

VOTE No. 16/2023/DIR/NR/ANPD

PROCESS No. 00261.000968/2021-06

INTERESTED PARTY: NATIONAL DATA PROTECTION AUTHORITY – ANPD

REPORTING DIRECTOR: NAIRANE FARIAS RABELO LEITÃO

SUBJECT: RESOLUTION DRAFT APPROVING THE REGULATION ON INTERNATIONAL DATA TRANSFER AND THE STANDARD CONTRACTUAL CLAUSES MODEL.

HEADNOTE: REGULATION. APPROVAL OF THE RESOLUTION DRAFT, WITH PROPOSED AMENDMENTS, FOR THE PURPOSE OF SUBMISSION TO PUBLIC CONSULTATION AND PUBLIC HEARING, AS PROVIDED IN LGPD.

REPORT:

This is a draft Resolution approving the Regulation on International Data Transfer of Personal Data and the standard contractual clauses model.

3.2. According to the Project Initiation Document (PID) (SEI No. 2803876), the project team was formed in November 2021 by employees from the General Coordination of Standardization (CGN) and the General Coordination of International and Institutional Relations (CGRII).

3.3. After study and alignment meetings, a Call for Submissions was proposed, based on Technical Note 20 (SEI No. 3367935), containing 20 questions related to the topic. The General Coordination of Standardization (CGN) received the responses from May 18 to June 30, 2022 (SEI No. 3370435).

3.4. After analyzing the contributions, a Regulatory Impact Analysis Report (RIAR) was prepared (SEI No. 4123575), which supported the first version of the draft, submitted for internal consultation from January 30 to February 24, 2023 (SEI No. 3924240).

3.5. During the Internal Consultation period, meetings were held with the Specialized Federal Attorney's Office (PFE) and the Board of Directors (CD) to present and contextualize the subject under analysis, as stated in Certificate 2 (SEI No. 3924187).

3.6. After making adjustments to the draft by the Project Team based on the Internal Consultation (SEI No. 4124323) and meetings with other departments, the draft proposal for regulation, accompanied by the Regulatory Impact Analysis Report (RIAR), was sent for evaluation to the Specialized Federal Attorney's Office of the ANPD.

3.7. In response, the PFE/ANPD issued OPINION No. 00025/2023/GAB/PFE/ANPD/PGF/AGU (SEI No. 4349695), which recommended proceeding with the matter, subject to compliance with the recommendations concerning the points enumerated in paragraph 128 of the said Opinion, which was supplemented by Dispatch No. 00068/2023/GAB/PFE/ANPD/PGF/AGU.

3.8. On July 4th, the General Coordination of Standardization presented Technical Note No. 51/2023/CGN/ANPD (SEI No. 4389590), through which the recommendations in the Legal Memorandum were evaluated, with some being accepted and justification provided for not incorporating other recommended changes.

ANALYSIS:

I. Formal Aspects

4.1. Initially, I observe that the applicable formal procedures for the case have been observed, so the initiation and conduct of the process followed the regulatory provisions, with the necessary motivation for the issuance of the normative act.

4.2. In this regard, the relevant steps of the regulatory process were followed, as provided in Article 4 of ANPD Ordinance No. 16, dated July 8, 2021, namely: Regulatory Agenda, Regulation Project, Regulatory Impact Analysis, Internal Consultation, and Legal Analysis.

4.3. It is noteworthy that the Regulatory Agenda of the National Data Protection Authority (ANPD), approved for the biennium 2021-2022 through Ordinance No. 11, dated January 27, 2021, included in item 9, among the Authority's prioritized actions, the establishment of regulations for the international transfer of personal data, including the assessment of the level of data protection of foreign countries or international organizations and the definition of standard contractual clause content, among others, in accordance with Articles 33 to 35 of the General Data Protection Law (LGPD).

4.4. Ordinance No. 35, dated November 4, 2022, also made public the Regulatory Agenda for the biennium 2023-2024, which included in its item 4 the continuation and finalization of the regulation of international data transfer.

4.5. The Regulation Project commenced with the drafting and signing of the Project Initiation Document attached to the records (SEI No. 2803876), and an Internal Consultation was conducted (SEI No. 3924187).

4.6. Furthermore, a Regulatory Impact Analysis Report was prepared (SEI No. 4123575), and the Attorney General's Office was consulted regarding the regulation proposal (SEI No. 4349695), in accordance with the Internal Regulations, prior to its submission to the Board of Directors, as stipulated in Article 23, sole paragraph, of Ordinance No. 16/2021.

4.7. As per the internal regulations and Article 55-J, paragraph 2 of the LGPD, the regulation will undergo public consultations and hearings. After this phase, the contributions presented by society will be duly evaluated by the technical team, followed by analysis by the Attorney General's Office, and finally, a final decision by the Board of Directors.

4.8. The responsibility for providing information about societal participation on the ANPD's website will lie with the CGN, as stipulated by Article 24 of Ordinance No. 16/2021.

4.9. Additionally, it is important to mention that the Resolution is the appropriate administrative act to produce the intended legal effects since the issuance of regulations "expresses a decision regarding the regulatory provision within the competence of ANPD," in accordance with Article 51 of the Internal Regulations.

4.10. In more detail, Article 63 of the Regulations establishes the following:

"Article 63. The normative acts of ANPD shall be issued through Resolutions, exclusively under the competence of the Board of Directors, observing procedures relating to Public Consultation and Public Hearing. § 1 The issuance of normative acts by ANPD shall be preceded by Regulatory Impact Analysis, to be prepared in accordance with relevant legislation, containing information and data about the probable effects of the act, in order to verify the reasonableness of the impact and support decision-making."

4.11. Finally, after confirming the compliance with applicable formal requirements and that the chosen normative act is appropriate for the purpose of regulating international data transfers, I proceed to the substantive analysis of the draft.

II – Merit Analysis

4.12. The right to personal data protection is expressly included in the list of fundamental rights and guarantees granted to citizens under Article 5 of the Constitution of the Federative Republic of Brazil of 1988. Furthermore, the Constitution established, in Article 21, the Union's competence to organize and oversee the protection and processing of personal data in accordance with the law, as well as its exclusive authority to legislate on the protection and processing of personal data.

4.13. In the same vein, the LGPD introduced a new legal framework regarding the processing of personal data in the country, granting prerogatives to ANPD to ensure, implement, and oversee compliance with the law throughout the national territory. Thus, ANPD is the federal agency responsible for effectively implementing LGPD in the country.

4.14. Among ANPD's competences is the establishment of norms and guidelines for the interpretation and implementation of LGPD.

4.15. Chapter V of the LGPD, which specifically addresses International Data Transfer, presents, in Article 33, the modalities through which international transfers of personal data can be conducted:

"Article 33. International transfer of personal data is only permitted in the following cases: I - to countries or international organizations that provide a level of data protection adequate to that provided for in this Law; II - when the controller offers and demonstrates compliance with the principles, rights of the data subject, and the data protection regime provided for in this Law, through: a) specific contractual clauses for a particular transfer; b) standard contractual clauses; c) global corporate rules; d) seals, certificates, and codes of conduct regularly issued; III - when the transfer is necessary

for international legal cooperation between public intelligence, investigation, and prosecution agencies, in accordance with international law instruments; IV - when the transfer is necessary for the protection of the life or physical integrity of the data subject or a third party; V - when the national authority authorizes the transfer; VI - when the transfer results from a commitment undertaken in an international cooperation agreement; VII - when the transfer is necessary for the execution of public policy or a legal assignment of public service, with publicity as provided for in the inciso I of caput of art. 23 of this Law; VIII - when the data subject has provided specific and highlighted consent for the transfer, with prior information about the international nature of the operation, clearly distinguishing it from other purposes; or IX - when necessary to fulfill the situations provided in items II, V, and VI of art. 7 of this Law."

4.16. In this context, recognizing the importance and relevance of cross-border data flows for economic and social development, ANPD is concerned with implementing mechanisms and procedures that enable controllers and operators to transmit personal data to a foreign country or international organization while ensuring compliance with the principles, guidelines, and fundamentals established in Law No. 13,709, dated August 14, 2018, the LGPD.

4.17. Article 35 of the LGPD states that the national authority will define the content of standard contractual clauses and verify specific contractual clauses for a particular transfer and global corporate rules, considering the requirements, conditions, and minimum guarantees for the transfer that observe the rights, guarantees, and principles. Thus, regulating the application of Article 35 is necessary to provide data processing agents with greater clarity and legal certainty for international data transfers, as well as for ANPD to exercise its supervisory and sanctioning authority in accordance with its §§2 and 3 and Article 52, in case of violations of the rules set forth in the Law.

4.18. Along the same lines, the Specialized Federal Attorney's Office (PFE) highlighted the conformity of the draft with the LGPD in Opinion No. 00025/2023 GAB/PFE/ANPD/PGF/AGU (4349695), including regarding the regulatory power over the subject.

The issuance of the draft resolution under analysis emerges as an expression of the normative, supervisory, and sanctioning competences granted to the National Data Protection Authority by the General Data Protection Law (LGPD), pursuant to Articles 1, 5, XIX, 33, 34, 35, 36, 52, 55-J, I, XIII, and §2 of Law No. 13,709, dated August 14, 2018, and Articles 1, 2, I and XIII, and 4 of Annex I of Decree No. 10,474, dated August 26, 2020.

The draft proposes the approval of the International Data Transfer Regulation to a foreign country or international organization of which the country is a member, in accordance with Annex I, furthermore, it finally defines the content of the so-called standard contractual clauses, governed by Annex II of the examined resolution.

At the outset, it is evident that Law No. 13,709/2018 granted the National Data Protection Authority direct legal authorization for the sub-legal regulation proposed in the focused draft, echoing the provisions of Articles 33 to 36 of the LGPD, notably that established in Article 33, paragraph II, subparagraphs "a," "b," and "c."

4.19. Based on these grounds, the regulatory draft presents a suitable model to comply with the command of LGPD in regulating standard contractual clauses and including within the regulatory framework specific contractual clauses and global corporate rules, modes of international data transfer that follow fundamentally similar requirements to SCCs. These three mechanisms have been termed "contractual instruments."

4.20. Thus, the regulation of the application of Article 35 becomes essential, aiming to provide data processing agents with greater clarity and legal certainty regarding international data transfers. Additionally, this measure seeks to enable the National Data Protection Authority (ANPD) to exercise its supervisory and sanctioning competence, as provided for in §§2 and 3 of Article 52 of the Law, in case of violations of the rules established in the legislation.

4.21. Therefore, the proposal for a resolution regulates five main issues: i) Definition of international transfer of personal data; ii) Definition of requirements, conditions, and minimum guarantees for the transfer; iii) Content of the modality provided for in Article 33, II, b of the LGPD, i.e., the standard contractual clauses, in accordance with Article 35, caput, and §1; iv) Process for verification of specific contractual clauses and global corporate rules, in accordance with Article 33, II, a and c, and Article 35, caput, and §§1, 2, and 5, and v) Definition of the form and deadlines for communicating changes in the presented guarantees.

4.22. In this regard, among the specific objectives to be achieved through the regulatory intervention by the project team, as listed in the AIR, were: 1) identifying requirements, conditions, and minimum guarantees necessary for an international data transfer; 2) defining the content of standard contractual clauses, and 3) defining the flowchart of the process for verifying specific contractual clauses and global corporate rules, with the definition of form, deadlines, and requirements.

4.23. In the examination of the regulation and the provided annexed model, it is evident that they are mature for societal consultation, given that they encompass the objectives and regulatory issues intended in the normative act.

4.24. For these reasons, I find it appropriate and timely to approve the International Data Transfer Regulation, along with the models of standard contractual clauses, subject to public consultation procedures. However, I perceive the need to make some adjustments to clarify the procedures and rules contained in the draft.

4.25. To facilitate the identification of the modifications made, a version with revision markings (SEI No. 4462093) and the consolidated final version (SEI No. 4461806) have

been included in the process. Below, I highlight the relevant changes made, providing corresponding analysis and justifications.

4.26. It is worth noting that typing errors or purely formal adjustments that have no substantive impact will not be presented. These modifications are duly recorded in the draft with the attached revision markings in the process.

III – Suggested Changes

4.27. During the development of the regulation related to international transfer of personal data, which focused on "contractual instruments," ANPD underwent institutional strengthening through the transformation of its legal nature by Law No. 14,460/2022.

4.28. With the promulgation, ANPD was definitively transformed into a special autarchy with technical and decision-making autonomy, while maintaining its organizational structure and competences.

4.29. In the same context, discussions regarding the adequacy decision with the European Union ("EU") progressed, reflecting significant progress in the pursuit of greater integration between Brazil and the bloc.

4.30. These negotiations also demonstrated that having Brazilian regulations on the matter in place could accelerate recognition decisions with other countries and international organizations.

4.31. The issue is that when the draft regulation under review was developed by the Project Team, discussions related to the adequacy decision were not yet concrete or even possible due to ANPD's lack of independence.

4.32. However, considering the changing circumstances, including the strengthening, maturation, and formal independence of ANPD, I propose including the adequacy decision mechanism within the scope of the normative act.

4.33. This is also justified due to the fact that including this mechanism within the scope of regulation will bring significant benefits to Brazil, allowing for greater international integration and facilitating and strengthening discussions regarding the adequacy decision with other countries, cross-border data flows, and trade relations.

4.34. Moreover, as provided in the draft Regulation, ANPD will be able to assess standard clauses from other jurisdictions in order to recognize that they are compatible with the provisions of LGPD and "ensure a level of data protection equivalent to that guaranteed by national standard contractual clauses" (Article 14, I).

4.35. As can be observed, the mechanism proposed by the technical area functions similarly to an adequacy decision, albeit on a smaller scale, limited to the analysis of the level of personal data protection provided in the standard contractual clauses.

4.36. If deemed "adequate," equivalent standard contractual clauses may be used as a valid modality for international transfers, subject to conditions established by ANPD.

4.37. It's worth mentioning that the technical area's proposal also includes: (i) the entire procedural process to be followed in this scenario, involving input from the technical area, input from the Attorney's Office, and final decision by the Board of Directors; and (ii) the key parameters to be considered in the decision, including the risks and benefits posed by the recognition of equivalence, "in addition to the impacts on the international data flow, diplomatic relations, and international cooperation between Brazil and other countries and international organizations" (Article 14, II).

4.38. The fact is that these same procedural processes and decision-making criteria can be extended to the adequacy decision procedure. This will allow efforts to be focused on a decision of broader scale and effects, optimizing the available resources within ANPD.

4.39. It's important to recall that, in the case of the adequacy decision, the criteria for analysis are expressly indicated in Article 34 of LGPD, significantly reducing the scope of regulatory definition on the part of ANPD. For this reason, these criteria have been reproduced in the proposed amendment to the Regulation and specified in cases where it was deemed necessary.

4.40. Furthermore, I propose changing the deadline set in the sole paragraph of Article 2 of the Resolution to 180 (one hundred and eighty) days for data controllers to incorporate the clauses approved by ANPD into their respective contractual instruments. Considering a swifter adaptation, this will lead to a better attainment of the principles set forth in LGPD, in addition to enhancing business environments' security.

4.41. It's important to highlight that the normative text will still undergo public consultation, allowing for society's participation and engagement to assess the inclusion. This can provide insights to refine the regulation, enriching the proposal and ensuring a final text that aligns with diverse interests, while also weighing the risks and benefits identified by different sectors.

4.42. Finally, it is essential to reinforce that incorporating the adequacy decision mechanism within the scope of this regulation will strengthen Brazil's position on the international stage, promoting the protection of personal data of data subjects, ensuring greater legal certainty, and international integration, in accordance with data protection principles and the evolving international discussions in this field.

IV – Regarding the Public Consultation

4.43. LGPD mandates, in its Article 52, Paragraph 2, that "regulations and norms issued by ANPD must be preceded by public consultation and public hearing."

4.44. As per the established procedure in the Internal Regulations, the Public Consultation must be formalized through publication in the Official Gazette of the Union. The duration of this consultation period cannot be less than ten days, which can be extended due to the complexity, relevance, and public interest of the matter under consideration, as allowed by Article 62, Paragraph 5, of the Internal Regulations.

4.45. Furthermore, CGN must publish relevant information on the ANPD's website, as specified in Article 62, Paragraph 2, of the Internal Regulations, and Article 24 of ANPD Ordinance No. 16, dated July 8, 2021.

4.46. The same procedure (publication in the Official Gazette and on the ANPD's website) must be observed for the public hearing, with the caveat that the date, time, location, and procedure must be disclosed at least five business days in advance, in line with Article 60 of the Internal Regulations.

4.47. In this case, CGN suggested "conducting a 30-day Public Consultation exclusively through the +Brasil Platform, and a Public Hearing to present and discuss the proposed normative act with the society during the Public Consultation period. It is suggested that the Public Hearing be held during the Consultation Period, with its scheduling contingent on the number of registered participants." I am in favor of this suggestion as it complies with the legal timeframe and emphasizes the importance of societal participation.

4.48. It is essential to consider that the publication of this regulation is a priority and urgent. Any delay in publishing the regulation would undermine the public interest and the rights of data subjects, as it would further postpone the implementation of essential measures for the full enforcement of LGPD.

4.49. As for the suggestion to hold the Public Hearing during the same period as the Public Consultation, I find it pertinent and appropriate, aligning with the model of other hearings conducted by ANPD.

CONCLUSION

5.1. In light of all the foregoing, I vote in favor of the approval of the draft Resolution, as per the revised and consolidated draft attached to the records (SEI nº 4461806), for the purpose of submitting the Regulation on International Data Transfer and the models of standard contractual clauses in accordance with the relevant provisions of the LGPD, the Internal Regulations, and ANPD Portaria nº 16, dated July 8, 2021.

5.2. I recommend that the Public Consultation be conducted exclusively on the Participa + Brasil Platform for a duration of 30 (thirty) days. The Public Hearing should be held during the Consultation period, in a date and format to be determined by the General Coordination of Normative Actions (CGN), following standard procedures and in accordance with the provisions of Articles 23 and 24 of ANPD Portaria nº 16, dated July 8, 2021.

5.3. I propose that, following its approval by the Board of Directors, the process be forwarded to the General Coordination of Institutional and International Relations (CGRII) of ANPD to arrange for the translation of the Regulation into other languages.

5.4. Lastly, given the significance of the matter and the urgent need for the regulation of this topic, I suggest voting through a deliberative circuit, as stipulated in Article 40, § 1, of the Internal Regulations.

5.5. This concludes my vote.

NAIRANE RABELO LEITÃO

DIRECTOR