

CD/ANPD RESOLUTION No. 4 OF FEBRUARY 24, 2023

Approves the Regulation for Calculating and Applying Administrative Sanctions.

OFFICIAL FEDERAL GAZETTE

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Body: Ministry of Justice and Public Security/National Data Protection Authority

The **BOARD OF THE NATIONAL DATA PROTECTION AUTHORITY**, in exercising the attributions conferred upon it by Articles 55-J, IV, and §2 of Law 13,709 of August 14, 2018 – the General Personal Data Protection Law (“LGPD”), by Article 2, IV, and Article 29 of Annex I of Decree 10,474 of August 26, 2020, and provided for in the Internal Regulations of the National Data Protection Authority, approved by Ordinance No. 1 of March 8, 2021,

WHEREAS what is stated in the records of Proceeding No. 00261.000358/2021-02; and

WHEREAS the resolution taken in the Deliberative Circuit No. 02/2023, resolves to:

Article 1. Approve the Regulation for Calculating and Applying Administrative Sanctions, in the form of the Annex to this Resolution.

Article 2. The Regulation of the National Data Protection Authority’s Inspection Process and Administrative Sanctioning Process, approved by Resolution CD/ANPD No. 1 of October 28, 2021, and published in the Official Federal Gazette on October 29, 2021, is amended as follows:

“Article 32.

§ 1 If compatible with the provisions in Articles 30 and 31, other measures not provided in this Article may be adopted.

§ 2 Non-compliance with a preventive measure:

I – permits the ANPD to act so that, at its discretion, it may adopt other preventive measures or act in a repressive manner, with the adoption of compatible measures; and

II - will be considered an aggravating circumstance if an administrative sanctioning proceeding is opened.

§ 3 The measures provided for in this Chapter IV are not to be confused with the preventive measures in Article 26, item IV of Annex I of Decree No. 10,474 of 2020.” (New wording)

“Article 55.

§ 1 The decision shall indicate the facts and legal grounds and shall apply the respective sanction, when applicable, following the parameters and criteria defined in § 1 of Article 52 of the LGPD and in the ANPD’s regulations.

§ 2 In the event the offender is required to adopt measures obligating it to act or not to act, the decision must also contain, when applicable:

I - the deadline to execute the measures and the conditions for the ANPD to verify them or for the offender to demonstrate compliance with the measures imposed; and

II - the value of the one-time fine or daily fine with the deadline for payment.

“Article 62.

§ 3 If the decision is upheld or partially reconsidered, the General Inspection Coordination Office will forward the proceeding to the Directing Council for further action, together with an analysis of the general assumptions for the appeal to be admissible, the granting of the suspensive effects, and the merits of the request, in addition to other information it deems pertinent.

(New wording)”

Article 3. The following provisions of the National Data Protection Authority’s Regulation on the Inspection Process and of the Administrative Sanctioning Process, approved by Resolution CD/ANPD No. 1 of October 28, 2021, and published in the Official Federal Gazette on October 29, 2021, are hereby revoked,:

I - § 4 of Article 35; and

II - § 3 of Article 36.

Article 4. This Resolution takes effect from the date of its publication.

WALDEMAR GONÇALVES ORTUNHO JUNIOR

President of the Board of the National Data Protection Authority

ANNEX

REGULATION FOR CALCULATING AND APPLYING ADMINISTRATIVE SANCTIONS

CHAPTER I

GENERAL PROVISIONS

Article 1. This Regulation aims to establish parameters and criteria for the application of administrative sanctions by the National Data Protection Authority (ANPD), as well as the parameters and criteria for calculating the base value of fines.

Article 2. For the purposes of this Regulation, the following definitions are adopted:

I – business group or conglomerate: a group of companies in fact or in law with their own legal personalities, under the direction, control or administration of a natural or legal person, or even a group of people that hold, separately or jointly, the power of control over the others, as long as the integrated interest, effective communion of interests and joint performance of the companies that are part of it are demonstrated;

II - breach: non-compliance with an obligation established in Law 13,709, of August 14, 2018 (LGPD), and in the ANPD's regulations;

III - ongoing breach: an infraction executed for an extended period of time by means of an action or omission by the offender related to the same normative instrument;

IV - offender: processing agent that commits a breach;

V - corrective measures: measures determined by the ANPD with the purpose of correcting the breach and bringing the offender back into full compliance with the LGPD and the regulations issued by the ANPD, and shall be applied jointly with the warning sanction, pursuant to the terms of this Regulation;

VI - good practices and governance policy: internal rules and processes that ensure comprehensive compliance with the personal data protection legislation, established and implemented by the processing agent through the adoption of:

a) good practice and governance rules, pursuant to Article 50, head provision and § 1, of the LGPD; or

b) privacy governance program, pursuant to Article 50, § 2 of LGPD;

VII - area of business activity: the area of a company, group, or conglomerate of companies, as defined by the ANPD and verified in the facts of the case, which can be proven via the entity's corporate purpose, National Classification of Economic Activities (CNAE) code, a directly related service code, or similar instruments;

VIII - specific recurrence: repetition of a breach by the same offender of the same legal or regulatory provision, within five (5) years of the date of *res judicata* of the administrative sanctioning process;

IX - ongoing recurrence: an infraction committed by the same offender, regardless of the legal or regulatory provision, within five (5) years of the date of *res judicata* of the administrative sanctioning process, excluding the provisions in item VIII of the head provision; and

X - *res judicata*: a matter whose final decision has been handed down in an administrative sanctioning proceeding within the scope of the ANPD, making it unchangeable and unquestionable within the proceeding in which it was handed down.

CHAPTER II

THE APPLICATION OF SANCTIONS

Section I

Administrative Sanctions

Article 3. Breaches will subject the offender to the following administrative sanctions:

I – an official warning, pursuant to the terms of Article 9 of this Regulation;

II – a one-time fine, pursuant to the terms of Articles 10 to 15 of this Regulation;

III – a daily fine, pursuant to Article 16 of this Regulation;

IV – the mandatory public disclosure of the breach after it is properly assessed and its occurrence has been confirmed, pursuant to Articles 20 and 21 of this Regulation;

V – the blocking of personal data linked to the breach until the controller's data processing operations are brought into compliance, pursuant to Article 22 of this Regulation;

VI – the destruction of personal data linked to the breach, pursuant to Article 23 of this Regulation;

VII – the partial suspension of the operation of the database linked to the breach, pursuant to Article 24 of this Regulation;

VIII – the suspension of processing personal data linked to which the breach, pursuant to Article 25 of this Regulation; and

IX – the partial or total prohibition of exercising activities related to data processing, pursuant to the terms of Article 26 of this Regulation.

§ 1 The sanctions provided for in items VII, VIII and IX of the head provision of this article will only be applied after at least one of the sanctions dealt with in items II, III, IV, V and VI of the head provision of this article has already been imposed for the same specific case.

§ 2 In the hypothesis that §1 of this Article refers to, the ANPD will inform the main sectorial regulatory agency or entity with sanctioning powers to which the controller is subject of the breach during the instruction phase, so that it may make a statement on the potential consequences of the imposition of sanctions for the exercise of the controller's regulated economic activities, especially in the provision of public services, as well as provide other information it deems pertinent.

§ 3 The sectorial regulatory agency or entity will have a period of up to twenty (20) working days, extendable only once for the same period, after which the process may proceed and be decided even without a statement.

§ 4 The offender may make a statement about the information presented by the sectorial regulatory agency or entity in its final allegations.

§ 5 The provisions of items I and IV to IX of the head provision of this article may be applied to public entities and bodies without prejudice to the provisions of Law No. 8,112 of December 11, 1990, Law No. 8,429 of June 2, 1992, and Law No. 12,527 of November 18, 2011.

Article 4. The sanctions will be applied after administrative proceedings are conducted and a grounded decision is issued by the ANPD, ensuring the right to a full defense, adversarial proceedings, and due process of law, pursuant to the terms of Law 9,784 of January 29, 1999 – The Regulation of the Inspection Process and the Administrative Sanctioning Process, approved by Resolution CD/ANPD No. 1 of October 28, 2021.

Sole paragraph. In the event of multiple offenders, the sanctions will be applied individually.

Article 5. The sanctions will be applied gradually, separately or cumulatively, according to the specific characteristics of the case and under the terms of this Regulation.

§ 1 The application of sanctions does not exclude the possibility of the ANPD adopting other administrative measures provided for in the LGPD and in the Regulation of the Inspection Process and Administrative Sanctioning Process, approved by Resolution CD/ANPD No. 1 of October 28, 2021, and in the other legal and regulatory provisions in effect to ensure the offender's compliance with personal data protection legislation.

§ Failure to comply with the applied sanction or the failure to regularize the conduct within the stipulated period will result in the ANPD taking action to apply more serious sanctions without prejudice to the adoption of other applicable legal measures.

Article 6. The summons for the sanction and the calculation of the deadlines provided for in these Regulations shall be carried out according to the provisions of the Regulation of the Inspection Process and of the Administrative Sanctioning Process, approved by Resolution CD/ANPD No. 1/2021.

Article 7. In determining the sanction, the following parameters and criteria must be considered:

- I – the gravity and nature of the breach and the personal rights affected;
- II – the offender's good faith, or lack of good faith;
- III – the advantage the offender gained or intended to gain;
- IV – the offender's economic situation;
- V – the existence of a specific recurrence;
- VI – the existence of an ongoing recurrence;
- VII – the degree of the damage caused, as per the terms of Appendix I of this Regulation;
- VIII – the offender's cooperation;
- IX – the ongoing, demonstratable adoption of internal mechanisms and procedures capable of minimizing damage to safely and adequately process data in accordance with the LGPD;
- X – the adoption of a good practices and governance policy;
- XI – the prompt adoption of corrective measures; and
- XII – whether the seriousness of the fault is in proportion to the severity of the sanction.

Section II

Classification of Breaches

Article 8. Breaches are classified into the three following categories, according to the seriousness and nature of the breaches and the personal rights affected:

I - minor;

II - medium; or

III - serious.

§ 1 The breach is considered minor when none of the hypotheses listed in § 2 or § 3 of this Article are confirmed.

§ 2 The breach is considered medium when it may significantly affect the interests and fundamental rights of the data subjects, characterized as situations in which the processing activity significantly impedes or limits the exercise of rights or the use of a service, as well as cause material or moral damage to the data subjects, such as discrimination; violation of physical integrity; to image and reputation rights; financial fraud or identity misuse, provided it is not classified as serious.

§ 3 The breach is considered serious when:

I – the hypothesis established in § 2 of this Article is confirmed together with at least one of the following situations:

a) it involves large-scale processing of personal data, characterized as involving a significant number of data subjects, also considering the volume of data involved, and the duration, frequency and geographical extent of the data processing conducted;

b) the offender obtains or intends to obtain an economic advantage as a result of the breach committed;

c) the breach puts the life of the data subjects at risk;

d) the breach involves processing sensitive data or the personal data of children, adolescents, or the elderly;

e) the offender processes personal data without the support of one of the legal grounds provided for in the LGPD;

f) the offender conducts unlawful, abusive or discriminatory data processing; or

- g) the systematic adoption of irregular practices by the offender is confirmed;
- II – it constitutes an obstruction to carrying out inspections.

Section III

Official Warnings

Article 9. The ANPD may give an official warning when:

- I - the breach is minor or medium and is not characterized as a specific recurrence; or
- II - there is a need to impose corrective measures.

Section IV

Applying a One-Time Fine

Article 10. The ANPD will apply a one-time fine when:

- I - the offender has not complied with the preventive or corrective measures imposed on it within the established deadlines, when applicable;
- II - the breach is classified as serious; or
- III - due to the nature of the breach, the data processing activity, the personal data processed, or the circumstances of the specific case, it is not appropriate to apply another sanction.

Subsection I

Definition of the Base Value

Article 11. To define the base value of the one-time fine, the methodology described in Appendix I of this Regulation is used for each breach committed, with the following considerations:

- I - the category of the breach;
- II - the offender's turnover in the last available fiscal year prior to the imposition of the sanction, excluding the taxes mentioned in item III of Article 12, § 1 of Decree-Law 1,598 of

December 26, 1977, relative to the line of business activity in which the breach occurred; and

III - the degree of the damage, in the terms of Appendix I of this Regulation.

§ 1 For the purposes of the provisions of the item II of the head provision, turnover is defined as the following:

I - the gross revenue referred to in Article 12 of Decree-Law 1,598 of December 26, 1977, excluding returns and cancelled sales, as well as discounts granted unconditionally;

II - the gross revenue referred to in Article 3, § 1 of Complementary Law No. 123 of December 14, 2006, excluding product returns and cancelled sales, as well as the discounts granted unconditionally to private legal entities that have opted for the *Simples Nacional* tax regime;

III - the total amount of earned funds, excluding sales taxes, for non-profit private legal entities, under the terms of the legislation in effect; or

IV - the value defined by the ANPD under the terms of this Regulation, which may consider:

a) the revenue limit provided for in Article 3, items I and II or in Article 18-A, § 1, as applicable, of Complementary Law No. 123 of December 14, 2006, in the case of entities that opt for the *Simples Nacional*;

b) in the case of startups, the revenue limit provided for in Article 4, item I, § 1, of Complementary Law No. 182 of June 1, 2021;

c) the total revenue of the company, group, or conglomerate of companies in Brazil if the information is unavailable for the line of business activity in which the breach occurred;

d) the sum of the income received by natural persons regarding personal data processing activities, directly or indirectly; or

e) in all other cases, the turnover limit that corresponds to the maximum fine of fifty million Reais (BRL 50,000,000.00).

§ 2 The sum of the revenue obtained across all the lines of business activity affected will be considered when:

I - the breach occurs in more than one line of business activity; or

II - the personal data covered by the breach is used as a source of information for processes in other lines of business of the company, group or conglomerate.

§ 3 For the purposes of the provisions of item IV of § 1 of this Article, the ANPD shall define the sum of the revenue when:

I - the offender submits inadequate or improper documentation, characterized, among other forms, by fraud, falsehood, error, inaccuracy, simulation, or omission as to any element defined by law as a mandatory declaration;

II - the offender fails to submit documentation within the timeframe established by the ANPD;
or

III - the sum of the revenue is presented in an incomplete manner.

§ 4 If the offender is able to prove that it did not obtain any revenue in the fiscal year prior to the imposition of the sanction, the base value for calculating the one-time fine should be considered:

I - the sum of the most recent revenue confirmed by the offender, excluding taxes, updated up to the last day of the fiscal year prior to the application of the sanction; or

II - in the absence of this, the ranges of absolute values in Brazilian Reais (BRL) that are set forth in Appendix I to this Regulation.

Subsection II

Aggravating Circumstances

Article 12. The value of the one-time fine is increased by the percentages below if the following aggravating circumstances apply:

I - ten percent (10%) for each case of specific recurrence, up to a limit of forty percent (40%);

II - five percent (5%) for each case of ongoing recurrence, up to a limit of twenty percent (20%);

III - twenty percent (20%) for each guiding or preventive measure not complied with in the inspection process or preparatory procedure that preceded the administrative sanctioning process, up to the limit of eighty percent (80%); and

IV - thirty percent (30%) for each corrective measure not complied with, up to the limit of ninety percent (90%).

§ 1 In the event of the occurrence of more than one of the items in this Article, the percentages relating to each factor must be added together.

§ 2 For item II, if multiple specific recurrences are confirmed and the resulting percentage increase exceeds the maximum percentage provided for in item I of this Article, the exceeding percentage is classified under general recurrence.

Subsection III

Mitigating Circumstances

Article 13. The amount of the one-time fine is reduced in line with the percentages below if the following mitigating circumstances apply:

I - in the event the breach ceases:

- a) seventy-five percent (75%), if before the ANPD initiates preparatory proceedings;
- b) fifty percent (50%), if after the initiation of preparatory proceedings and before the opening of an administrative sanctioning proceeding; or
- c) thirty percent (30%), if after the administrative sanctioning proceeding has been opened but before the first-level decision is rendered;

II - twenty percent (20%), in the event good practices and governance policies are implemented or ongoing internal mechanisms and procedures capable of safely and adequately processing data and minimizing damage to data subjects can be demonstrated, before the first-level decision is rendered;

III - in situations where the offender proves it has implemented measures capable of reverting or mitigating the effects of the breach on the affected personal data subjects:

- a) twenty percent (20%), if prior to the ANPD initiating preparatory proceedings or administrative sanctioning proceedings by the ANPD; or
- b) ten percent (10%), if after the initiation of preparatory proceedings and before the opening of an administrative sanctioning proceeding; and

IV - five percent (5%), in situations where the offender demonstrates cooperation or good faith.

§ 1 For the effects of items I and III of this Article, the cessation of the breach and the adoption of measures capable of reverting or mitigating the effects of the breach that result from merely complying with an administrative or judicial decision will not be considered mitigating factors.

§ 2 In the event of the incidence of more than one of the items in this Article, the percentages relating to each factor must be added together.

§ 3 The offender is responsible for proving to the ANPD compliance with the requirements provided for in this Article.

Subsection IV

The Incidence of Aggravating and Mitigating Factors

Article 14. The aggravating circumstances established in Article 12 and the mitigating circumstances established in Article 13 of this Regulation will be applied to the base value of the fine.

Article 15. In any case, the result of applying the provisions of Article 14 of this Regulation:

I - cannot be less than the minimum values provided for in Appendix II of this Regulation, except for cases in which the advantage obtained or intended by the offender can be estimated, in which case a value equal to double the economic advantage resulting from the breach will be applied; and

II - is limited to two percent (2%) of the turnover of the private legal entity, group or conglomerate of companies in Brazil in its last fiscal year, excluding taxes, or to fifty million Brazilian Reals (BRL 50,000,000.00).

Section V

Applying Daily Fines

Article 16. The ANPD will apply daily fines when necessary to ensure compliance with a non-pecuniary sanction or a determination established by the ANPD within a certain period, observing:

I - the total limit provided for in Article 52, item II, of the LGPD, per breach;

II - the category of the breach; and

III - the degree of the damage, pursuant to Appendix I of this Regulation.

§ 1 The value of the daily fine is applied on a cumulative basis, considering the time between the imposition of the fine and the performance of the obligation, up to a total limit of fifty million Reais (BRL 50,000,000.00) per breach.

§ 2 The degree of damage referred to in item III of the head provision, comprises the extent of the damage and the harm caused, pursuant to Article 54 of the LGPD.

§ 3 The daily fine may be applied in the event of the situations hypothesized in the head provision of this Article or when the offender:

I - fails to remedy the irregularities within the stipulated period after having been notified of them;

II - obstructs inspection efforts, provided that the application of the daily fine is deemed necessary to remove such an obstruction; or

III - commits an ongoing breach that has still not ceased at the time the decision is handed down.

§ The daily fine is applicable as of:

I - the first working day in which there is a failure to comply with the non-monetary sanction or determination established by the ANPD after officially acknowledging the notification of the decision, regardless of any new notifications; or

II - the business day following the official acknowledgment of the decision that stipulated it until the obligation is met.

Section VI

Payment of the Fines

Article 17. The fine must be paid within twenty (20) working days of the official acknowledgement of the decision to apply the sanction.

§ 1 The daily fine must be paid within the term referred to in the head provision of this Article, as from the official notice of the decision that ascertains the amount due.

§ 2 For small processing agents, as defined by CD/ANPD Resolution No. 2, of January 27, 2022, the timeframe for paying the fines provided for in the head provision of this Article is doubled.

§ 3 When the fine is not paid within the term set forth in the head provision, its value should be increased in line with the following charges:

I - interest on arrears, as of the first day of the month following the due date, equivalent to the reference interest rate of the Special System for Settlement and Custody (Selic), for federal bonds, accumulated monthly, until the last day of the month prior to payment, and one percent (1%) in the month of payment; and

II - a late payment fine of thirty-three one hundredths of a percent (0.33%) per day, up to a limit of twenty percent (20%), calculated from the first day after the expiration of the deadline for paying the imposed administrative sanction, until the day on which payment is made, under the terms of the applicable federal legislation.

Article 18. The offender that expressly waives the right to appeal the first instance decision will be entitled to a reduction factor of twenty-five percent (25%) on the amount of the fine imposed, if the payment is made within the period for payment defined in the head provision of Article 17.

Article 19. Payment made after notification of the decision to apply the sanction does not prejudice the right to file an administrative appeal.

Sole paragraph. If the administrative appeal is granted, the amount of the fine paid will be refunded with interest at the Selic rate or another index that may replace it, as per the legislation in effect.

Section VII

Public Disclosure of the Breach

Article 20. The ANPD may oblige the offender to publicly disclose the breach, depending on the relevance of the matter and the public interest.

§ 1 Public disclosure consists of the offender itself publicly disclosing the breach after its occurrence has been properly ascertained and confirmed.

§ 2 Public disclosure must cover the content, the means, the duration, and the deadline for compliance.

§ 3 The offender shall exclusively bear the burden of publicly disclosing the breach.

Article 21. The sanction regarding public disclosure of the breach must not be confused with the publication of the decision to apply an administrative sanction in the Official Federal Gazette or with the other acts performed by the ANPD in order to comply with the principle of administrative publicity.

Section VIII

Blocking Personal Data

Article 22. The ANPD may apply the sanction of blocking the personal data.

§ 1 The sanction of blocking personal data consists of temporarily suspending any data processing operation that involves the personal data linked to the breach and blocking the data until the offender regularizes the conduct.

§ 2 As soon as it is notified of the sanction referred to in the head provision of this Article, the offender must immediately inform the processing agents with whom it shares use of the data that the data has been blocked so that they repeat the identical procedure, except in cases where this communication proves impossible or involves a disproportionate amount of effort, hypotheses which the ANPD will evaluate.

§ 3 The offender must prove to the ANPD that it has regularized its conduct in order to receive authorization to unblock the personal data.

Section IX

Destruction of Personal Data

Article 23. The ANPD may obligate the offender to destroy the personal data linked to the breach.

§ 1 The sanction of destroying personal data consists of excluding data or a dataset that is stored in a database, regardless of the procedure employed.

§ 2 As soon as it is notified of the sanction referred to in the head provision of this Article, the offender must immediately inform the processing agents with whom it shares use of the data that the data must be destroyed so that they repeat the identical procedure, except in cases where this communication proves impossible or involves a disproportionate amount of effort, hypotheses which the ANPD will evaluate.

Section X

Partial Suspension of Database Operations

Article 24. The ANPD may partially suspend the operation of the database linked to the breach.

§ 1 The purpose of the sanction mentioned in the head provision is to suspend the operation of the database that infringes on personal data protection legislation.

§ 2 The sanction of partial suspension of the database operation can be applied for a maximum period of six (6) months, extendable for an equal period, until the controller regularizes the processing activity, taking into account the complexity for regularization and the classification of the breach.

§ 3 To determine the timeframe of the suspension, the ANPD shall consider the public interest, the impact on the rights of the data subjects, the category of the breach and the complexity involved in the offender regularizing the processing activity.

§ 4 The regularization of the processing activity must be demonstrated by the offender in order to reestablish the operation of the partially suspended database.

Section XI

Suspension of Personal Data Processing Activities

Article 25. The ANPD may suspend the offender from conducting personal data processing activities.

§ 1 The purpose of the sanction provided for in the head provision of this Article is to suspend the activity of personal data processing linked to the breach in order to ensure compliance with legal and regulatory standards, and can be applied for a maximum period of six (6) months, extendable for an equal period.

§ 2 In determining the timeframe of the suspension, the ANPD shall consider the public interest, the impact on the rights of the data subjects, and the category of the breach.

Section XII

Partial or Total Prohibition of Conducting Activities Related to Data Processing

Article 26. The sanction prohibiting the offender from conducting activities related to personal data processing consists of the partial or total impediment of personal data processing operations, and may be applied in cases where:

I - there is a recurring breach punished via partial suspension of database operations or suspension of personal data processing activities (provided in Section X and XI);

II - personal data is processed for illicit purposes, or without the support of adequate legal grounds; or

III - the offender does not meet or no longer meets the technical and operational requirements to continue adequately processing personal data.

Section XIII

Compliance with the Principle of Proportionality

Article 27. The ANPD may disregard the methodology for calculating fines or replace one sanction with another one contained in this Regulation, in the event it deems the seriousness of the breach to be disproportionate to the severity of the sanction, subject to the provisions of item XI of §1 of Article 52 of the LGPD, this Regulation and other applicable rules.

Sole paragraph. The decision referred to in the head provision of this Article cannot be based on abstract legal values and must be based on proper reasons and legal grounds, demonstrating the need and suitability of the measure imposed, the degree of the disproportionality, the public interest to be protected, and the parameters adopted in applying the sanction, considering the practical consequences of the decision.

CHAPTER III

FINAL PROVISIONS

Article 28. The provisions of this Regulation also apply to administrative proceedings in progress at the moment it comes into effect.

APPENDIX I TO THE REGULATION FOR CALCULATING AND APPLYING ADMINISTRATIVE SANCTIONS

Methodology for the application of the sanction fine

1. PURPOSE

This Appendix describes the methodology for calculating the amount of the one-time fine sanctions applicable to breaches of Law No. 13,709, of August 14, 2018, and the regulations issued by Brazil's National Data Protection Authority (ANPD).

2. REFERENCES

2.1. Law No. 13,709 of August 14, 2018 – the General Personal Data Protection Law (LGPD);

2.2. Law No. 9,784 of January 29, 1999, which regulates administrative proceedings within the Federal Public Administration;

2.3. Resolution CD/ANPD No. 1 of October 28, 2021, which approves the ANPD's Regulation of the Inspection Process and Administrative Sanctioning Process;

2.4. Ordinance No. 1 of March 8, 2021, which approves the Internal Regulations of the ANPD.

3. CALCULATION FORMULA

The value of one-time fine sanctions is determined by applying the following formula:

$V_{\text{fine}} = V_{\text{fine}} \times (1 + \text{Aggravating} - \text{Mitigating})$

Where:

V_{fine} = the amount of the fine;

V_{base} = base fine value;

Aggravating = sum of the percentages, in decimal form, of the aggravating circumstances; and

Mitigating circumstances = sum of the percentages, in decimal form, of the mitigating circumstances.

4. APPLICATION OF THE CALCULATION FORMULA

The methodology for calculating the one-time fine is divided into four (4) steps to facilitate understanding:

- ✓ Step 1 - determining the base rate;
- ✓ Step 2 - determining the base value of the fine;
- ✓ Step 3 - determining the amount of the fine; and
- ✓ Step 4 - adjustment to the minimum and maximum fine limits.

Step 1

4.1 Determining the base rate (Abase)

To define the base rate for calculating the fine, the ANPD must first classify the breach as minor, medium or serious, according to the criteria set forth in the Regulation for Calculating and Applying Administrative Sanctions.

The minimum and maximum rates are determined according to the category of the breach, as per Table 1 below:

Table 1 - Minimum(A1) and maximum(A2) rates for defining the base fine value

Category	Percentage of revenue	
	A ₁	A ₂
Minor	Eight one-hundredths of one percent (0.08%)	Fifteen one-hundredths of one percent (0.15%)
Medium	Thirteen one-hundredths of one percent (0.13%)	one-half of one percent (0.5%)
Serious	Forty-five one-hundredths of one percent (0.45%)	one and one-half of one percent (1.5%)

After defining the tax bracket, the degree of damage is determined using a scale from 0 to 3, as shown in Table 2 below.

Table 2 - Values for Degree of Damage

Value	Degree of Damage
3	<p>The breach causes injury or offense to diffuse, collective or individual rights or interests, which, given the extraordinary circumstances of the case, have an material or moral impact that is irreversible or difficult to reverse on the affected data subjects, causing, among other situations, discrimination, violation of physical integrity, of the right to image and reputation, financial fraud or misuse of identity; or</p> <p>Damages resulting from bad faith litigation, such as, among other hypotheses provided for in the procedural legislation, alteration of the truth of the facts, use of the process to achieve an illegal objective, unjustified resistance to the progress of the process, reckless acting in any act of the process or impediment to the ANPD's performance.</p>
2	<p>The breach causes injury or offense to diffuse, collective, or individual rights or interests, which, given the circumstances of the case, generate material or moral impacts on the data subjects that do not fit the criteria described for the degrees of damage 0,1 or 3; or</p> <p>Damage resulting from the untimely submission of information or untimely compliance that directly hinders the inspection or administrative sanctioning processes or third parties, and that does not arise from litigation in bad faith.</p>
1	<p>The breach causes injury or damage to the rights or interests of a small number of data subjects, with limited material or moral impact, which can be reversed or compensated relatively easily; or</p> <p>Non-compliance with the determination or sending or making available of information outside the deadlines or conditions established by the ANPD, without direct damage to the inspection or administrative sanctioning process or to third parties, and that does not arise from litigation in bad faith.</p>
0	<p>The breach does not cause damage or only causes damage with insignificant impacts to the data subjects, arising from predictable or commonplace situations that do not justify the need for compensation.</p>

Once the “degree of damage” parameter is established, the basic rate of the fine is then determined, respecting the minimum and maximum rate range for fines.

$$A_{base} = \frac{(A_2 - A_1)}{3} \times GD + A_1$$

Where:

A_2 = maximum rate depending on the category of the breach;

A_1 = minimum rate depending on the category of the breach;

GD = degree of damage caused by the breach; and

A_{base} = base rate.

Step 2

4.2 Determining the base value (V_{base})

The base value of the fine is calculated by multiplying the base rate by the gross revenue, excluding taxes.

$$V_{base} = A_{base} \times (Revenue - Taxes)$$

Where:

V_{base} = fine base value;

A_{base} = base rate;

Revenue = the offender’s revenue; and

Taxes = incidental taxation.

In cases where the offender is a natural person or legal entity with no registered revenue, the basic fine will be calculated according to the following formula, considering absolute value ranges, in Brazilian Reais, according to the category of the breach, according to Table 3, and the parameter of the degree of damage, to be considered according to Table 2:

$$V_{base} = \frac{(V_2 - V_1)}{3} \times GD + V_1$$

Where:

V_{base} = base-value;

V_2 = maximum value depending on the category of the breach;

V_1 = minimum value depending on the category of the breach; and

GD = degree of damage caused by the breach.

Table 3 - Minimum and maximum values for defining the basic fine value for cases in which the offender is a natural person or legal entity with no registered revenue.

Category	Value (BRL)	
	V ₁	V ₂
Minor	One thousand five hundred Reais (BRL 1,500.00)	Three thousand five hundred Reais (BRL 3,500.00)
Medium	Three thousand Reais (BRL 3,000.00)	Seven thousand Reais (BRL 7,000.00)
Serious	Six thousand seven hundred and fifty Reais (BRL 6,750.00)	Fifteen thousand seven hundred and fifty Reais (BRL 15,750.00)

Step 3

4.3 Determining the value of the fine (V_{fine})

Aggravating and mitigating circumstances are applied to the base amount of the fine, as provided in the Regulation for Calculating and Applying Administrative Sanctions.

$$V_{fine} = V_{base} \times (1 + \text{Aggravating} - \text{Mitigating})$$

Where:

V_{fine} = value of the fine;

V_{base} = base fine value;

Aggravating = sum of the percentages, in decimal form, of the aggravating circumstances; and

Mitigating = sum of the percentages, in decimal form, of the mitigating circumstances.

Step 4

4.4 Adequacy of the minimum and maximum fine limits (V_{final})

In cases where the advantage obtained can be estimated, the value of the resulting fine is checked to confirm it is at least twice the value of the advantage obtained, as per the terms of Article 13, sole paragraph, item I of the Regulation for Calculating and Applying Administrative Sanctions. If the amount of the fine is lower, it is adjusted so that the final amount of the fine is double the amount of the advantage gained.

Finally, the amount of the fine is adjusted, when necessary, to comply with the minimum fine amounts as provided in Appendix II and to the maximum limit of two percent (2%) of the private legal entity’s, group’s or conglomerate of companies’ turnover in Brazil in its last fiscal year, excluding taxes, limited to a total of fifty million Reais (BRL 50,000,000.00) per breach, so that:

$$V_{final} = \begin{cases} V_{fine} & , \quad SE \ V_{min} \leq V_{fine} \leq V_{max} \\ V_{min} & , \quad SE \ V_{fine} < V_{min} \\ V_{max} & , \quad SE \ V_{fine} > V_{max} \end{cases}$$

Where:

V_{min} = minimum fine value to be considered according to Appendix II or double the advantage gained – whichever is greater;

V_{max} = maximum fine value to be considered, respecting the maximum limit of two percent (2%) of the legal entity’s gross revenue or fifty million Reais (BRL 50,000,000.00), whichever is smaller; and

V_{final} = final amount of fine to be applied.

Thus, the final value of the fine per breach has a minimum limit of the greater of a) twice the advantage obtained, when possible to estimate; and b) the minimum values provided in Appendix II. In turn, the maximum limit will be the smallest value between a) fifty million Reais (BRL 50,000,000.00); and b) two percent (2%) of the turnover of the private legal entity, group or conglomerate of companies in Brazil in its last fiscal year, excluding taxes.

APPENDIX II TO THE REGULATION FOR CALCULATING AND APPLYING ADMINISTRATIVE SANCTIONS

Minimum values to observe for the adequacy of one-time fines, as described in Appendix I.

Table 1 - Minimum one-time fine values for cases in which the offender is a natural person or legal entity with no registered revenue

GRADING	VALUE (in BRL)
Minor	One thousand Reais (1,000.00 BRL)
Medium	Two thousand Reais (2,000.00 BRL)
Serious	Four thousand Reais (4,000.00 BRL)

Table 2 - Minimum values of the one-time fine for offenders not listed in Table 1

GRADING	VALUE (in BRL)
Minor	Three thousand Reais (3,000.00 BRL)
Medium	Six thousand Reais (BRL 6,000.00)
Serious	Twelve thousand Reais (12,000.00 BRL)

This text does not replace the content of the certified version of the Resolution.

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