending consultation with regulators to process personal data. However, considering that the ANPD is in a solid performance, the referred Authority offers a “contact us” tab on its website, and it is possible to communicate in cases of (i) Filing a petition of the data subject against the data Controller; (ii) Lodge a complaint of non-compliance with the LGPD; (iii) Doubts about the LGPD; (iii) Personal Data Breaches; (iv) Sending invitations or documents to the ANPD; (v) Press; (vi) Ombudsman; (vii) Requests for access to Information based on the applicable law.

The website is available at:

[https://www.gov.br/anpd/pt-br/canais\\_atendimento](https://www.gov.br/anpd/pt-br/canais_atendimento).

**14. Do the laws in your jurisdiction require or recommend conducting risk assessments regarding data processing activities and, if so, in what circumstances? How are these risk assessments typically carried out?**

According to article 38 of LGPD, the ANPD may require that the controller must prepare a data protection

impact assessment (DPIA), including sensitive data, referring to its data processing operations, per regulations, with due regard for trade and industrial secrets. The DPIA shall contain the description of all personal data processes that could generate risks to civil liberties and fundamental rights of the data subjects, as well as measures, safeguards and mechanisms to mitigate these risks.

Also, when processing is based on legitimate interest, it must be carried out under the processing of data strictly necessary for legitimate purposes, considered from concrete situations, therefore, the ANPD may request for the controller a data protection impact assessment (DPIA), provided by the article 10, §3º, of LGPD.

The ANPD held three technical meetings to discuss the data protection impact assessment (DPIA) in June 2021, and according to the ANPD regulatory agenda, the matter would be the object of a resolution that was scheduled for the first half of 2021. However, up to this point the ANPD has not yet issued a resolution on the topic.

### **15. Do the laws in your jurisdiction require appointment of a data protection officer (or other person to be in charge of privacy or data protection at the organization) and what are their legal responsibilities?**

According to the LGPD, the controller shall nominate a Data Protection Officer - DPO. The identity and contact information of the DPO shall be publicly disclosed, in a clear and objective, preferably on the controller's website. Although LGPD does not impose the nomination as an obligation to the processors, they also may appoint a DPO, according to article 5º, VIII.

The activities of the DPO consist of:

- Accept complaints and communications from data subjects, provide clarifications and adopt measures;
- Receive communications from the ANPD and adopt measures;
- Guide employees and contractors regarding the practices to be taken in relation taken about the privacy and data protection processes;
- Perform other duties determined by the controller or established in complementary rules.

In addition, the ANPD published the Guideline of Definitions of Personal Data Processing Agents and Data

Protection Officer, which makes the following points:

- i. The LGPD does not specifically determine in which circumstances an organization must appoint a DPO, adopting as a general rule that every organization must appoint a DPO;
- ii. the LGPD does not determine whether the DPO should be a natural or legal person, an employee of the company, or an external agent. In any case, the guide indicates that the DPO must be appointed by a formal act;
- iii. as a good practice, the DPO must have freedom in performing his duties, as well as knowledge of data protection and information security.
- iv. The LGPD does not prohibit the DPO from having the support of a multidisciplinary data protection team.

ANPD may establish additional rules on the definition and duties of the DPO, including events of waiver of the appointment requirement, according to the nature and size of the entity, or volume of data processing operations.

This topic has been regulated by Resolution N. 2 of 27th January 2022, which regulates the application of the LGPD for Small-Sized Processing Agents. Processing agents that fit the criteria of the resolution may refrain from appointing a DPO, but if they do, it will be considered good practice. The criteria are budgetary according to the size of the company and material, whereby if the agent performs the high-risk processing, it will not be able to benefit from the referred Resolution.

### **16. Do the laws in your jurisdiction require or recommend employee training? If so, please describe these training requirements.**

The LGPD provides that the DPO must educate the company's employees and contractors about good data protection practices. Although the LGPD does not express the controller's obligation to raise awareness and train its employees, it is an indispensable measure for the compliance of the companies with the LGPD.

### **17. Do the laws in your jurisdiction require businesses to providing notice to individuals of their processing activities? If so, please describe these notice requirements (e.g., posting an online**

**privacy notice).**

Yes. The data subject has the right to easy access to the information about the processing of his or her data, which should be provided in a clear, adequate and ostensible manner concerning it, including other aspects provided for in regulations for compliance with the principle of free access, per article 9° of LGPD, such as:

- The specific purpose of the processing;
- Form and duration of the processing, observing business and industrial secrets;
- Data controller identification;
- Information about the shared use of data by the controller and for which purpose;
- Responsibilities of the agents that will carry out the processing;
- Rights of the data subject, explicitly mentioning the rights provided in the LGPD.

If there is a change in specific purposes of the processing, type or duration of the processing, identification of the controller and information regarding the shared use of data, the controller shall inform the data subject, with a specific highlight of the content of the changes.

In the cases in which the legal basis of the processing is consent, whenever there are changes in the purposes of the processing of personal data that are not compatible with the original consent, the controller shall previously inform the data subject of the amendments of the purpose, and the data subject may revoke the consent whenever there may exist disagreements with the amendments.

Also, if the processing of personal data is a condition for the supply of a product, the provision of a service or the exercise of a right, the data subject shall be informed of this fact and of how the exercise of the rights outlined in the LGPD may be carried on.

ANPD is supposed to regulate data subject's rights by the first half of 2022, which might add some rules to the notice requirements imposed on businesses in Brazil.

**18. Do the laws in your jurisdiction draw any distinction between the owners/controllers and the processors of personal data and, if so, what are they? (e.g., are obligations placed on processors by operation of law, or do they typically only apply through flow-down contractual**

**requirements from the owners/controller?)**

Yes, the LGPD defines controllers and processors as "processing agents" and distinguishes their concepts, in article 5º, items VI, VII and IX of LGPD. A data controller is a natural person or legal entity of public or private law that has the competence to make decisions regarding the processing of personal data and a data processor is a natural person or legal entity of public or private law that processes personal data on behalf of the controller.

Furthermore, LGPD foresees, in article 39, that the processor shall carry out the processing according to the instructions provided by the controller, which shall verify compliance with its instructions and the rules governing the matter.

The LGPD also sets the responsibility in its articles 42 to 45, of the controller or the processor who, as a result of carrying out activities of processing personal data, causes material, moral, individual, or collective damage to others, in violation of the aforementioned data protection legislation, shall redress/repair it.

The data processor is jointly liable for any damages caused by the processing if it fails to comply with the obligations of the data controller, or fails to follow the lawful instructions of the controller in which case the processor is deemed equivalent to the controller, except if they prove that:

- They did not carry out the processing of personal data that is attributed to them;
- Although they carried out the personal data processing attributed to them, there was no violation of the LGPD;
- The damage results from the exclusive fault of the data subject or any third party.

The controller or the processor who neglects to adopt security information measures foreseen in the LGPD shall be held liable for the damages caused by the violation of the data security, like data breaches.

Regarding contractual and governance instruments, Article 46 of the LGPD provides for the possibility for processing agents to formulate rules of good practice and governance of processing operations, defining procedures for requests from data subjects and information security standards, for example.

In the same vein, the ANPD published Guideline of Definitions of Personal Data Processing Agents and Data Protection Officer, which also foresees as a relevant practice the establishment of contractual clauses (Data Processing Agreement) between processing agents – controllers and processors, aligning the obligations and

responsibilities arising from processing operations.

**19. Do the laws in your jurisdiction require minimum contract terms with processors of personal data or PII or are there any other restrictions relating to the appointment of processors (e.g., due diligence or privacy and security assessments)?**

There is no legal provision requiring minimum contract terms or other restrictions related to hiring service providers. Companies shall negotiate contract limits and restrictions between themselves. Nonetheless, the LGPD provides general guidelines related to security issues for data processors and data controllers.

Moreover, the ANPD addressed aspects of this issue in the Guideline of Definitions of Personal Data Processing Agents and Data Protection Officer such as the processor's obligation to sign contracts that establish, among other matters, the provisions of activities and responsibilities with the controller. Also, the LGPD establishes that this matter can be further regulated by the ANPD.

According to LGPD, the service providers (Controllers and Processors) may formulate rules for good practice and governance that set forth conditions of organization, procedures, complaints, and petitions for data subjects, technical standards, and specific obligations for the involved parties, among others, per the article 50 of the LGPD.

Also, when creating these rules, the controller and the processor should consider some items at the moment of the creation and implementation of good practice rules and data governance, regarding the data processing, such as nature, scope, purpose, probability, and the risks and benefits that will result from the processing of data subject's data.

According to ANPD regulatory agenda and planning, one of the priorities is education. The ANPD has undertaken to engage in dialogue with governmental and non-governmental bodies to produce guides and educational materials with best practice recommendations on personal data protection, as it has done up to this moment by publishing educational material and guidelines.

These discussions might also be reflected in the LGPD Good Practices Guideline, which shall be issued by the ANPD by the second half of 2022, according to phase three of the ANPD's regulatory agenda.

**20. Please describe any restrictions on monitoring, automated decision-making or profiling in your jurisdiction including the use of tracking technologies such as cookies. How are these terms defined and what restrictions are imposed, if any?**

There is no definition or specific regulation for tracking technologies, such as 'cookies' in Brazil, however, if the information gathered by any tracking technology can identify a natural person, it falls within the scope of the LGPD.

In attention to the principle of transparency, provided for in article 6º, item VI of the LGPD, the controller must inform the data subject about the use of tracking technologies on its websites and/or applications, explaining what each of them is for. In the specific case of cookies, all types must be listed.

Concerning automated decision-making and profiling, LGPD grants data subjects the right to request a review of decisions solely taken based on automated processing of personal data that affects their interests, including decisions intended to define their personal, consumer, and credit profiles or aspects of his/her personality.

LGPD does not regulate the use of cookies and up to this date, the ANPD has not issued any guidelines on the topic. The common market good practice nowadays is to fulfill the principle of transparency, stated in LGPD, by showing and allowing data subjects to manage cookie settings, as well as using a cookie banner. We await further clarifications on this topic by the ANPD.

**21. Please describe any restrictions on cross-contextual behavioral advertising. How is this term or related terms defined?**

Behavioral advertising is advertising delivered through the use of data and information from the data subject. This can be demographic data, economic status, gender, age, employment, lifestyle, interests, purchase history. Personalization of ads is possible as a result of online monitoring. LGPD does not prohibit behavioral advertising, but creates mechanisms and principles so that it does not become unlawful. Therefore, the principles established in the LGPD will guide how processing agents will perform behavioral advertising.

The practice of behavioral advertising cannot go against the guarantees provided in article 2º of the LGPD:

- Right to privacy;
- Informational self-determination;

- Freedom of information and communication;
- Inviolability of privacy, honor and image and the free development of personality.

Therefore, Article 18 establishes the need for security and transparency in data processing, guaranteeing rights that the data subject can exercise. We await further definitions on the subject by the ANPD, so that the LGPD can be applied more objectively and with clear recommendations.

In addition, The Internet Law, in article 7, determines a need to provide clear and complete information for the processing of personal data.

Moreover, the Consumer Code, in its article 36, establishes that advertising should be conveyed in a way that the consumer immediately understands that it is an advertisement.

Although in Brazil there is no express regulation about behavioral advertising, the requirements outlined in Brazilian laws must be respected.

## **22. Please describe any laws in your jurisdiction addressing the sale of personal information. How is “sale” or related terms defined and what restrictions are imposed, if any?**

There are no specific determinations regarding the sale of personal information in Brazilian jurisdiction. However, public entities have fined companies that were commercializing personal data in the near past, as they did not have express authorization from the data subjects to sell their data. Consent was considered, in this particular case, the legal basis necessary to legitimate the processing, which was not collected.

Regarding LGPD, depending on the interpretation of its principles and foundations, the sale of personal data may be considered illegitimate, as it may harm individuals' right to privacy and their self-determination regarding personal data, not to mention the possible difficulty to fit the principles of adequacy and transparency.

## **23. Please describe any laws in your jurisdiction addressing telephone calls, text messaging, email communication or direct marketing. How are these terms defined and what restrictions are imposed, if any?**

The National Telecommunication Agency (“Anatel”) approved, through Act No. 10.413, the obligation for telephone operators to use the code 0303 at the beginning of the number of any call for marketing purposes. This standardization aims to allow the data subject to identify telemarketing calls, avoiding unwanted calls. The procedure was approved by Anatel in 2021 and entered into force in March 2022.

Additionally, there are public opposition lists created by state laws in Brazil where the individual/data subject can subscribe to indicate he/she does not want to receive marketing communications via telephone calls and SMS. These lists are monitored by the Procon (Consumer Protection Office) from each state, and the obligation to observe the lists applies to controllers and processors that use these means to send advertising of their products and services to individuals whose area codes are from states that adopt official opposition lists.

Notwithstanding, all communications with the data subject for marketing purposes must comply with the principles and good practices established by the LGPD, as well as with the Consumer Code that contains provisions that grant overall consumer protection against, among other topics, abusive marketing in advertising products and services.

Finally, the LGPD does not define the term “direct marketing”, nor does it bring specific responsibilities in its text for this type of advertising. Thus, to carry out direct marketing, the controller must observe the particularities of the processing activity and ensure compliance with the LGPD legal provisions, especially concerning the data subject's rights and their legitimate expectation of receiving specific advertisements content.

## **24. Please describe any laws in your jurisdiction addressing biometrics, such as facial recognition. How are these terms defined and what restrictions are imposed, if any?**

The LGPD foresees biometrics data as a sensitive category of personal data. The LGPD considers as sensitive any data related to racial or ethnic origin, religious beliefs, political opinions, membership of trade unions or religious, philosophical or political organizations, data concerning health or sexual life, genetic or biometric data, when related to a natural person.

The processing of biometric data shall observe the specific list of legal bases (article 11) and other provisions, because of the high risk that the processing

of this category of personal data poses to data subjects' fundamental rights.

There is still no specific law about facial-recognition in Brazil, but there are some Bills under discussion by the House of Representatives.

One of these, is Bill No. 2537 of 2019, which obliges all commercial establishments that use facial recognition software to alert consumers with signs or stickers fixed at the entrance of their facilities. If approved by the House of Representatives, this Bill will be submitted to the Federal Senate for analysis.

Another one is Bill No. 4612 of 2019, that intends to regulate the development, application, and use of facial and emotional recognition technologies, as well as other digital technologies aimed at the identification of individuals and behavior prediction or analysis. This project is still proceeding in the House of Representatives and, if approved, has the potential to complement the provisions of biometric data in the Brazilian legislation, in special, LGPD.

The most recent bill pending in the National Congress on this subject is Bill No. 572 of 2021, presented on February 24, 2021 and suggests the creation of the National Database for Facial and Digital Recognition.

**25. Is the transfer of personal data or PII outside the jurisdiction restricted? If so, please describe these restrictions and how businesses typically comply with them (e.g., does a cross-border transfer of personal data require a specified mechanism? Does a cross-border transfer of personal data or PII require notification to or authorization from a regulator?)**

LGPD regulates the transfer of data outside the jurisdiction in articles 33 to 36. The international transfer of personal data is only allowed in the following cases:

- To countries or international organizations that provide a level of protection of personal data that is adequate to the provisions of the LGPD;
- When the controller offers and proves a guarantee of compliance with the principles, rights of the data subject and the regime of data protection established in the LGPD, in the form of:
  - a. Specific contractual clauses for a given transfer;
  - b. Standard contractual clauses;

- c. Global corporate rules;
  - d. Regularly issued stamps, certificates and codes of conduct;
- When the transfer is necessary for international legal cooperation between public intelligence and investigation bodies, per instruments of international law;
  - When the transfer is necessary for the protection of the data subject's or a third party's life or physical safety;
  - When the ANPD authorizes the transfer;
  - When the transfer is the result of a commitment assumed in an international cooperation agreement;
  - When the transfer is necessary for the execution of a public policy or legal attribution of public service;
  - When the data subject has provided specific and highlighted consent for international data transfer, with prior information about the international nature of the operation, with this information being clearly distinct from other purposes;
  - For compliance with the legal or regulatory obligation by the controller, when necessary for the performance of a contract or preliminary proceedings related to a contract to which the data subject is a party, at the request of the data subject and for the regular exercise of rights in judicial, administrative or arbitral procedures.

Although the articles related to international data transfer of LGPD is in full force since September 2020, the efficacy of some of its provisions requires regulation by the ANPD. This is the case for some of the provisions on international data transfer, such as standard contractual clauses and global corporate rules.

Aware of these gaps in the LGPD, the ANPD has included international data transfers in its regulatory agenda's phase two, which is expected to happen by July 2022. Among the main objectives of the ANPD, we highlight, without prejudice to other regulations, (i) the definition of which countries or places will be considered with "an adequate level of data protection"; (ii) the creation of standard contractual clauses; and (iii) the verification of standard contractual clauses.

**26. What security obligations are imposed on personal data or PII owners/controllers and on processors, if any, in your jurisdiction?**

The LGPD establishes that processing agents shall adopt

security, technical and administrative measures able to protect personal data from unauthorized access and accidental or unlawful situations of destruction, loss, alteration, communication or any type of improper or unlawful processing.

Under LGPD, ANPD can establish minimum technical standards to make the provisions above applicable, taking into account the nature of the processed information, the specific characteristics of the processing and the current state of technology, especially in the case of sensitive personal data, as well as the data protection principles.

From February 22 to March 24 2021, ANPD carried out a public consultation to receive relevant subsidies from civil society regarding notifications of security incidents. Although there is no regulation up to this moment, ANPD has released, on March 31, 2021, a public note with guidelines and a form to notify ANPD in case of a data breach. The controllers and processors shall ensure the security of the information as provided in the LGPD, even when the processing is over. Besides, the software or systems used for processing personal data shall be structured to comply with the security requirements, standards of good practice and governance, general data protection principles and other sectorial regulatory rules.

Also, the Internet Act provides security requirements for internet service providers. Decree 8.771/2016 provides the security standards for handling personal data and private communications, as follows:

- Definition of responsibilities and authentication mechanisms to ensure individualization of the persons who will have access to and handle data, as well as detailed access logs;
- Creation of detailed inventory of access to connection records and access to applications containing time, duration, the identity of the designated employee or individual responsible for the access in the company and the accessed file; and
- Management solutions of records through techniques that ensure the inviolability of data, such as the use of encryption or equivalent protection measures. The safeguard and availability of connection logs and access data, as well as personal data and the content of private communications, must meet the security requirements to preserve intimacy, privacy and image of the parties directly or indirectly involved.

Moreover, the Brazilian Central Bank issued Resolution

4.658/2018, which provides a cyber-security policy and the requirements for contracting services of data processing, data storage and cloud computing to be observed by financial institutions and other institutions licensed by the Brazilian Central Bank.

## **27. Do the laws in your jurisdiction address security breaches and, if so, how does the law define “security breach”?**

Although the LGPD does not define “security breach”, it addresses the issue.

Generally, any security incident that may result in any relevant risk or damage to the data subjects may be considered a “security breach” and the data controller must communicate to the ANPD and the data subject about it, within a reasonable period.

On March 31, the ANPD released a note in which the most recent definition of a security incident is: any adverse event, confirmed or suspected, related to the breach in the security of personal data, such as unauthorized, accidental, or unlawful access that results in destruction, loss, alteration, leakage or in any way inadequate or unlawful data processing, which may cause risk to the rights and freedoms of the data subject. In addition, the ANPD has also provided a template form for the ANPD’s communication and has set a reasonable deadline of two business days from the time of the data breach.

## **28. Does your jurisdiction impose specific security requirements on certain sectors, industries or technologies (e.g., telecoms, infrastructure, artificial intelligence)?**

There are several sectorial laws and regulations concerning security requirements for specific regulated sectors and industries, such as, but not limited to:

- The Internet Law, which provides security requirements for internet service providers, and Decree 8.771/2016, which provides security standards for handling personal data and private communications for internet service providers;
- Cybersecurity Regulation Applied to the Telecommunications Sector of the National Agency for Telecommunications – ANATEL which aims to establish conducts and procedures for the promotion of security in telecommunications networks and services, including cybersecurity and the protection of

critical telecommunications infrastructures. The regulation was approved on December 17, 2020 and is in force since January 4, 2021, with a 180-day deadline for adequacy and implementation of service provider companies.

- Decree 9.637/2018, which institutes the National Information Security Policy and provides for the governance of information security, and the Normative Ruling 4/2020 of the Institutional Security Office, which provides on the minimum requirements cyber security requirements to be adopted when establishing 5G networks;
- Decree 9.573/2018, which approves the National Critical Infrastructure Security Policy, and Decree 10.222/2020, which approves the National Strategy of Cyber Security;
- Complementary Law 105/01, which provides for the secrecy of operations in financial institutions, the Resolution 3.380/06 of the Brazilian Central Bank (BACEN), which provides for the implementation of an operational risk management structure for financial institutions, and the Resolution 4.658/2018 of BACEN, which provides on the cyber security policy and the requirements for hiring data processing and storage services and cloud computing to be observed by financial institutions and other institutions authorized to operate by BACEN;
- Ordinance 271/2017, which provides the Information Security and Communications Policy of the Ministry of Health (POSIC/MS), and Ordinance 1.966/18, which defines information and communication security standards within the Ministry of Health;
- Provisional Measure No. 2.200-2/01, establishes the Brazilian Public Key Infrastructure - ICP-Brazil, to ensure the authenticity, integrity and legal validity of documents in electronic form, support applications and qualified applications that use digital certificates, as well as secure electronic transactions;
- Circular 249/04 and 285/05 of the Superintendence of Private Insurance - SUSEP, which determine internal controls of activities and information systems insurance companies, capitalization companies and public pension entities and establish information security policy requirements, as well as Circular 599/2020 of SUSEP, which establishes that the request for accreditation by an entity registering insurance operations, open supplementary pension, capitalization

and reinsurance must present an executive summary of data secrecy and cyber security policies and a declaration that these policies comply with the legislation and regulations in force;

- Resolution 656/15 of the National Telecommunications Agency (Anatel), which establishes standards on Risk Management of Telecommunications Networks and Use of Telecommunications Services in Disasters, Emergency Situations and Public Disaster;
- NBR ISO/IEC 27001 and 27002 were approved in 2013 by the Brazilian Association of Technical Standards (ABNT), which provides security techniques, information security management systems and a Code of practice for information security management.
- Resolution 124/2006 of the National Supplementary Health Agency imposes a fine on health insurance companies up to BRL 50,000.00 for the breach of personal information related to the health conditions of a patient, as mentioned above.
- Resolution N. 2 of 27th January 2022, which regulates the LGPD, for small-sized processing agents, addresses minimum information security requirements for the protection of personal data, also considering high-risk operations.
- ANPD Guideline on the Application of LGPD on Processing Agents in the electoral context, suggests good security practices for the processing agents involved in the electoral process.

**29. Under what circumstances must a business report security breaches to regulators, to individuals, or to other persons or entities? If breach notification is not required by law, is it recommended by the regulator and what is the typical custom or practice in your jurisdiction?**

As mentioned above, ANPD has released, in February 2021, a public note with guidelines and a form to notify this body in case of an incident. The guidelines point out that in case of an incident (including a data breach):

- i. the incident should be assessed internally, regarding the nature, category, and quantity of data and data subjects affected, also concrete and probable consequences;
- ii. the DPO should be notified;
- iii. the controller should be informed, in case of being a processor;

- iv. the ANPD and the data subject should be notified in case of potential or relevant damage; and
- v. an internal report should be carried out, assessing the incident, the measures taken and risk analysis, to comply with the principle of accountability.

According to the guideline and article 48 of LGPD, the controller is responsible for notifying ANPD and the data subject. This document also recommends that controllers adopt a cautious position, so that the communication is rendered even in cases in which there is doubt about the relevance of the risks and damages involved. Although the responsibility and obligation for communication to the ANPD rest with the controller, if the information is exceptionally presented by the processor, it will be duly examined by ANPD.

To evaluate the relevance of the potential risk of damage to the data subjects, the document presents two questions that should be answered by the controller when analyzing the incident:

*1) Has there been a security incident related to personal data?* If not, it is not necessary to notify ANPD. If yes, the next question should be answered.

*2) Is there a relevant risk or damage to the individual rights and freedoms of the affected data subjects as a result of the security incident?* If yes, ANPD and data subject should be notified. If not, the notification will not be necessary if the controller can demonstrate, in an irrefutable way, that the incident does not constitute a relevant risk to the rights and freedoms of the data subjects.

The notification must contain clear and concise information. It is recommended, in these guidelines, that the document comprehends at least the identification and contact details of: the entity or person responsible for the processing activity; the DPO or other contact person; the indication of whether the notification is complete or partial – and, in this last case, if it is a preliminary communication or a complementary communication. It should also contain information about the incident, such as the circumstances in which it occurred, a description of the personal data and information affected, potential consequences, the pre-existent and also implemented measures, among others.

Finally, the public note addresses that, while the regulation is pending, it is recommended to notify ANPD within a period of 2 working days, counted from the date of awareness of the incident. Additionally, the Special Unit for Data Protection and Artificial Intelligence (ESPEC), linked to the Federal Public Prosecutors Office,

suggests companies notify data breaches. For this purpose, the Commission provides a webpage where companies can communicate security incidents and breaches of personal data.

Also, the Brazilian Computer Emergency Response Team (CERT.br) presents some recommendations for the notification of security incidents, giving guidance about what to notify, whom to notify and formats for the notification, among other instructions.

### **30. Does your jurisdiction have any specific legal requirement or guidance regarding dealing with cyber-crime, such as the payment of ransoms in ransomware attacks?**

The Senate has approved the country's adherence to the Convention on Cybercrime, which aims to facilitate and strengthen the means available to prevent and face cybercrime. By June 2021, the Convention had been ratified by 66 countries and the Brazilian initiative was added to the Internet law, for the criminal prosecution of cyber crimes and the Brazilian General Data Protection Act.

Beyond that, Law 12,737/12 amended the Brazilian Criminal Code (Decree-Law 2,848/1940) and provided for the criminal classification of computer-related crimes, such as the intrusion of a computing device, for example.

In the same way, Law 12,735/12 determined the installation of police stations and specialized teams to combat digital crimes. In conjunction with the police stations specialized in cybercrime, there are non-governmental institutions that work in partnership with the Government and the Public Prosecutor's Office to combat cybercrime, such as SaferNet Brazil, which offers a service for receiving anonymous reports of crimes and violations against Human Rights on the Internet.

Other normative instruments can be nominated, such as Law 11,829/08, which institutes the crime of child pornography on the Internet, and Law 13,185/15, which establishes a mandatory program to fight to cyberbully.

Also, Bill 154/2019, which amends the Brazilian Criminal Code to establish a generic aggravating factor for cybercrimes, due to the extended range of the practice, is being discussed in the House of Representatives.

The payment of ransoms in ransomware attacks and other cybercrimes related to money laundering, financial pyramids and crimes related to cryptocurrencies, among

others can be addressed by the Judiciary on the infractions provided for in the Brazilian Criminal Code or specific regulations. These legislations do not expressly address a response to cybercrimes but can be used to deal with these violations.

**31. Does your jurisdiction have a separate cybersecurity regulator? If so, please provide details.**

Brazil does not have a separate cybersecurity regulator. In this regard, cybersecurity challenges might be dealt with by public authorities, such as the Public Prosecutor's Office, or by the Judiciary, when the demand is brought to its attention, with the help of independent agencies or entities, such as Computer Security Incident Response Teams (CSIRTs). In cases of incidents of cybersecurity involving the Brazilian Public Administration, for example, the Computer Network Security Incident Processing Center of the Federal Public Administration (CTIR) should be contacted.

**32. Do the laws in your jurisdiction provide individual data privacy rights, such as the right to access and the right to deletion? If so, please provide a general description of the rights, how they are exercised, what exceptions exist and any other relevant details.**

The LGPD sets forth that all-natural people are ensured the ownership of their personal data and the guarantee of the fundamental rights to freedom, intimacy, and privacy. It also establishes that data subjects have the right to obtain from the controller, according to articles 17 to 22 of LGPD, at any time and upon request:

- Confirmation of the existence of the processing;
- Access to the data;
- Correction of incomplete, inaccurate, or outdated data;
- Anonymization, blocking, or erasure of unnecessary or excessive data or data processed in non-compliance with the provisions of the LGPD;
- Portability of data to another service or product provider, upon express request, by the regulations of the ANPD, observing commercial and industrial secrets;
- Deletion of the personal data processed with the consent of the data subjects, except in cases of:

1. Compliance with a legal or regulatory obligation by the controller;
2. Conduction of studies by a research entity, ensuring, whenever possible, the anonymization of the personal data;
3. Transfer to third parties provided that all legal requirements outlined in this Law are complied with;
4. Exclusive use of the controller, with forbidden access to third parties, and provided the data has been anonymized;

- Information about public and private entities with which the controller has shared data;
- Information about the possibility of denying consent and the consequences of the denial;
- Revocation of consent;
- Opposition to processing carried out based on one of the situations of waiver of consent if there is noncompliance with the provisions of LGPD;
- Review of decisions taken by the controller solely based on automated processing of personal data that affects the data subject's interests, including decisions intended to define his/her personal, professional, consumer, or credit profile or aspects of his/her personality.

All the rights aforementioned shall be exercised through the express request by the data subject or his/her legal representative, to the controller. This request shall be fulfilled without costs to the data subject, and, in case it is not possible to promptly take the actions, the data controller shall send to the data subject a reply in which it may: (I) inform that it is not the data processing agent, indicating, if possible, the agent; or (II) point out legal and factual grounds preventing prompt action.

Data subjects have the right to petition about their data against the controller before the ANPD. The defense of the interests and rights of data subjects may be carried out in court, individually or collectively.

The rights of confirmation of existence and access to data will be provided immediately, in a simplified format; or within fifteen (15) days from the date of the data subject's request, through a clear and complete declaration that indicates the origin of the data, the nonexistence of record, the criteria used and the purpose of the processing, subject to commercial and industrial secrecy. Information and data may be provided by electronic means or in printed form. Also, when the processing is based on consent or in a

contract, the data subject may request a complete electronic copy of its personal data, observing commercial and industrial secrecy, in a format that allows its subsequent utilization, including for other processing operations.

The ANPD Resolution N. 2 of 27th January 2022, approved the Regulations for the application of the LGPD for Small-Sized Processing Agents. This Resolution provides, in its articles 14, I, III, and 15, double time for the fulfillment of the data subject's rights provided in the LGPD, including the provision of a simplified declaration of processing of personal data in 15 days.

Besides, the Consumer Code sets forth those individuals have the right to access all data stored about themselves in consumer-related databases, and request changes, corrections, and even removal from the database. This right to access might also be exercised before consumer-defense entities.

Finally, according to the Internet Law, users have the right to request at the end of their contract with internet application providers the definitive exclusion of personal data, respecting the mandatory log retention rule.

It is also worth remembering that the protection of personal data is now considered a fundamental right under Brazilian Constitution.

### **33. Are individual data privacy rights exercisable through the judicial system or enforced by a regulator or both?**

Both. The Federal Constitution establishes that the law shall not exclude from the Judiciary's assessment injury or threat to rights; therefore, the defense of the interests and rights of data subjects may be exercised in court, individually or collectively, by the provisions of the relevant legislation, regarding the instruments of individual and collective protection.

In addition to this guarantee, LGPD stipulates that data subjects have the right to petition concerning their data against the controller before ANPD. The right to access might also be exercised before consumer-defense entities.

### **34. Does the law in your jurisdiction provide for a private right of action and, if so, in what circumstances?**

Yes. According to the Federal Constitution, any individual can file a judicial action pursuing compensation for economic and moral damages for violation of privacy or

intimacy. Furthermore, the Brazilian Code of Civil Procedure determines that the exercise of the right of action depends on the interest and legitimacy of the claimant.

The CF/88 established, in February 2022, the protection of personal data as a fundamental right, in its article 5º, LXXIX. Also, the CF/88 assures Brazilians and foreign nationals the right to rectify their data, and the Consumer Code provides that individuals have the right to access all data stored about themselves, and request changes.

The Internet Law provides for the user's right to request the definitive exclusion of personal data, by the end of the relationship with the internet application provider. Also, LGPD provides that the data subject may exercise their rights and interests through a court, individually.

### **35. Are individuals entitled to monetary damages or compensation if they are affected by breaches of data privacy laws? Is actual damage required or is injury of feelings sufficient?**

According to LGPD, in its articles 42 to 45, the controller or processor, as a result of carrying out their activity of processing personal data, causes material, moral, individual, or collective damage to others, in violation of personal data protection legislation, is obliged to redress it. Also, the processing agent who neglects to adopt measures to avoid security incidents shall be held liable for the damages caused by the violation of the data security that caused the damage.

Individuals affected by a violation of LGPD are entitled to compensation or monetary damages. Usually, actual damage is required and injury of feelings must be proved to justify compensation. Many court decisions are repelling the mere injury of feelings to generate monetary compensation to data subjects, but it is still too early to establish jurisprudence on data protection about this subject.

### **36. How are the laws governing privacy and data protection enforced?**

According to article 55 - I of LGPD, the ANPD is competent to ensure the protection of personal data, supervise and impose sanctions in case of data processed in violation of the Brazilian laws, through an administrative process ensuring defense and right to appeal. In addition, the ANPD published Resolution N. 1 on October 28, 2021, which regulates the inspection

process and the sanctioning administrative process within the scope of the ANPD's performance.

The Resolution establishes that the administrative process can be initiated: (i) ex officio by the General Inspection Coordination; (ii) as a result of the monitoring process (also regulated by the Resolution); and (iii) upon request made by the General Inspection Coordination, after carrying out an admissibility analysis and deciding on the immediate opening of a sanctioning process.

Furthermore, the sanctioning administrative process must observe the following criteria:

- i. serving purposes of general interest;
- ii. adequacy between means and ends, prohibited the imposition of obligations, restrictions, and sanctions to a greater extent than those strictly necessary to meet the public interest;
- iii. observance of the essential formalities to guarantee the rights of interested parties;
- iv. adoption of simple forms, suitable to provide an adequate degree of certainty, security and respect for the rights of interested parties;
- v. ex officio imposition of the administrative process, without prejudice to the action of the interested parties; and
- vi. interpretation of the administrative rule in the way that best guarantees the fulfillment of the public purpose for which it is aimed, prohibited the retroactive application of a new interpretation.

Complementary issues such as the methodologies that will guide the calculation of the value of fines sanctions and the conditions for adopting a fine may be regulated subsequently by the ANPD.

In addition to the ANPD, other bodies already acted in the enforcement of privacy in Brazil and will continue to act, such as the Public Prosecutor's Office, the Special Unit for Data Protection and Artificial Intelligence (ESPEC), the National Consumer Bureau (SENACON) and consumer protection authorities, such as Procon. These bodies opened several cases and investigations against companies that suffered security incidents and data breaches in Brazil or processed personal data and sensitive personal data in potentially or effectively harmful ways to the data subjects.

### 37. What is the range of sanctions (including fines and penalties) for violation of these laws?

The LGPD provides that the ANPD will impose

administrative sanctions on processing agents for violation of the rules, namely:

- Warning, with an indication of the period for the adoption of corrective measures;
- A simple fine of up to 2% (two percent) of a private legal entity, group, or conglomerate's revenues in Brazil, for the prior fiscal year, excluding taxes, up to a total maximum of BRL 50,000,000.00 (fifty million reais) per infraction;
- A daily fine, observing the total limit referred above;
- Publication of the infraction after duly ascertained and confirming its occurrence;
- Blocking of the personal data to which the infraction refers until its regularization;
- Deletion of the personal data to which the infraction refers;
- Partial suspension of the operation of the database to which the violation refers for a maximum period of 6 (six) months, extendable for the same period until the controller's regularization of the processing activity;
- Suspension of the exercise of the processing activity of the personal data to which the infraction refers for a maximum period of 6 (six) months, extendable for the same period;
- Partial or total prohibition of the exercise of activities related to data processing.

Also, the Internet Law states that, without prejudice to any other civil, criminal or administrative sanction, the non-compliance with data protection rules can result in the following sanctions that may be applied on an individual or cumulative basis:

- A warning, with a deadline for the adoption of corrective measures;
- A fine up to 10% of the gross income of the economic group in Brazil in the last fiscal year, taxes excluded;
- Temporary suspension of the activities that entail the events set forth in any operation related to the processing of data;
- Prohibition to execute activities that entail the processing of data.

The Consumer Code determines a penalty of six months to one-year imprisonment or fine, or both, to those who block or hinder access by the consumer to respective information contained in files, databases or, records, or those who are expected of knowing that information relating to the consumer as contained in any file, database, record or registration is incorrect and,

nevertheless, fail to immediately rectify it. The same statute sets forth administrative penalties imposed by the authorities in charge of protecting consumer rights, and such penalties include fines, intervention and, counter-advertising.

The Bank Secrecy Law (Complementary Law 105/2001) establishes a penalty of one to four years imprisonment and a fine for financial institutions (and similar entities) that breach the secrecy of the financial operations of, and the financial services provided to its users.

The Brazilian Criminal Code (Decree-Law 2.848/1940), as amended by Law 12.737/2012, sets forth the penalty of three months to one-year imprisonment and a fine for those who invade another computer device connected or not to the internet through improper breach of security mechanism and for the purpose of obtaining, tamper or destroying data or information without the explicit or tacit authorization of the device owner or installing vulnerabilities to gain an illicit advantage.

### **38. Are there any guidelines or rules published regarding the calculation of fines or thresholds for the imposition of sanctions?**

There is no specific guideline published by the ANPD, up to this moment, but LGPD defines parameters applicable when calculating the amount of the monetary sanctions. The rules defined are as follows:

- i. Severity and nature of the infringements and personal rights affected;
- ii. Good faith of the offender;
- iii. Advantage received or intended by the offender;
- iv. Offender's economic standing;
- v. Recurrence;
- vi. Extent of damage;
- vii. Cooperation of the offender;
- viii. Repeated and substantiated adoption of internal mechanisms and procedures capable of minimizing the damage with a view towards safe and adequate processing of data, per the provisions of LGPG;
- ix. Adoption of best practices and governance policies;
- x. Prompt adoption of corrective measures; and
- xi. Proportionality between severity of the infringement and nature of the sanction.

It is important to add that LGPD does not limit the sanctions to administrative sanctions imposed by the ANPD. Data subjects and their representatives may seek

the court for compensation, in which case the limitation of the monetary amount imposed by LGPD will not be applicable.

### **39. Can personal data or PII owners/controllers appeal to the courts against orders of the regulators?**

There is no express provision about this possibility in the LGPD or any other legislation that refers to data protection in Brazil. However, taking into consideration that the Federal Constitution establishes that the law may not exclude from the Judiciary's assessment injury or threat to rights, data subjects could appeal to the courts against orders of the ANPD, provided that the data subject proves his/her right of action (interest and legitimacy).

### **40. Are there any proposals for reforming data protection or cybersecurity laws currently under review? Please provide an overview of any proposed changes and how far such proposals are through the legislative process.**

Yes, there are many proposals for changes and additions to the Brazilian legislation, such as:

- Bill N. 21/20 creates the legal framework for the development and use of Artificial Intelligence ("AI") by the public authorities, companies, diverse entities, and individuals. The text is in progress in the Federal Senate and establishes principles, rights, duties, and governance instruments for AI.
- Bill N. 4612/19, intends to regulate the development, application, and use of facial and emotional recognition technologies, as well as other digital technologies aimed at the identification of individuals and behavior prediction or analysis. This project is still proceeding in the House of Representatives and, if approved, has the potential to complement the provisions of biometric data in the Brazilian legislation, in special, LGPD. The most recent bill pending in the National Congress on this subject is Bill N. 572/2021, presented on February 24, 2021, and suggests the creation of the National Database for Facial and Digital Recognition.
- Bill N. 490/22 makes it mandatory to share the location and date of automated vehicle identification made by surveillance equipment for public safety purposes. The text under

analysis by the House of Representatives inserts the device in the Brazilian Traffic Code. The project will be analyzed by the committees of Public Security and Combating Organized Crime; Transportation; and Constitution and Justice and Citizenship.

- Bill N. 2630/20, known as “The Fake News Law”, establishes rules regarding the transparency of social networks and private messaging services, especially regarding the responsibility of providers to combat disinformation and to increase transparency on the internet, transparency regarding sponsored content and the actions of public authorities, as well as establishes sanctions for non-compliance with the Brazilian law. This project is still in progress in the House of Representatives.

- The ANPD has released an agenda with regulations to be carried out by it. Many of these regulations have already been published, but there is still a long way to go before the end of the LGPD regulations, for example points deserving regulation of the rights of personal data subjects (expected in the first half of 2022); procedures on personal data protection and privacy, as well as on personal data protection impact assessment (DPIA) for cases where the processing poses a high risk to ensuring general principles of personal data protection; regulation about the adequacy of personal data protection of countries or international bodies (expected in the first half of 2022); complementary regulation to article 7, LGPD, about Legal Hypotheses of Personal Data Processing (expected in the second half of 2022).

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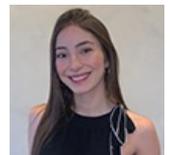
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