

Technology, Data Protection and Intellectual Property

What you need to know about the Brazilian new regulation on the role of the Data Protection Officer (DPO)

On July 17, the National Data Protection Authority (ANPD) published Resolution CD/ANPD No. 18, of July 16, 2024, which approves the regulation on the role of the Data Protection Officer (DPO). The new regulation resulted from a long regulatory process that included the participation of the public at different stages, including public consultations and hearings.

However, as can be seen from the regulation, the ANPD accepted very few contributions from the public, maintaining points that had been the subject of criticism, such as the obligation to disclose publicly the identity of the DPO, as well as the rules on conflicts of interest, which are excessively broad and vague. In this slideshow, we discuss and analyze the main points of the new regulation and make recommendations for companies and entities in the private sector.

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1.

What is the DPO? In practice, what this role entails?

The position of DPO was created by Law No. 13,709/2018, the Brazilian Data Protection Law (LGPD). The DPO is the person appointed by the data processing agent (controller and/or processor) to act as a communication channel between the organization, the data subjects and the ANPD.

The DPO is responsible for ensuring the organization's compliance with the LGPD. The activities performed by the DPO include accepting complaints and communications from data subjects, receiving communications from ANPD, guiding the entity's employees and third party suppliers regarding the protection of personal data.

In this regard, the new regulation sets out complementary rules regarding the indication, definition, attributions and performance of the DPO.

2.

Who can be appointed as a DPO?

According to the new regulation, the DPO may be a natural person (member of the organizational structure or external to it) or a legal entity. The new regulation makes it clear that it is not necessary for the DPO to have specific training or certifications, as had already been suggested by some professional associations in recent years. It is up to the controller to establish the professional qualifications required for the DPO to perform his/her duties, considering his/her knowledge on data protection legislation, as well as the context, volume and risk of the data processing activities.

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3.

What are the formalities required for the appointment of the DPO?

The appointment of the DPO must be carried out by a formal act of the data processing agent, which must include the forms of action and the activities to be performed by such professional. The formal act referred to in the regulation is a written document, dated and signed, which clearly and unequivocally demonstrates the intention of the data processing agent to designate a natural person or a legal entity as DPO. For example, this written document may be the minutes of a meeting of the company's senior management or a signed document formally appointing the DPO.

It is important to highlight that the formal act of appointing the DPO may be requested by the ANPD in the context of a communication of an information security incident or during an administrative proceeding.

Recommendation: We recommend companies to review their privacy and data protection governance programs to ensure that there is a formal act of appointment of the DPO.

4.

How to deal with situations of absence and vacancy of the position of DPO?

The regulation provides that in the absence, impediment or vacancy of the DPO, the function will be performed by a formally designated substitute. It also adds that the absence and vacancy of the DPO must not hinder or prevent the exercise of the rights by data subjects or the response to ANPD's communications.

Recommendation: It is recommended that companies ensure that their privacy and data protection governance documents include specific rules on the matter, including rules for the appointment of an interim DPO in vacancies, until the definitive DPO is appointment.

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5.

Does every company have to appoint a DPO?

The appointment of a DPO is only waived for small-sized data processing agents (e.g., microenterprises, small businesses, startups, small private entities etc), as per Resolution CD/ANPD No. 2, of January 27, 2022. However, these organizations must still provide a communication channel to data subjects.

Furthermore, the new regulation sets out that the appointment of a DPO by processors is optional, but it will be considered good governance practice policy if they choose to do so. The practical applicability of this provision, however, is questionable, since as a rule, processors also act as controllers of at least the personal data of their own employees and the legal representatives of their clients.

Recommendation: Our recommendation is that all companies that do not fall under the exceptions mentioned above ensure that they have a formally appointed DPO.

6.

Is it necessary to publicly disclose the identity of the DPO?

The regulation indicates the need to disclose the identity of the DPO along with his/her contact information. Although this requirement is already foreseen in the LGPD, it is not adopted by most data processing agents, due to the lack of regulation of this obligation and the risks of the potential unnecessary exposure of the individuals who occupy the position of DPO.

Despite numerous contributions from the public for the ANPD to circumvent this situation in the regulation to avoid unnecessary exposure of the DPO's identity, the authority has chosen to maintain the obligation without any measures to protect the privacy of the individual who holds the position of DPO.

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In our opinion, the provision of the LGPD that requires the disclosure of the identity of the individual occupying the position of DPO is excusable, since the objective of the rule is to enable the DPO to serve as a point of contact between the processing agent and data subjects, thus ensuring an effective communication channel for the exercise of the rights provided for in the LGPD.

There are other ways to ensure a communication channel so that data subjects can access the DPO and exercise their rights without publicly disclosing the DPO's personal data. For example, by providing only the DPO's institutional email address (e.g., dpo@..., encarregado@..., privacidade@..., etc.), instead of indicating the personal data of the individual occupying the position of DPO.

Therefore, we think that this rule of the LGPD, which is now reproduced in the new regulation, does not comply with the principle of data minimization, as provided for in the LGPD itself. Additionally, this legal requirement could make the DPO vulnerable to a possible violation of his/her privacy with the potential for material and moral damages resulting from vexatious exposures, in addition to crimes such as fraud and identity theft.

In any event, the new regulation establishes that the disclosure of the DPO's identity will include at least: (i) the full name, if the DPO is a natural person or (ii) the company name, as well as the full name of the natural person responsible, if the DPO is a legal entity (such as company that provides DPO as a Service).

The regulation also adds that the disclosure of the DPO's contact information will include at least data relating to the means of communication that enable the exercise of the rights of data subjects and allow the receipt of communications from the ANPD.

Recommendation: Given this situation, we recommend companies to review their privacy notices to include the information required by the regulation.

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7. What is the role of the DPO when it comes to strategic decision making on the processing of personal data by the data controller?

Both the LGPD and the regulation make it clear that it is up to the data controller, and not the DPO, to make strategic decisions about personal data processing activities. The DPO's role is limited to providing assistance and guidance to data controller in these situations.

Thus, the regulation provides that it will be up to the DPO to provide assistance and guidance to data controller in the preparation, definition and implementation, as applicable, of:

- Security incident registration and communication
- Record of personal data processing activities
- Data protection impact assessment
- Internal mechanisms for monitoring and mitigating risks related to the processing of personal data
- Technical and administrative security measures capable of protecting personal data from unauthorized access and accidental or unlawful destruction, loss, alteration, communication or any form of inappropriate or unlawful processing
- Internal processes and policies that ensure compliance with the LGPD and ANPD regulations and guidelines
- Contractual arrangements that regulate issues related to the processing of personal data
- International data transfers
- Good practice and privacy governance rules, pursuant to art. 50 of the LGPD
- Products and services that adopt design standards compatible with the principles set forth in the LGPD including Privacy by Design and limiting the collection of personal data to the minimum necessary to achieve their purposes

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- Other activities and strategic decision-making regarding the processing of personal data.

The regulation also makes it clear that the DPO must not be held accountable with ANPD for the performance of its activities and duties. Therefore, the new regulation emphasize that the controller is responsible for its data processing activities and its compliance with the LGPD.

Recommendation: We recommend that companies ensure that their governance programs set out the activities to be performed by the DPO in the context of strategic decision making on processing activities carried out by the controller, as indicated above.

8.

Can a C-Level or employee combine the role of DPO with other positions? In what situations a conflict of interest may occur?

Attention must be given to the simultaneous exercise of other positions while acting as DPO. The new ANPD regulation provides that the DPO may accumulate positions, if this does not result in situations of conflict of interests. Such situations may occur if the activities of DPO are combined with other activities that involve strategic decision-making on the processing of personal data by the data processing agent.

The regulation is vague in this regard and does not provide clear criteria for assessing situations of conflict of interests. For example, this could occur when a Chief Technology Officer (CTO), who also acts as DPO, decides on new technological tools with the potential to impact employees' data protection rights, such as productivity monitoring tools or behavioral analysis via artificial intelligence systems. In this case, it is possible, depending on the specific situation, that the position of CTO (and the need to meet obligations related to this role) may negatively impact his/her capacity, as DPO, to assess potential violations of the LGPD due to the use of these tools.

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Another common example is the accumulation of the role of Chief Compliance Officer (CCO) and the role of DPO. In this case, there could be potential conflicts of interest, such as in the case where the CCO needs to make strategic decisions data processing activities in the context of an internal investigation into suspected corruption or harassment by an employee. In this case, the role of the DPO could be compromised, as it is up to him/her to make sure that the investigation is conducted in accordance with the LGPD.

However, although the regulation is vague and does not provide clear parameters to assess effective situations of conflict of interest due to the accumulation of functions, the rule makes it clear that the mere accumulation of positions is not sufficient to give rise to a situation of conflict of interests. Actual situations as such must be subject to verification in each specific case, which may occur within the context of an administrative proceeding started by the ANPD.

Recommendation: We recommend that companies assess the positions that may be accumulated by the DPO to identify potential situations of conflict of interests. If there are potential situations of conflict of interests, we recommend replacing the professional or implementing governance measures to mitigate risks.

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9.

Is it possible for a DPO to act for more than one legal entity? Could this type of situation constitute a conflict of interest?

According to the regulation, the DPO may perform his/her activities for more than one legal entity, as long as it is possible to fully fulfill his/her duties related to each data processing agent. Moreover, the regulation establishes in a rather vague manner that a conflict of interests may arise between the duties performed by a DPO within a data processing agent or when performing his/her duties for different data processing agents. The regulation does not provide a clear criteria to assess in which situations a DPO acting for more than one data processing agent could result in conflicts of interests.

The vagueness and imprecision of the rule result in legal uncertainty for companies, since it is not clear what are the risks of conflict of interest in these situations. The regulation may end up jeopardizing companies that provide outsourced DPO services (DPO as a Service), since these entities provide services to multiple data processing agents at the same time. Likewise, it could impact situations in which a single DPO performs his/her duties for different companies within the same economic group.

Recommendation: We recommend companies to map out situations in which a DPO acts for more than one economic agent and set out governance measures to prevent potential situations of conflict of interests.

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10. What are the points of attention for multinational companies that have a DPO located abroad?

Some multinational companies rely on a governance structure whereby there is no DPO based in Brazil so that a local team reports to the DPO located abroad. However, the regulation provides that the DPO must be able to communicate with data subjects and with the ANPD, clearly and precisely and in Portuguese, which may be challenging to manage in these situations.

Recommendation: In view of this, we recommend that multinational companies that do not have a DPO appointed in Brazil review its practices to cope with this situation.



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Lefosse

Sao Paulo

Rua Tabapua, 1227 14° floor
04533-014 Itaim Bibi
Sao Paulo SP Brazil
+ 55 11 3024-6100

Rio de Janeiro

Praia do Flamengo, 200 – 20° floor
22210-901 Flamengo
Rio de Janeiro RJ Brazil
+ 55 21 3263-5480

Brasilia

SCS Quadra 09, Edifício Parque
Cidade Corporate, Torre B, 8° floor
Brasilia, DF Brazil
+ 55 61 3957-1000



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