



September 13, 2023

BSA RECOMMENDATIONS TO ANPD ON THE PRELIMINARY STUDY FOR PROCESSING PERSONAL DATA ON THE BASIS OF LEGITIMATE INTERESTS

BSA | The Software Alliance (BSA)¹ welcomes the opportunity to provide feedback to the National Data Protection Authority (Autoridade Nacional de Proteção de Dados - ANPD) on its Preliminary Study for Processing Personal Data on the Basis of Legitimate Interests (Preliminary Study).

BSA is the leading advocate for the global software industry before governments and in the international marketplace. Our members are business-to-business companies that create the technology products and services that power other companies, including cloud storage services, customer relationship management software, identity management services, and workplace collaboration software. BSA members invest significantly in privacy and security, and they have made protecting the privacy of their customers' data a top priority.

BSA supports data protection rules that are risk-based, technology neutral, and flexible. We commend the ANPD for its efforts to develop the Preliminary Study, which can establish helpful guidance for companies about how to apply the legitimate interests basis for processing under the Brazilian Personal Data Protection Law (LGPD). Companies routinely process data on the basis of legitimate interests in a variety of ways that help individuals.

Legitimate Interests Is an Important Basis For Processing

We appreciate the ANPD's recognition of the importance of legitimate interests as a basis for processing under the LGPD. Organizations regularly rely on legitimate interests as a basis for processing personal data in ways that benefit both consumers and businesses. For example, companies routinely process data about their network on the basis of legitimate interests in order to improve security and guard against fraud.

We encourage the ANPD to refine the Preliminary Study with the goal of clarifying how companies can rely on legitimate interests and incentivizing their use of this legal basis. Relying on legitimate interests is critical to fulfilling the LGPD's approach of providing a broad set of legal bases for companies to process personal data, rather than relying on a single legal basis such as consent. Indeed, there is widespread recognition that privacy laws that rely exclusively on consent increase burdens on data subjects (with little benefit to them) and leads to consent fatigue, because they may require data subjects to provide consent to many types of expected processing, such as processing to deliver the goods and services that a consumer requested. Responsible use of legitimate interests as

¹ BSA's members include Adobe, Alteryx, Atlassian, Autodesk, Bentley Systems, Box, Cisco, CNC/Mastercam, Databricks, DocuSign, Dropbox, Elastic, Graphisoft, IBM, Informatica, Juniper Networks, Kyndryl, MathWorks, Microsoft, Okta, Oracle, Prokon, PTC, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

a basis for processing will create benefits for both individuals and for organizations in ensuring personal data is processed in trustworthy ways and in accordance with the provisions of the LGPD.

We appreciate that the Preliminary Study recognizes that organizations relying on legitimate interests should conduct a three-phase assessment, focused on: (1) the purpose of processing, (2) the necessity of processing, and (3) the application of a balancing test and corresponding safeguards.

Our comments address each phase of this assessment, suggesting revisions that are intended to help organizations rely on legitimate interests as an appropriate basis for processing.

Phase One: Purpose to be Achieved by Processing

In the first phase of assessing the application of the legitimate interest basis for processing, organizations are to verify the nature of the personal data to be processed, including whether the data is sensitive data or children's data, which are subject to additional restrictions. Next, the organization is to identify the interest at issue, which is to be considered legitimate if it meets three conditions: (1) compatibility with the legal system; (2) the interest is based on concrete situations, not abstract or speculative scenarios, and (3) the interest is linked to legitimate, specific, and explicit purposes. The Preliminary Study is clear that the interest may be held by the controller or by a third party, although the controller remains responsible for proving that the standard is met.

We recommend two revisions to this section of the Preliminary Study:

- *First: The Preliminary Study should include additional examples of legitimate interests to be achieved by processing.* The LGPD recognizes several examples of legitimate interests, including the support and promotion of a controller's activity, protection of a data subject's ability to exercise her rights, and the provision of services that benefit the data subject, taking into account the subject's legitimate expectations and fundamental rights and freedoms. We encourage the ANPD to include additional examples in the Preliminary Study of other potential legitimate interests, to further support the regular use of this grounds for processing. For example, in the United Kingdom the Information Commissioner's Office has issued guidance recognizing several activities as potential legitimate interests, including use of client or employee data, marketing, fraud prevention, intra-group transfers, or IT security, although it recognizes this is not an exhaustive list.² We encourage the ANPD to consider recognizing these and other interests as potential legitimate interests.

We specifically urge the ANPD to consider promoting the use of legitimate interests when organizations process personal data for the purpose of identifying potential biases and discrimination in an AI system. Testing AI systems for biases benefits all individuals who may be affected by an AI system, but testing can be more robust when a system is tested against a wide range of data, some of which may have been collected for other purposes. We believe identifying and mitigating potential biases in AI systems is critical to the responsible development of AI technologies and we encourage the ANPD to support such processing as a potential legitimate interest.

- *Second: Section 2 of the Preliminary Study should be re-organized, to better align with the three-phase assessment identified by the ANPD.* Specifically, Sections 2.6 (on fundamental rights and freedoms) and 2.7 (on legitimate expectations of the holder) should be relocated. These topics currently appear in the middle of Section 2, after the Preliminary Study's

² UK Information Commissioner's Office, Legitimate Interests, *available at* <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/a-guide-to-lawful-basis/lawful-basis-for-processing/legitimate-interests>.

discussion of the purposes to be achieved by processing (i.e., Phase One) but before the discussion of the necessity of that processing (i.e., Phase Two). But both topics are central to Phase Three of the assessment, under which organizations apply a balancing test. We suggest re-ordering this section of the Preliminary Study, to better align with the ANPD's three-phase approach.

Phase Two: Necessity of Processing

In the second phase of the assessment, a controller is to identify whether processing based on legitimate interests is necessary to achieve the identified interests. This aligns with the LGPD's statement that organizations processing data based on a controller's legitimate interests may only process personal data "strictly necessary for the intended purpose."

We recommend two changes to this part of the Preliminary Study:

- *First: The Preliminary Study should emphasize the importance of reasonableness in assessing the necessity of processing.* In several places, the Preliminary Study helpfully recognizes that organizations must consider the reasonableness of alternative forms of processing when assessing the necessity of processing. For example, Paragraph 53 states the necessity assessment is to consider "whether the treatment is proportionate and adequate for the intended purpose, or whether there are other reasonable means to achieve this purpose without processing the data." We encourage the ANPD to emphasize this point throughout the Preliminary Study. For example, in Annex II's Simplified Test Model, the questions in Part 2 could be updated to clearly require an assessment of reasonableness. In the processing and intended purpose section, Question 2 could be revised to ask: "Is it possible to use other reasonable means to achieve the same purpose in a less intrusive way for the holder of personal data?" Similarly, in the minimization section, Question 2 could be revised to ask: "Are there other reasonable means to use less intrusive data to achieve the same purposes?"
- *Second: The Preliminary Study should more explicitly address how organizations may consider the costs of processing when assessing the necessity of processing.* As the Preliminary Study recognizes, although it is "important to prioritize less intrusive ways to achieve the purpose" companies are also to consider whether it is possible to achieve [a stated purpose] in a less costly way."³ The Preliminary Study should recognize throughout the guidance that companies may consider the costs of various forms of processing when considering alternative options.

Phase Three: Balancing Test

In the third phase of the assessment, organizations are to conduct a balancing test that weighs the interests of the controller or third party and the fundamental rights and freedoms of data subjects. The Preliminary Study notes that at this point, it is "necessary to assess the potential risk and impacts on data subjects," in addition to balancing those risks with safeguards to be adopted. In this stage, organizations are to adopt the perspective of the data holder.⁴ However, the ANPD is clear that "the existence of a possible risk or negative impact on data subjects does not in itself rule out the possibility of processing personal data based on legitimate interests."⁵ Rather, "[w]hat the LGPD requires is not zero impact, but that any impacts are minimized and taken into account when adopting

³ Preliminary Study, Paragraph 71 (discussion of Phase Two of the assessment).

⁴ Preliminary Study, Paragraph 71 (discussion of Phase Three of the assessment).

⁵ *Id.*

safeguards to ensure that, in the specific case, the holder's fundamental rights and freedoms prevail."⁶

In conducting this assessment, the Preliminary Study emphasizes the legitimate expectations of the data subject, as well as the risks and impacts on fundamental rights and freedoms.

Our comments focus on two aspects of this part of the Preliminary Study.

- *First: We commend the ANPD for recognizing that the goal of the balancing test is not to achieve zero impact, but to ensure that impacts are minimized and taken into account when adopting safeguards to ensure that a data subject's fundamental rights and freedoms prevail. We appreciate the Simplified Test Model's focus on identifying these safeguards and encourage the ANPD to further expand on the discussion of safeguards as the Preliminary Study is revised.*
- *Second: The Preliminary Study should be revised to encourage organizations to apply the balancing test for each purpose, consistent with the LGPD's text. Currently, Paragraph 64 states that the test is to be applied for each "specific purpose," which appears to go beyond the LGPD's requirements and may inadvertently discourage organizations from utilizing the legitimate interests bases for processing separate balancing tests are required for processing done for the same general purpose. We recommend revising the Preliminary Study to require a balancing test be conducted for each "purpose," rather than each "specific purpose."*

Conclusion

We hope that our comments will assist the ANPD as it further refines the Preliminary Study, to create practical guidance for organizations that rely on the legitimate interests grounds for processing and to encourage the responsible use of this basis for processing. BSA appreciates the ANPD's solicitation of feedback and would be pleased to serve as a resource for further consultation.

Sincerely,

BSA | The Software Alliance

⁶ *Id.*