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Guidance for Definitions of Personal Data Processing Agents and Data Protection Officers

BRAZILIAN DATA PROTECTION AUTHORITY (ANPD)





On **May 28, 2021**, ANPD published a guide to establish **non-binding guidelines for data processing agents**, defining the functions of the controller, operator and DPO and their respective responsibilities.



ANPD relied on the **General Data Protection Regulation (GDPR)** and the **European Data Protection Board (EDPB)** guidelines to execute this guidance.



The guidance does not replace future ANPD regulations. The guidelines mainly impact on **contractual relations between data processing agents**.



CONTROLLER

Natural or legal person, under public or private law, responsible for making the **main decisions regarding the processing of personal data** and for defining the **purposes** of this processing.

The **identification of the controller** must take into account the **factual context** and the relevant circumstances of the case, which may result from a **contract** signed between the parties. The controller will be considered to have this role **even if it does not perform any processing operation**.

PS: Natural persons who act as **professionals subordinate to a legal entity** or as members of its bodies (employees, administrators, partners, etc.) **are not controllers**.

Responsibilities

- Fully liable for **damages that the processing of personal data causes to third parties**, whether individual or collective.
- Informs ANPD when a **security incident** occurs.
- Fulfills **data subjects' requests**, such as for access to their data, data correction or deletion, etc.

PS: Data subjects can file complaints about the controller with ANPD.



JOINT CONTROLLERSHIP

This is the joint, **common or convergent determination**, by two or more controllers, of the **purposes and essential elements*** for carrying out the same processing of personal data, in which the controllers have a **mutual interest**.

- *The **essential elements** of data processing include, for instance, the definition of categories of data subjects, data categories, data storage periods and legal bases.
- Even if the same data set is processed, there will be no joint controllership **if the processing objectives are different**.
- As a rule, in joint controllership there is **joint liability of controllers**, which reinforces the importance that everyone is in compliance **with the LGPD**.



PROCESSOR AND SUB-PROCESSOR

Processor

Natural or legal person, under public or private law, who performs the processing of personal data on behalf of the controller.

- The processor can decide on the non-essential elements of data processing, such as the choice of software and equipment to be used and the details of cyber attack prevention and security measures.
- Therefore, the processor must follow the controller's instructions.
- The operator is jointly liable for damages caused by the processing when the operator does not follow the instructions of the controller or fails to comply with the obligations of data protection legislation.

PS: Although the LGPD does not provide for a mandatory contract between controller and operator, having a contract is a good data processing practice, as contractual clauses impose limits on the processor's performance, delimit responsibilities between the parties and reduce the risks and uncertainties arising of the processing operation.

Sub-processor

This person is hired by the operator to assist him or her in processing personal data on behalf of the controller. The direct relationship of the sub-processor is with the processor and not with the controller.

- It is recommended that the processor, when contracting the sub-processor, obtain formal authorization from the controller. This aims to avoid the misunderstanding that, when hiring the sub-processor, the processor has performed the data processing in breach of the controller's instructions.
- The sub-processor may have responsibilities similar to that of the processor in relation to the activities that him or her has been hired to perform. Before ANPD, the sub-processor may have the role of processor, depending on the specific case.



DATA PROTECTION OFFICER (DPO)

This is the person appointed by the controller and processor to (i) act as a communication channel between the controller, data subjects and ANPD and (ii) ensure the compliance of an organization, public or private, with the LGPD.

- The LGPD has not determined under what circumstances an organization must appoint a DPO. Thus, it should be assumed, as a rule, that every organization should appoint a DPO.
- The DPO's contact information must be easily accessible to the data subjects.

- It is possible for the same DPO to work for more than one organization.
- Considering good international practices, the DPO may be either an employee of the institution or an external agent of a physical or legal nature. It is recommended that the DPO be appointed by a formal act, such as a contract for the provision of services, or an administrative act and have knowledge of data protection and information security.

PS: ANPD's future regulations may provide--depending on the nature and size of the entity and the volume of its data processing operations--the option to not appoint a DPO.

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