ANPD Launches Public Consultation on Regulation of Dosimetry and Application of Administrative Penalties

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Regulation of Dosimetry and Application of Administrative Penalties

The Brazilian National Data Protection Authority (ANPD) has submitted for public consultation, until September 15, 2022, the draft resolution that approves the **Regulation of Dosimetry and Application of Administrative Penalties**.

The purpose of the regulation is to complement Resolution CD/ANPD No. 1 of 2021, which determines the Inspection Process and the Administrative Sanctioning Process of the ANPD. The authority's main aim is to promote the effectiveness of the administrative sanctions provided for in the LGPD by setting a methodology for applying the sanctions, with clear parameters and criteria.

Therefore, it is essential that companies keep an eye on the regulation, since the methodology adopted by the ANPD for the application of sanctions will be crucial to understanding the infractions the agency considers most serious and the most important compliance measures for business.

The regulation classifies infractions according to their gravity, their nature, and the nature of the personal rights affected. Thus, infractions can be:

Mild	To be established by elimination criteria, that is, when the elements of medium and severe infractions are not present.
Medium	(i) Involves large-scale processing of personal data, i.e. when the processing covers a significant number of data subjects, considering the volume of data involved, the duration, frequency and geographical extent of the processing performed. or (ii) Significantly affects the interests and fundamental rights of the data subjects. An example is when the processing activity may prevent the exercise of rights or the use of a service and/or cause material or moral damage to the data subjects, such as discrimination, violation of physical integrity, infringing on the right to image and reputation, financial fraud or identity theft.
Severe	(i) An obstruction to the inspection activity. or (ii) A medium infraction verified together with any of the following criteria: (a) The infractor earns or intended to earn an economic advantage as a result of the infraction; (b) The infraction implies risk to the life or physical integrity of the data subjects; (c) The infringement involves processing sensitive data or personal data of children, adolescents and/or the elderly; (d) The offender processes personal data without the support of one of the lawful bases foreseen in the LGPD; (e) The infringer takes advantage of the weakness or ignorance of the data subject, in view of his/her age, health, knowledge or social condition; (f) The infringer conducts unlawful or abusive discriminatory treatment; or (g) The infringer is found to be acting in bad faith or systematically adopting improper practices.

Based on the determination of the severity of the infraction, the ANPD will determine the applicable administrative sanctions. The regulation establishes the criteria for applying each LGPD sanction:

Sanction	When Applied
Warning	The infraction is mild or medium and is not a specific recurrence, or when there is a need to impose corrective measures.
Daily Fine	(i) To ensure compliance with a non-monetary sanction or other determination by the ANPD; or (ii) after being notified, the violator fails to remedy the violations, obstructs inspection activities, commits an infraction that endures, or fails to comply with the Conduct Adjustment Agreement (TAC) signed with the ANPD.
Simple Fine	(i) The offender has failed to comply with remedial, preventive or corrective measures; (ii) the offense is classified as severe; or (iii) because of the nature of the offense and the circumstances of the case, the processing activity or the personal data, it is not possible or appropriate to impose another sanction.
Partial suspension of the database subject of the violation. **Suspension or prohibition, partial or total, of the exercise of the data processing activity.**	Only if another sanction has already been imposed, and its insufficiency has been verified.
Publicizing the infraction. **Blocking or deleting personal data.**	The regulation does not specify when these sanctions would be applied. The language used can be interpreted to mean that these sanctions can be applied for any relevant infractions, as determined by the ANPD.

The Regulation of Dosimetry also details how the simple fine will be calculated, which has been a major and relevant uncertainty for processing agents. It is worth noting that the calculation described below is for legal entities with revenue. The steps are:

1. Classify the infraction as mild, medium or severe, as detailed above.

2. Assess the percentage of revenue, if the offender is a legal entity with revenues, according to the table below:

Classification	Revenue percentage	
	A1	A2
Mild	0.08%	0.15%
Medium	0.13%	0.50%
Severe	0.45%	1.50%

3. Determine the degree of damage. To do this, the ANPD has made available a table describing the possible degrees, which accompany a multiplication factor for the fine:

Value	Degree of damage
3	(i) Injury or offense to diffuse, collective or individual rights or interests, with irreversible impact or impact difficult to reverse, of material or moral order, causing, among other effects, discrimination, violation to the right to image and reputation, financial fraud or identity theft; or (ii) Damages resulting from bad faith litigation, such as alteration of the truth of the facts, unjustified resistance to the progress of the lawsuit, reckless acting in any act of the lawsuit, or impediment to the performance of the ANPD.
2	(i) Injury or offense to diffuse, collective or individual rights or interests, generating impacts, of material or moral order, that do not fit the criteria indicated in the description of the other degrees of damage; or (ii) Damage resulting from the untimely submission of information or untimely non-compliance with direct damage to the inspection or administrative sanctioning process or to third parties, if not resulting from bad faith litigation.

1	(i) Injury or offense to the rights or interests of a small number of data subjects, with limited material or moral impact, which can be reversed or offset relatively easily; or (ii) Submission or availability of information or non-compliance with the determination outside the deadlines or conditions established by the ANPD, without direct damage to the inspection or administrative sanctioning process or to third parties and not arising from bad faith litigation.
0	No damage or only damage with insignificant impact to the data subject arising from predictable or common situations that do not justify the need for compensation.

4. Multiply the multiplication factor of the degree of damage by a percentage of revenue. The portion of the revenue used in this calculation is the gross revenue minus taxes.

So, in light of steps 1 to 4 above, the fine is calculated using the following equation:

A2 – A1 x Damage Multiplication Factor + A1

5. Analyze whether aggravating and/or attenuating factors will apply. Once the value of the fine is determined, as noted in the steps above, the regulation allows an increase or reduction, which can be accumulated, of the fine for certain aggravating or attenuating situations.

Aggravating Factors	
From 10% to 40%	In a case of specific recurrence within five years from the date the sanctioning administrative proceeding became final
From 5% to 20%	In a case of general recidivism within the same period
From 20% to 80%	If an orientation or preventive measure is not complied with
From 30% to 90%	If a corrective measure is not complied with

Attenuating Factors	
75% if prior to the opening of a preparatory proceeding by the ANPD.	
50% if after the opening of the preparatory proceeding and until the opening of the sanctioning administrative proceeding.	In cases of voluntary cessation (not arising from a decision) of the violation
30% if after the initiation of the sanctioning administrative proceeding and until the rendering of the first instance decision by the ANPD.	
20%	In cases of voluntary implementation of good practices and governance policy or the constant, enduring and demonstrated adoption of internal mechanisms and procedures capable of minimizing damages to the data subjects, provided that this happens before the decision of the first instance by the ANPD
20%	If the violator has proven the voluntary implementation of measures capable of reverting or mitigating the effects of the infraction, prior to the opening of sanctioning proceedings
5%	In cases where the violator cooperates with the ANPD or acts in good faith
25%	If the violator waives the right to appeal with the ANPD and pays the fine on time

-> It is clear that maintaining a data protection governance program is relevant and significant for the ANPD and can be used to mitigate fines.

6. Determine the final value. In this last phase, the ANPD takes into consideration that the amount of the simple fine cannot be less than double the advantage obtained or intended, when estimable. In addition to such minimum criteria in light of the advantage obtained or intended by the violator, the final value of the fine will not be less than the minimum values described below for legal entities with revenues in any instance.

Grading	Value (In R$)
Mild	3,000.00 (three thousand reais)
Medium	6,000.00 (six thousand reais)
Severe	12,000.00 (twelve thousand reais)

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