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01

Brazilian Context.

ANPD publishes template for a simplified RoPA for small processing agents

In June, the Brazilian Data Protection Authority (ANPD) published a template for the simplified record of personal data processing activities (RoPA), which can be adopted specifically by small processing agents.

According to ANPD, the template provided contains only the necessary information that may be requested by the Authority in case of inspection processes. The fields provided in the template cover: processing agents' contact information; categories of personal data subjects; personal data; shared use of data; security measures; data retention period; data processing activity, purpose, and lawful basis; and observations.

The simplified RoPA complements the Regulation for the Application of the LGPD for Small Processing Agents (Resolution CD/ANPD No. 2/2021) and the Information Security Guidance for Small Processing Agents.

ANPD imposes first fine for LGPD breach

On July 6th, ANPD issued its first conclusive opening order against a small business, due to breach of the LGPD.

The inspection process started off with a complaint filed by the Prosecutor's Office of the State of São Paulo, Prosecution from the city of Ubatuba. According to the complaint, the company was offering a list of WhatsApp contacts of voters for the purpose of disseminating electoral campaign material for the 2020 municipal election in the city of Ubatuba, state of São Paulo. In sum, the company used data available on the Internet to generate information and thus commercialize it to third parties.

The penalties applied include: (i) a warning for the breach of the legal obligation to appoint a data protection officer; (ii) a fine of BRL 7,200.00 for the violation of the statutory basis provisions; and (iii) a fine of BRL 7,200.00 for the breach of the obligation to submit documents and information during inspection processes, as set forth in article 5 of ANPD's Inspection Regulation.

According to the order, the fine must be paid within 20 business days, as of the official notice. The company may file an appeal within 10 business days, and should it expressly waive its right to appeal, a 25% reduction in the amount of the imposed fine may be applied.

ANPD publishes preliminary analysis of Bill No. 2,338/2023 on the use of Artificial Intelligence

In July, ANPD published its contribution, in the form of a Preliminary Analysis, to Bill No. 2,338/2023, on the use of Artificial Intelligence (AI) in Brazil. The AI Bill, whose author is senator Rodrigo Pacheco (PSD, Democratic Social Party, from the state of Minas Gerais), received comments especially about the interface between Artificial Intelligence and Data Protection, and the determination of a competent authority.

It is worth mentioning that such Bill is a result of a preliminary draft prepared by a commission of legal experts and sets forth a series of rights for those affected by decisions made by AI, such as the right to challenge such decisions, to request human intervention, in addition to the right to receive information about the type of decision, the severity, and the security measures taken.

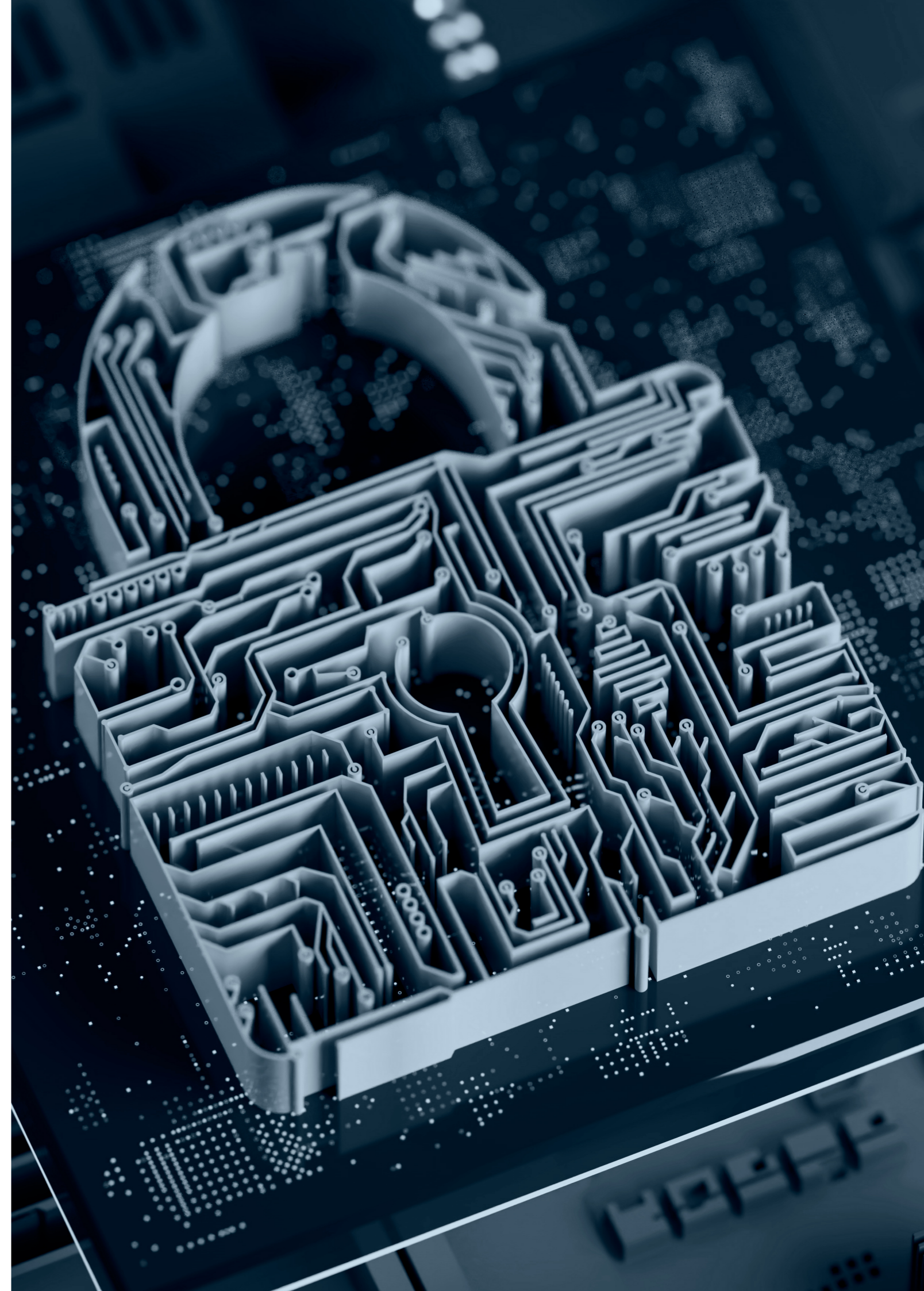
Among the ANPD's comments in the Preliminary Analysis, it can be highlighted the fact that there are - and, in the Authority's view, should be soon resolved - overlaps between what are currently ANPD's competences, as set forth in the LGPD, and what will be the competence of the future AI authority, as set forth in the Bill. Also, ANPD highlights that it is essential that data protection matters related to the AI regulatory sandbox be "solved".

ANPD publishes Guidelines on the processing of personal data for academic purposes

On June 26th, ANPD published the Guidelines on the “Processing of personal data for academic purposes and for the conduction of studies and research” (please see [here](#)), which sets forth greater legal and regulatory clarity for the processing of personal data for such purposes.

As already known, when the processing activity is exclusively conducted for academic purposes, the application of the LGPD is partially exempted (art. 4, II, of LGPD) and the lawful bases of arts. 7 and 11 of LGPD shall be applied. Among the legal provisions of Art. 7 and 11 of the LGPD, personal data and sensitive personal data processed for studies by research bodies should be anonymized whenever possible.

The Guidelines contain clarifications on personal data sharing and on the lawful bases that authorize personal data processing activities for academic purposes and for conducting studies and research. For easier understanding, the ANPD provides case examples of processing activities conducted by research centers and bodies, educational institutions, and data sharing by Health Departments.





02

Judicial Branch.

TRF2 states that expenses with LGPD implementation could be used to offset PIS and COFINS credits

The Federal Regional Court of the 2nd Region issued a decision stating that a company in the technology and application payment means sector is entitled to offset PIS (Social Integration Program) and COFINS (Social Security Financing Contribution) credits on expenses with the implementation of the Brazilian General Data Protection Law (LGPD).

The decision was based on a judgment passed by the Superior Court of Justice (STJ), which held that the investment made by the company to comply with LGPD was a “mandatory investment, essential to achieve the plaintiff’s corporate objectives.” Therefore, these expenses, necessary for the development of the business activity, should be considered inputs, and the company would be entitled to offset PIS and COFINS credits.

It should be noted, however, that other federal courts have already judged this topic and ruled contrary to the Federal Regional Court of the 2nd Region’s understanding. Moreover, the solution to this conflict may come from Congress, where Bill (PL) 4/2022 is pending. Such bill seeks to regulate the right to offset PIS and COFINS credits against expenses with the LGPD.

Court of Justice of São Paulo suspends decision that prevented monitoring program with facial recognition

In May, a class action was filed against the City Hall of São Paulo and the Municipal Secretariat for Urban Security, with the purpose of questioning the validity of the “Smart Sampa program,” which aims to implement an urban monitoring system through the use of facial recognition technology.

When analyzing the preliminary injunction, the lower court judge temporarily suspended the processing of the “Smart Sampa” public notice due to the “existence of a serious threat to fundamental rights”.

The decision also considered that there are studies carried out in Brazil that point to concrete risks of reproducing structural racism when using this system. In addition, it considered that the facial recognition system presents a risk when it comes to personal data processing, since information is being captured, processed, and stored on a large scale.

The City Hall of São Paulo filed an appeal against this decision, which was received by the Court of Appeals and the judge in charge suspended the effects of the previous decision, considering that no scientific technical elements were presented to demonstrate the need for this preventive control by the courts.

On May 25th, 2023, an attachment for the reactivation of the “Smart Sampa” public notice was posted, as the program is no longer suspended by the courts. The companies participating in the auction are already gathering the relevant documents to continue the program.

Thus, we still await the judgment of the appeal and the class action, to follow the next steps of the discussion.

TRE-SP signed an agreement with the Brazilian Bar Association to implement guidelines of the Brazilian General Data Protection Law

The Regional Electoral Court of São Paulo (TRE-SP) signed a collaboration agreement with the Brazilian Bar Association, section of São Paulo’s State (OAB-SP) to implement the guidelines of Brazilian General Data Protection Law (LGPD). The objective is to establish a clear and efficient procedure for fulfilling court requests directed to the section and subsections of the OAB-SP, regarding the sharing of personal data of lawyers, interns, and law firms.

During the negotiations, the president of São Paulo’s OAB section, Patrícia Vanzolini, pointed out that “security in sensitive data processing activities is a requirement that exists all over the world, both in the public administration and the corporate world”.

The agreement promises greater legal certainty and effectiveness in actions related to LGPD enforcement, guaranteeing the rights to privacy and data protection, since it provides for a fast and secure flow in the processing of communications between the two institutions.



03

Authorities.

STJ postpones judgment on the possibility of the Prosecutor's Office compelling banks to provide registration data

In November 2021, the Special Superior Court of Justice (STJ) started the trial on the possibility of the Prosecutor's Office and the Brazilian police authorities forcing banks and financial institutions to provide, without court authorization, registration data of customers for civil and criminal investigations. Since then, there have only been two votes, and the trial was suspended due to requests for record analysis.

Justice Nancy Andrichi states that it is possible for the Prosecutor's Office to force banks to provide, without court order, data such as bank account number, full name, RG (Brazilian ID), CPF (Individual Taxpayer ID), telephone number and address, since this information is not protected by bank secrecy. In addition, she deemed that the purpose of this claim is limited by specific legal hypotheses, and with the possibility of later control by the judicial branch.

The other vote, by Justice Raul Araújo, was different in the sense that, in his view, the Prosecutor's Office purpose is to obtain a blank check, which would allow it to investigate any citizen, by means of information provided by banks, without proper court control. He also considered that the interpretation of the fundamental right to data protection should be restrictive.

In the meantime, Constitutional Amendment 115/2022 came into force, including the right to the protection of personal data under the Federal Constitution, directly affecting the debate on the case. Because of this, on May 17, 2023, the Special Court decided to renew the judgment, as proposed by Justice João Otávio de Noronha, so that the case will be put on the agenda again, to be duly considered by the 15 justices of the Special Court.

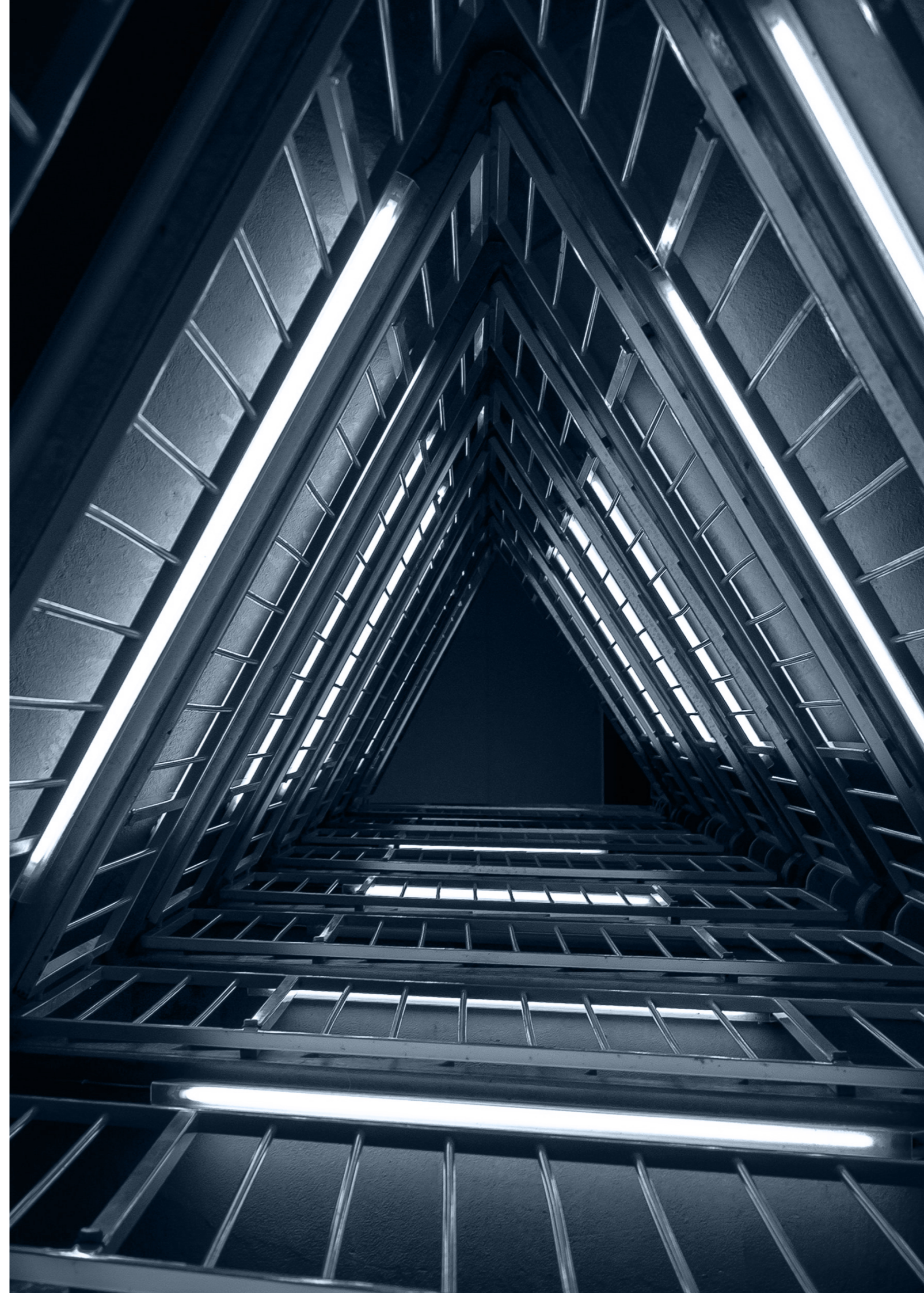
Procon SC notifies streaming services company to provide clarification regarding fees charged for password sharing

Procon (Consumer Protection Office), state of Santa Catarina, has notified a streaming services company to provide clarifications about its new password sharing charging policy.

The agency requested that the company clarify how control will be done, considering that consumers who purchase the service can access it anywhere. It also requests that the platform informs the criteria used for charging for the services and how they will be provided, considering the limitation of access.

Procon also required the company to inform which definition of family will be used to enable password sharing, and how clear information on such procedure was provided to consumers. Santa Catarina state agency's concern is to know how Netflix will do such monitoring without infringing the Brazilian General Data Protection Law (LGPD).

Procon-SC also wants to ensure that consumers will have their rights protected, noting also that the platform uses the words "watch wherever you want" as advertising material.





021

Normative Developments.

ANPD makes preliminary contribution to the public debate on Bill on Freedom, Accountability and Transparency on the Internet

On July, the ANPD published a preliminary contribution to the Bill of Law No. 2,630/20, which establishes the Brazilian Law on Freedom, Accountability and Transparency on the Internet. The bill creates measures to repress the spread of false content on social media and messaging applications, as this impacts the data protection environment.

Among ANPD's comments, it is worth highlighting the risk of overlapping legal competences from the supervisory authority created by this law and from ANPD, especially with regard to user consent, profiling, automated decisions, personal data of children and adolescents, and use for research purposes.

In addition, the Authority emphasized its concern about the use of vague and imprecise expressions in the regulation of data collected for criminal investigation purposes, which could lead to a disproportionate and abusive collection of personal data.

05

International Rulings.

European Commission adopts new decision on the international transfer of personal data

On July 10th, 2023, the European Commission adopted an important decision on the EU-US Data Privacy Framework, which replaces the former Privacy Shield of 2016. The new decision enables international transfers of personal data from the European Union to companies in the United States, with no need to set up additional data protection safeguard measures, provided that they have adequate and comparable levels of data protection.

To obtain the certification under the EU-US Data Privacy Framework, US companies are required to comply with a range of data protection obligations in accordance with the General Data Protection Regulation (GDPR) and, in return, companies will no longer need to enter into individual data protection agreements with each supplier. Those companies that have been certified as compliant with the former Privacy Shield will just need to update their data protection compliance measures by October 10, 2023, to obtain the new certification.

The decision also refers to the US intelligence services, which must ensure that there will be restricted access control to personal data as necessary and on a proportionate basis. In addition, the rights of European data subjects will be ensured by an independent and impartial authority (Data Protection Review Court), which will examine any requests from data subjects and may order the deletion of data that are processed improperly. The European Commission, jointly with European and US data protection authorities, will monitor the implementation of EU-US Data Privacy Framework to verify if all aspects have been fully implemented and if it is actually working.

EDPB adopts template complaint form and Recommendations on the application for approval and on the elements and principles to be found in Controller’s Binding Corporate Rules

The European Data Protection Board (EDPB) has adopted a template complaint form to facilitate the filing of complaints by individuals and the subsequent handling of complaints by Data Protection Authorities (DPA) in cross-border cases. The template considers the existing variations in national laws and practices. DPAs will use it on a voluntary basis and can adapt it to their respective national requirements.

Additionally, the EDPB developed a template acknowledgement of receipt that emphasizes the complainant’s entitlement to a strong legal defense against a legally binding DPA judgement and attempts to provide general information about what happens after the complaint’s submission.

After a public inquiry, the EDPB adopted a final version of the Recommendations to be found in controllers’ BCRs (BCR-Cs), which aims to provide an updated standard application form for the approval of BCR-Cs, clarify the necessary content of BCR-Cs and provide further explanation, and make a distinction between what must be included in a BCR-C and what must be presented to the BCR lead data protection authority in the BCR application.

The document is applicable to all BCR-Cs holders as of the date of publishing.

EDPB adopts final version of the Guidelines on the calculation of administrative fines following public inquiry

The EDPB adopted a final version of the Guidelines on the calculation of administrative fines following a public inquiry, which aims to harmonize the methodology DPAs use to calculate fines and include standardized “starting points”. Three factors are considered in this process: categorization of infringement by nature, seriousness of the infringement and turnover of a business.

The Guidelines outline a 5-step process that considers the number of instances of sanctionable conduct, possibly resulting in multiple infringements; the starting point for the calculation of the fine; aggravating or mitigating factors; legal maximums of fines; and the requirements of effectiveness, dissuasiveness, and proportionality.

The Guidelines are a critical component of the framework the EDPB is building for more efficient cooperation among DPAs on cross-border matters.



Two energy firms are fined in a total of £250,000 for making unlawful marketing calls

The Information Commissioner's Office (ICO) has fined Crown Glazing Ltd and Maxen Power Supply Ltd a combined sum of £250,000 for making unauthorized marketing calls to individuals and businesses on the UK's "do not call" list.

Companies are not permitted to call individuals or businesses listed on the "do not call" lists maintained by the Telephone Preference Service (TPS) and Corporate Telephone Preference Service (CTPS), unless the person or company has given their express consent to receive marketing calls.

Along with the fines, the ICO sent both companies an enforcement notice directing them to stop calling individuals and organizations listed with the TPS and CTPS, as well as those who have previously objected to such calls.






The ICO further emphasizes the importance of complying with the Privacy and Electronic Communications Regulations 2003 (PECR), which set the guidelines for businesses intending to make direct marketing calls, texts, or emails.



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Cybersecurity & Data Privacy practice.

**PARTNERS RESPONSIBLE
FOR THE CONTENT:**

Marcela Waksman Ejnisman

-  Patrícia Helena Marta Martins
-  Carla do Couto Hellu Battilana
-  Bruna Borghi Tomé
-  Luiza Sato
-  Sofia Kilmar

For further information, please visit:

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