



ADMINISTRATIVE PROCESS TRAIL

INSPECTION PROCESS

 Guide 02

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SUMMARY

INTRODUCTION

OBJECTIVES OF THE INSPECTION PROCESS
AND RESPONSIVE ACTION

MEANS OF OPERATION AND PREMISES OF
INSPECTION

MONITORING, GUIDANCE, AND PREVENTION
ACTIVITIES OF THE INSPECTION PROCESS

INTRODUCTION

In the first Guide, we aimed to address the structure of the National Data Protection Authority (ANPD) and the principles that should guide all its actions within the scope of the administrative process.

In this second Guide, the focus will be specifically on the monitoring, guidance, and prevention activities that encompass the inspection process. Repressive activities, although also part of the inspection process, will be covered in the next Guide of this series.



OBJECTIVES OF THE INSPECTION PROCESS AND RESPONSIVE ACTION

The inspection process aims to verify and analyze compliance with the obligations established by the General Data Protection Law (LGPD), thereby ensuring the protection of the fundamental right to personal data protection, as guaranteed by the Federal Constitution.

According to Article 2 of Resolution CD/ANPD No. 1/2021¹, which approves the Regulation of the Inspection Process and the Sanctioning Administrative Process of the ANPD, the inspection includes the activities of monitoring, guidance, and preventive action by the ANPD.

Before delving into the specific aspects of these activities that comprise the inspection process, it is important to give special attention to the inspection model adopted by the ANPD. This model dictates a collaborative stance between the ANPD and data processing agents, aiming for a resolution before applying any sanctions.

¹ BRAZIL. Resolution CD/ANPD No. 1/2021. Article 2: Supervision includes monitoring, guidance, and preventive actions, in accordance with the procedures established in this Regulation. .



1.1. WHAT IS RESPONSIVE INSPECTION?

The ANPD adopts a responsive regulation model, which involves considering the possibility of influencing behaviors without necessarily resorting to sanctions, thus promoting compliance with the LGPD in a more advisory and collaborative manner. The underlying premise of this model is that regulators should adapt their actions according to the conduct of regulated entities when deciding how to enforce or support compliance. A practical manifestation of this adaptability is the combination of both soft and stringent regulatory and enforcement measures. This model is primarily supported by the studies of John Braithwaite² and has been developed by an active community of regulatory scholars³.

A detailed analysis reveals that responsive regulation involves the active and conscious construction of a regulatory framework, values, and shared interpretative schemes within the regulatory system. This community is formed through close and informal dialogue between the regulatory authority and the regulated entities, contributing to the gradual increase in the competence, motivation, and integrity of the regulated entities in complying with the rules.

This regulatory dialogue aims to guide and build consensus in the interpretation of compliance norms, rather than focusing solely on the application of punishments and repressions. As a result, the discretion of authorities — such as data protection authorities in various countries operating on this model — is mitigated by closer communication with the regulated entities.



1.2. EUROPEAN INSPECTION MODEL

The European inspection model, established by the General Data Protection Regulation (GDPR), differs from the Brazilian structure by having multiple independent authorities in Member States, each responsible for monitoring and ensuring compliance with the legislation.⁴

However, similar to the ANPD, these authorities' approach is not limited to repressive and punitive actions but also includes educational and preventive measures. This approach can be better described through a “regulatory pyramid” structure, inspired by the responsive regulation model discussed earlier. This pyramid structure illustrates the order of regulatory strategies to be adopted. Initially, consultation and dialogue are prioritized, and only after these steps fail does the authority apply more severe punishments⁵.

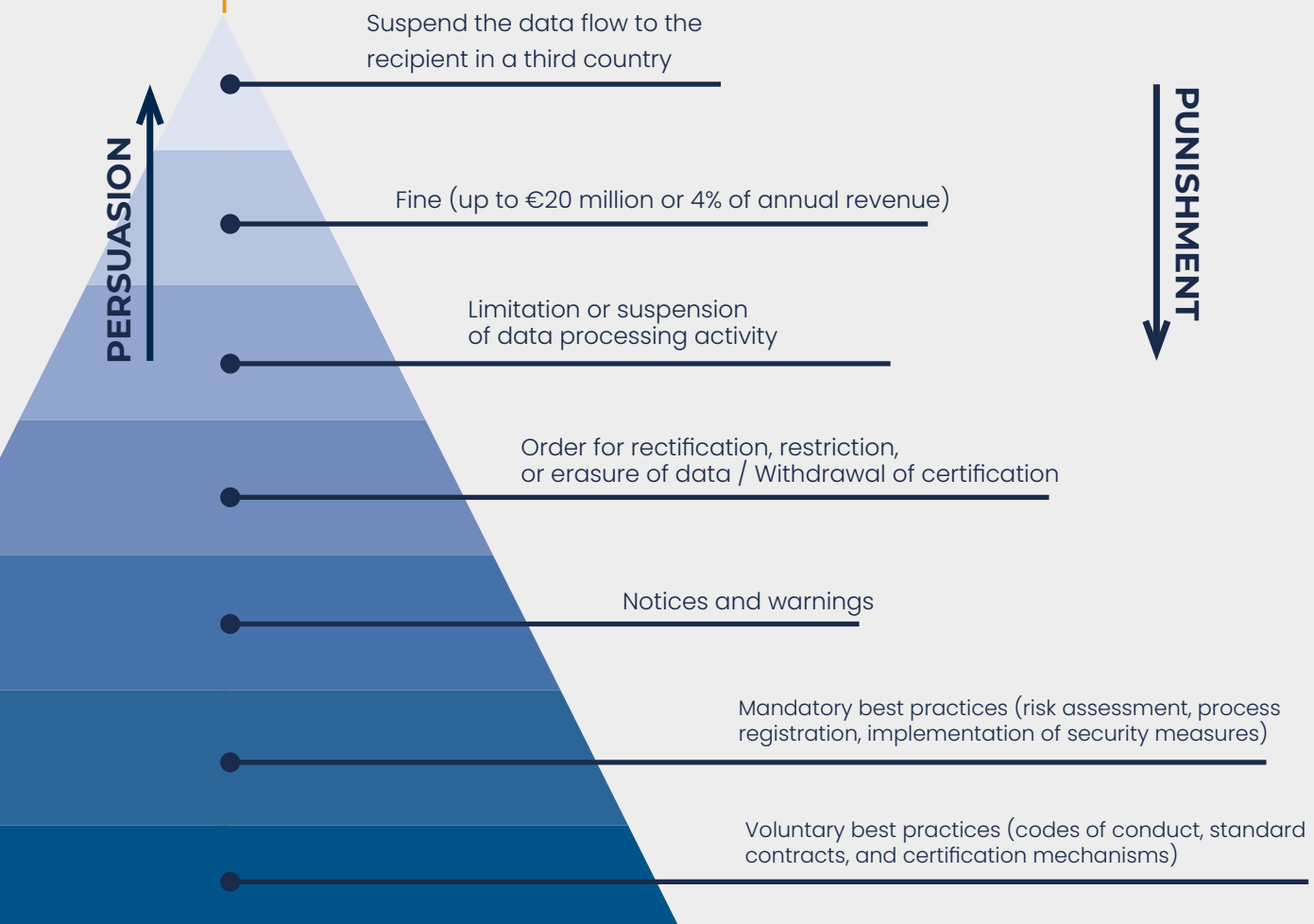
2 BRAITHWAITE, John. *Restorative Justice & Responsive Regulation*, 2002. BRAITHWAITE, John. *The Essence of Responsive Regulation*, 2011.

3 FORD, Cristie. *Macro- and Micro-Level Effects on Responsive Financial Regulation*, 2011; FORD; AFFOLDER. *Responsive Regulation in Context*, 2011; NIELSEN, Vibeke L. *Are Regulators Responsive?*, 2006; IVEC; BRAITHWAITE. *Applications of Responsive Regulatory Theory in Australia and Overseas*, 2015.

4 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, Article 51: “Member States shall provide that one or more independent public authorities are responsible for monitoring the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons in relation to the processing of personal data and to facilitate the free flow of such data within the Union.”

5 MCGEVERAN, W. *Friendling the Privacy Regulators*. Scholarship Repository, University of Minnesota Law School, 2016. Available at: https://scholarship.law.umn.edu/faculty_articles/615

Below, we can visualize a regulatory pyramid model⁶ that seeks to incorporate specific sections of the European regulation into this model.



As we can see, the pyramid depicts the structure of the responsive regulation model in the European bloc, starting with a self-regulation strategy established in Articles 40 and 43 of the GDPR. This approach escalates as necessary, moving through mandatory measures such as risk assessment and process registration, up to extreme situations requiring severe sanctions, such as fines of up to 20 million euros and the suspension of data flows.

Initially, there was some apprehension among data processing agents, fearing that the authorities would immediately adopt an excessively punitive stance in case of GDPR violations. However, over time, Member State authorities have demonstrated a more balanced approach to violations, focusing more on dialogue and preventive measures rather than directly imposing sanctions⁷.

⁶ IRAMINA, A. GDPR v. LGPD: Strategic Adoption of the Responsive Approach in the Drafting of Brazil's General Data Protection Law and the European Union's General Data Protection Regulation. *Revista de Direito, Estado e Telecomunicações*, Brasília, vol. 12, no. 2, pp. 91-117, October 2020

⁷ IRAMINA, A. GDPR v. LGPD: Strategic Adoption of the Responsive Approach in the Drafting of Brazil's General Data Protection Law and the European Union's General Data Protection Regulation. *Revista de Direito, Estado e Telecomunicações*, Brasília, vol. 12, no. 2, pp. 91-117, October 2020.

Nevertheless, despite the strategy showing positive results, some countries have had to resort to sanctions to ensure GDPR compliance. An example is France, which in 2019, after unsuccessful attempts at dialogue, fined Google 50 million euros for accessing users' personal data for advertising purposes without proper consent⁸; This stance by the French authority aligns with the European Commission's understanding that the regulation's success should be primarily measured by the positive change in culture and behavior of the actors involved in data protection, rather than the number of fines and sanctions applied.⁹



1.3. BENEFITS AND EXAMPLES OF RESPONSIVE INSPECTION IN BRAZIL

An example of a responsive approach in Brazil is the National Telecommunications Agency (Anatel), which historically employed a strict enforcement model known as "command and control", focusing on enforcing regulations through penalties. Over time, Anatel recognized the need for a more efficient approach and shifted towards a responsive model, emphasizing behavior correction and improving services provided to consumers.

The implementation of responsive regulation by Anatel through the Regulatory Inspection Regulation¹⁰ marked a significant transformation in its inspection methods over the past 24 years.

Similarly, the National Data Protection Authority (ANPD) can benefit from this responsive approach. By adopting this model, the ANPD can optimize its resources and respond more effectively to societal demands, focusing on behavior correction and promoting voluntary compliance with data protection standards. This dynamic and educational model can enhance the effectiveness of inspection and ensure better protection of personal data.

⁸ AFP. France fines Google 50 million euros for use of personal data. Folha de São Paulo, Paris, 2019. Available at: <https://www1.folha.uol.com.br/mercado/2019/01/franca-multa-google-em-50-milhoes-de-euros-por-uso-de-dados-pessoais.shtml>

⁹ EUROPEAN UNION. European Commission. (2019a) Communication from the Commission to the European Parliament and the Council: Data Protection Rules as a Trust-Enabler in the EU and Beyond – Taking Stock. Brussels, 2019. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0374>

¹⁰ BRAZIL. Resolution No. 746, of June 22, 2021, which approves the Regulatory Supervision Regulation. Available at: <https://informacoes.anatel.gov.br/legislacao/resolucoes/2021/1561-resolucao-746>. Accessed on 20/05/2024.

MEANS OF OPERATION AND PREMISES OF INSPECTION

Within its regulatory jurisdiction, the ANPD aims to promote awareness of norms and public policies related to personal data protection, as well as security measures. Thus, the ANPD can operate in the following ways, as outlined in Article 16 of Resolution CD/ANPD No. 1/2021:¹¹

- Ex officio, meaning independently of any request or complaint¹²;
- Through periodic inspection programs, according to the ANPD's Map of Priority Topics, which outlines inspection subjects¹³;
- In coordination with other public bodies and entities; or
- In cooperation with data protection authorities from other countries, either at the international or transnational level.

¹¹ BRAZIL. Resolution CD/ANPD No. 1, dated October 28, 2021. Article 16: In the exercise of its regulatory authority, the ANPD may act: I - Ex officio; II - Due to periodic inspection programs; III - In coordination with public bodies and entities; or IV - In cooperation with data protection authorities from other countries, of an international or transnational nature. Sole paragraph. ANPD's inspection shall promote, among data subjects and data processing agents, awareness of norms and public policies on personal data protection and security measures, in order to disseminate best practices, in accordance with the LGPD.

¹² Following the provisions of Article 5 of Law No. 9.784/1999, which regulates administrative proceedings within the scope of the Federal Public Administration, the administrative process may be initiated ex officio or at the request of an interested party.

¹³ In December 2023, ANPD published Resolution CD/ANPD No. 10/2023, which approved the Map of Priority Topics for the biennium 2024-2025. The Map of Priority Topics encompasses four areas of action to be considered in 2024 and 2025, including the rights of data subjects, the processing of personal data of children and adolescents in the digital environment, artificial intelligence for facial recognition and personal data processing, as well as data scraping and data aggregators. Resolution CD/ANPD No. 10/2023 is available at <https://www.inpd.com.br/post/anpd-divulga-mapa-de-temas-priorit%C3%A1rios-2024-2025>. Accessed on 05/20/2024.

The ANPD's performance during the inspection process should be carried out considering the premises outlined in Article 17 of Resolution CD/ANPD No. 1/2021¹⁴, among which stand out:

- **Prioritization based on evidence and regulatory risks**, to identify and prioritize the most urgent cases and those posing the greatest risks to personal data protection. This allows resources to be effectively directed towards cases requiring immediate attention;
- **Joint action with other public bodies and entities**, to coordinate efforts and regulatory actions. This allows for the exchange of information among agencies, resulting in a more comprehensive and cohesive approach to data protection;
- **Responsive action**, with the adoption of measures proportional to the identified risk and the behavior of data processing agents. This means that if an agent is willing to correct its shortcomings and cooperate with the ANPD, measures may be less severe. However, in cases of resistance or negligence from the data processing agent, ANPD actions may be more stringent;
- **Encouragement of accountability** by data processing agents, promoting accountability practices where agents must demonstrate compliance with the LGPD. This includes implementing privacy policies, conducting internal audits, and preparing impact reports;
- **Encouragement of direct conciliation between the parties and prioritization of problem resolution and damage repair**, encouraging the amicable resolution of conflicts between data subjects and data processing agents. It is noteworthy that the focus of ANPD is to efficiently resolve the problem and repair the damages caused to the data subject. This may involve negotiations, mediation, and agreements that meet the interests of both parties, providing a quicker and less burdensome solution to both sides.

14 BRAZIL. RESOLUTION CD/ANPD No. 1, DATED OCTOBER 28, 2021. Article 17: Art. 17. The ANPD's inspection process shall observe the following premises: I - alignment with the strategic planning, with the monitoring instruments of data processing activities, and with the National Policy on Personal Data Protection and Privacy; II - prioritization of action based on evidence and regulatory risks, with focus and orientation towards results; III - integrated and coordinated action with public bodies and entities; IV - responsive action, with the adoption of measures proportional to the identified risk and the posture of the regulated agents; V - encouragement of promoting a culture of personal data protection; VI - provision of transparency, feedback, and self-regulation mechanisms; VII - encouragement of accountability and accountability by data processing agents; VIII - encouragement of direct conciliation between the parties and prioritization of problem resolution and damage repair by the controller, observing the principles and rights of the data subject provided for in the LGPD; IX - requirement of minimal intervention in imposing administrative conditions on personal data processing; and X - exercise of inspection activities that best suit the competencies of the ANPD.

MONITORING, GUIDANCE, AND PREVENTION ACTIVITIES OF THE INSPECTION PROCESS

As mentioned in this Guide, monitoring, guidance, and prevention activities are fundamental pillars of the responsive regulatory approach adopted by the ANPD, aiming not only to react to infractions but also to prevent their occurrence and guide data processing agents toward appropriate practices in compliance with the LGPD. Below, we will explore each of these activities in detail.



3.1. MONITORING ACTIVITY

Monitoring involves continuous surveillance of the personal data processing practices carried out by data processing agents. It is in the monitoring activity that the ANPD gathers information and relevant data to identify possible risks and infractions of the LGPD, ensuring the proper functioning of the regulated environment.

Through monitoring instruments such as the Monitoring Cycle Report and the Map of Priority Topics, the ANPD aims to achieve the objectives outlined in Article 18 of Resolution CD/ANPD No. 1/2021, as follows:

“Art. 18. The General Coordination of Inspection shall monitor the activities of personal data processing, within the limits provided for in articles 3 and 4 of the LGPD, with the purpose of:

- i. planning and providing support for inspection activities with relevant information;*
- ii. analyzing the compliance of data processing agents regarding personal data protection;*
- iii. considering regulatory risk based on the behavior of data processing agents, in order to allocate resources and adopt actions compatible with the risk;*
- iv. preventing irregular practices and promoting a culture of personal data protection; and*
- v. working towards correcting irregular practices and repairing or minimizing any damages”.*

What are monitoring instruments?

The Monitoring Cycle Report is an annual accountability tool that presents the results of the inspection activities carried out during the monitoring cycle. This report defines the ANPD's strategy for guidance and preventive action, detailing the measures that can be adopted by the Authority. Additionally, this instrument consolidates information received by the General Coordination of Inspection, including reports of LGPD violations, requests from data subjects (requests from a data subject to exercise their rights under the LGPD), and incident reports. It also serves as a transparency mechanism that highlights the Authority's commitment to accessibility and openness to society.

The Map of Priority Topics, prepared by the General Coordination of Inspection, is a biennial instrument that defines the priority topics considered by the ANPD for study and planning of inspection activities during the period. This instrument includes: (i) the memory of the decision-making process that led to the selection and prioritization of topics, including the methodologies employed; (ii) the objectives to be achieved and the parameters or indicators used to measure their achievement, when applicable; (iii) the execution schedule; and (iv) the indication of the need for interaction with other entities or organs of the public administration and data protection authorities from other countries.

The Receipt of Requests is a mechanism accessible to the public that allows data subjects and interested parties to contact the ANPD to report LGPD violations, request the exercise of rights provided for in the LGPD, and report incidents, for example. Before being analyzed, the request undergoes an admissibility check by the General Coordination of Inspection. This stage includes verifying the ANPD's competence, identifying the requester or the possibility of anonymity, the legitimacy of the requester, identifying the data processing agent when applicable, and describing the incident.

Furthermore, in cases of requests to exercise rights provided for in the LGPD, it must be proven that the issue was previously submitted to the controller and not resolved within the regulatory timeframe, and self-declaration by the data subject may be accepted in the absence of other evidence. Requests will be incorporated into the ANPD's monitoring cycle and analyzed in an aggregated manner. Individualized analysis may be carried out by justified decision of the General Coordination of Inspection, taking into account the relevance and impact of the case.



3.2. GUIDANCE ACTIVITY

Guidance involves providing guidelines, recommendations, and technical support to data processing agents. The ANPD develops and disseminates educational materials, guides, and conducts training sessions to clarify legal obligations and promote the adoption of good data protection practices.

This approach focuses on the application of methods and tools to promote guidance, awareness, and education of data processing agents and data subjects. Guidance measures are provided for in Article 29 of Resolution CD/ANPD No. 1/2021,¹⁵ among which the following stand out:

- development and provision of **best practice guides and document templates** for use by data processing agents. Some guides already published by the ANPD can be accessed [here](#);
- recommendation regarding the provision of **training sessions and courses**;
- development and provision of self-assessment **tools for compliance and risk assessment** to be used by data processing agents; and
- recognition and dissemination of good practices and governance actions, such as recommendations for technical standards to assist data subjects in exercising control over their personal data, establishment of Privacy Governance Programs, and compliance with relevant codes of conduct and best practices.



3.3. EUROPEAN INSPECTION

Prevention encompasses the implementation of proactive measures to prevent violations of the LGPD. The ANPD encourages the creation of privacy policies, privacy and data protection governance programs, as well as the adoption of technical and administrative measures to minimize risks and ensure the privacy and protection of data subjects' personal data.

This involves the joint and dialogic construction of solutions and measures aimed at bringing data processing agents back into full compliance or avoiding/remediating situations that may pose risks or harm to data subjects and other data processing agents.

¹⁵ BRAZIL. Resolution CD/ANPD No. 1, dated October 28, 2021. Article 29. Art. 29. The following constitute guidance measures: I - development and provision of best practice guides and document templates for use by data processing agents; II - suggestion to regulated agents for conducting training sessions and courses; III - development and provision of self-assessment tools for compliance and risk assessment to be used by data processing agents; IV - recognition and dissemination of rules of good practices and governance; and V - recommendation of: a) use of technical standards that facilitate control by data subjects over their personal data; b) implementation of a Privacy Governance Program; and c) compliance with codes of conduct and best practices established by certification bodies or other responsible entities.

The preventive measures provided by the ANPD include:



(i) Disclosure of Information: This is a preventive mechanism aimed at presenting data processing agents with aggregated sectoral information and performance data, such as the rate of issue resolution and requests from data subjects fulfilled. Typically, this information will be disclosed by the ANPD; however, in certain cases, the ANPD may require the regulated agent to also disclose the information. In these situations, disclosure can be aggregated, covering various sectors and agents, or restricted only to their activities.



(ii) Notice: This is a document prepared by the ANPD and should contain a description of the situation, as well as information that can indicate to the data processing agent what actions are necessary.



(iii) Request for Regularization or Report: This aims to indicate the need for the adoption of regularization measures within a specified period, but the complexity of these measures does not justify the preparation of a compliance plan. This measure can also be applied in situations where information has been identified by public bodies.

Requests for regularization or reports will contain a description of the situation and necessary information for the data processing agent to understand the actions that need to be taken, and compliance must be proven within the deadline set by the ANPD. This deadline may be extended, provided it is properly justified, for an equal period, only once.



(iv) Compliance Plan: This is a document that must be drafted clearly and objectively, serving as an action plan aimed at remedying identified risks before they materialize. The Compliance Plan must contain, at a minimum:

- the object or activity that needs to be adjusted;
- actions planned to reverse the identified situation;
- deadline for the adoption of mitigation measures ;
- monitoring criteria; and
- path to achieving the expected results.

To ensure the effectiveness of the Compliance Plan, it is essential to consider the following questions:

1

What is the purpose of this Compliance Plan?

Clearly define the objectives and goals that the plan aims to achieve, aligning them with regulatory requirements and organizational needs.

2

What are the deadlines and responsibilities assigned for each action of the Compliance Plan? Who will be responsible for executing each compliance action?

Establish specific deadlines and assign clear responsibilities for each action, ensuring that all involved parties know their roles and obligations.

3

What actions need to be taken? Which ones are urgent and need to be completed in the short term? What is the priority of each action?

Identify all necessary actions, classifying them by urgency and priority, to ensure that the most critical tasks are addressed first.

4

How will the actions be monitored? What are the criteria for determining if an action has been executed sufficiently and satisfactorily?

Develop an effective monitoring system, including metrics and evaluation criteria, to ensure that each action is performed according to established standards and meets the organization's expectations.

5

Result Monitoring: Were the results of implementing the Compliance Plan satisfactory and met the needs of the data processing agent, the ANPD, and the data subjects?

Conduct ongoing evaluation of the results, verifying if the implemented actions achieved the expected objectives and met the needs of the data processing agent, the ANPD, and the data subjects, adjusting the plan as necessary to improve its effectiveness.

Finally, it is important to note that:

- i. The Compliance Plan does not exempt the data processing agent from complying with the obligations established by the regulations. In other words, the Compliance Plan complements the obligations set by the ANPD and does not replace them; and
- ii. It is the responsibility of the data processing agent to prove the achievement of the expected outcome, as well as the measures taken to reverse the situation within the established deadline.



ATTENTION!

It is important to know that, depending on the severity and nature of the violations, the affected rights, recidivism, the degree of damage, or the applicable administrative prescription period, the General Coordination of Supervision may immediately initiate an administrative sanctioning process. This may occur regardless of the completion of a preparatory procedure or the adoption of orientation and prevention measures.

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