



September 25, 2023

Response to ANPD Consultation on International Data Transfers

BSA | The Software Alliance (BSA)¹ and the Global Data Alliance (GDA)² welcome the opportunity to provide feedback to the National Data Protection Authority (Autoridade Nacional de Proteção de Dados - ANPD) on international data transfer regulation and standard contractual clauses under the Brazilian Personal Data Protection Law (LGPD)

BSA and the Global Data Alliance support policies that help instill trust in the digital economy without imposing undue cross-border data restrictions or localization requirements that undermine data security, innovation, economic development, and international trade. Collectively, our member companies are significant investors in Brazil, collectively investing millions of dollars and employing thousands of Brazilian citizens. Member companies are active in Brazil in the aerospace, automotive, consumer goods, electronics, energy, financial services, health, media, supply chain, and telecommunications sectors. Relying on the ability to transfer data and access technology across transnational IT networks, Alliance members also help offer financial services, enterprise software technologies, and health, scientific and educational resources in Brazil.³

We commend the ANPD for recognizing the importance of international data flows and for recognizing that data transfer mechanisms have become a key instrument for both protecting data subjects' rights and for the development of the digital economy and international trade. We encourage you to prioritize transfer mechanisms that are based on high levels of data protection, trust, and confidence. We also are encouraged by global interest in the Global Cross Border Privacy Rules (CBPR) system and by Brazil's interest in this work.⁴ Our specific comments follow.

1. Article 9: Legal Bases for Processing and Mode of Transfer

Article 9 provides that, "the international transfer of data may only carried out to fulfill legitimate, specific, explicit and informed purposes to the holder..." based on (I) one of the legal bases for processing provided for in LGPD Arts 7 or 11; and (II) one of the following data transfer modalities: (a) countries recognized as adequate; (b) contractual clauses or global corporate rules; or (c) specific cases provided for in LGPD Art. 33.

The language in Article 9's chapeau appears to draw from principles embedded in LGPD, but it seems to prioritize the principle of purpose limitation above other aspects of LGPD and transforms that principle into specific and different regulatory requirements. To the extent that Article 9 would imply a requirement to re-state a legal basis when transferring data outside of Brazil, this would also be duplicative of the requirements of Articles 7 and 11, which already require the processing of personal data to be conducted only in certain circumstances.

Accordingly, we respectfully recommend that the language in the chapeau either be deleted or revised to state that transfers may be carried out only if they are consistent with LGPD and supported by: (1) one of the legal bases for processing in Art. 7 or 11, and (2) a valid transfer mechanism.

2. Articles 10-13: The Adequacy Decision

We welcome the detailed and nuanced approach outlined in Articles 10-13 regarding Brazil's adequacy determinations. We offer the following two suggestions.

Article 11 refers to an assessment of "legislation in force in the country of destination," as a key factor in making an adequacy determination. We recommend that Article 11 be revised to broaden this reference to include other legal norms in the country of destination, including regulations, rules, and other binding legal standards. We would also recommend that the ANPD prioritize or implement a "fast track" adequacy assessment procedure for countries or territories that have previously undergone adequacy assessments. For example, this could include countries already deemed adequate by the European Union or other jurisdictions. To be clear, we are not suggesting that the ANPD forego an assessment of their own. Rather, this approach would enable the ANPD to leverage the insight provided by their global counterparts. We would welcome early indication or confirmation from the ANPD on whether key economies (e.g., EU, US) would be deemed adequate under the Regulation.

Article 12 refers to an assessment of "risks and benefits provided by the adequacy decision." We observed that the listed risks and benefits do not address the risks and benefits from the perspective of economic, innovation, and other legitimate policy goals. We would recommend that Article 12 be revised to include a new sentence or clause that also accounts for these other policy goals. Specifically, we would recommend the inclusion of the following additional text to Article 12:

"...the rights of the holder and the data protection regime provided for in the LGPD, in addition to the impacts on the international flow of data (and associated policy interests, including economic opportunity, digital connectivity, fraud prevention, anti-money laundering, and other activities relating to the protection of health, privacy, security, and regulatory compliance), as well as diplomatic relations and international cooperation of Brazil with other countries and international organizations."

The ability to transfer data securely across transnational digital networks is of central importance to many national policy objectives. Data transfers support digital connectivity, cybersecurity, fraud prevention, anti-money laundering, and other activities relating to the protection of health, privacy, security, and regulatory compliance.

The ability to transfer data also supports shared economic prosperity. Cross-border access to marketplaces, purchasers, suppliers, and other commercial partners allow Brazilian enterprises in all sectors to engage in mutually beneficial international transactions with foreign enterprises. Data transfers are estimated to contribute \$2.8 trillion to global GDP, a share that exceeds the global trade in goods and is expected to grow to \$11 trillion by 2025.⁵ Disruptions in cross-border data flows have broad reverberations that can lead to reduced potential GDP gains, reduced investments in local markets, job losses and consequently welfare losses, and adverse impact on local and national digital ecosystems – at a time when economic recovery is top of agenda for every government.

Data transfers, which are critical at every stage of the value chain for companies of all sizes, support global supply chains and promote productivity, safety, and environmental responsibility. This ability also supports innovation and transnational research and development (R&D), as well as intellectual property protection and enforcement. Scientific and technological progress require the exchange of information and ideas across borders: As the WTO has stated, "for data to flourish as an input to innovation, it benefits from flowing as freely as possible, given necessary privacy protection policies."⁶

3. Article 14 – 33: Standard Contractual Clauses

On the one hand, we welcome the recognition in Article 15 that standard contractual clauses (SCCs) can be incorporated into a broader contract. We also welcome the reference to interoperability of equivalent instruments in Article 2(II) and the possibility under Article 17 that the ANPD would recognize other SCCs as sufficient under Brazilian law. In practice, we urge Brazil also to consider which SCC models have been widely adopted in international business. These would include SCCs from the EU and the UK. We also appreciate ANPD's adoption of simplified procedure for approval or application of equivalent clauses in Brazil.

On the other hand, we have several concerns regarding the draft regulation.⁷

First, we are concerned that Article 16 appears to suggest that companies transferring data must disclose all of the terms of their contracts to data subjects. Standard contracts can be very lengthy, containing sensitive commercial data, proprietary information, and individually negotiated terms. These negotiated terms, proprietary information, and commercially sensitive data are pertinent to the business relationship between the contracting entities – but not to the data subject. The LGPD already provides data subjects with rights to access, correct, and delete their data, among other rights over their information. A proposal to mandate public or widespread disclosure of these sensitive commercial terms goes beyond the scope of the LGPD.

Second, for the same reasons, we are concerned that the publication of specific contractual clauses under Article 31 would compromise proprietary information, as indicated above. We therefore recommend revising Article 31 to avoid requiring the ANPD to publish on its website the list of approved specific contract clauses and approved global corporate rules.

4. Articles 24 *et seq*: Binding Corporate Rules

As drafted, Article 24 suggests that the BCRs should be binding on all members of an economic group. We recommend that this language be amended to recognize the flexible application of BCRs (e.g., apply to designated parts of an economic group or to designated processing activities). Like with the SCCs, we would also recommend that the ANPD recognize existing BCRs that have been reviewed and approved by their countries in, for example, the EU and the UK.⁸

As regards Article 28, we recommend that the ANPD create a simplified process for recognizing the equivalence of BCRs already approved in other jurisdictions that have adopted robust standards of data protection. The ANPD may consider a list of countries, outside the scope of the country adequacy decision, that have a more robust BCRs analysis process and consider the equivalence of contents between the instruments. If the BCRs meet the ANPD criteria (such as equivalence of BCRs content, or the necessity of being previously approved by another Authority), this could allow for a simpler process for approval of BCRs. This more robust analysis would take place in instruments adopted for the first time by processing agents or that comply with the simplified process standard. This would make ANPD analysis much faster and without creating a backlog of decisions.

5. Article 2 (Sole Paragraph): Effective Date

Article 2 provides that any standard contractual clauses must incorporate the clauses approved by the ANPD into relevant contractual instruments within 180 days from the date of publication of this Resolution. We urge ANPD to consider whether a longer period of time (e.g., one year) may be more appropriate, given that Brazil will be implementing a wholly new cross-border data transfer framework by means of this Resolution, and given the number of legal entities and parties at issue.

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Thank you again for your focus on promoting interoperable mechanisms to support international data transfers. We welcome an opportunity to further engage with the ANPD on these important issues.

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, Palo Alto Networks, 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.

² The Global Data Alliance is a cross-industry coalition of companies that are committed to high standards of data responsibility and that rely on the ability to transfer data around the world to innovate and create jobs. Alliance members are headquartered across the globe and are active in the advanced manufacturing, aerospace, automotive, consumer goods, electronics, financial services, health, media and entertainment, natural resources, supply chain, and telecommunications sectors, among others. BSA | The Software Alliance administers the Global Data Alliance.

³ The seamless transfer of data across international borders enables the deployment of modern and emerging technologies and services that underpin the economy, across all sectors and at the local, national, and international level. This includes technologies and services enabled by data transfers, such as AI-related data analytics and machine learning technologies, as well as cloud computing, blockchain, and new privacy-enhancing technologies. These technologies and services, which are often accessed across borders or rely on data transferred across borders (or both), support many important economic activities and priorities, including remote work and virtual collaboration, distance education, telemedicine, cybersecurity, fraud monitoring and prevention, anti-money laundering, investigation of dangerous counterfeit products, and a broad range of other activities relating to the protection of health, privacy, security, and intellectual property.

⁴ We appreciate the ANPD's treatment of SCCs and BCRs in this regulation. Nevertheless, we note that the regulation does not address other mechanisms – including instrument seals, certificates and codes of conduct – to enable the international transfer of data, nor does the regulation address associated recognition and interoperability processes. These measures are addressed Art. 35 and 35, § 3, LGPD. We recommend that ANPD also consider how to address these alternative mechanisms.

⁵ OECD, *Measuring the Economic Value of Data and Cross-Border Data Flows*, 297 OECD Digital Economy Papers 24 (August 2020).

⁶ WTO, Government Policies to Promote Innovation in the Digital Age, 2020 World Trade Report (2020), at: https://www.wto.org/english/res_e/booksp_e/wtr20_e/wtr20-0_e.pdf

⁷ On a relatively minor note, Art. 23 appears to incorrectly reference Chapter VII. The correct reference should perhaps be to Chapter VIII.

⁸ We also add the following comments on BCRs:

- Art. 26 (II) & (III): The list of countries to which the data is transferred, as well as the list of entities belonging to the same group or conglomerate, generally needs to be updated from time to time. For this reason, we recommend that the ANPD should add an express flexibility in the regulation regarding the possibility of creating an annex, or link, which will contain this information, and which can be updated without the need for a new approval of the BCR by the ANPD.
- Art. 26 (VIII): It is unclear what the ANPD would consider to be "sufficient conditions and guarantees"
- Art. 27: The cross-reference to Chapter VII may be incorrect. The correct reference may be to Chapter VIII.
- Art. 32: Processing agents may make available to data subjects, or the general public, a public version of their BCRs, which do not contain confidential data or business secrets, for the purposes of transparency. We

therefore recommend an express mention in the regulation on the protection of business/industrial secrets in the rule of art. 32, or even that treatment agents can create a public version of the NCGs for publication on their websites and making them available to holders, if requested.