



ADMINISTRATIVE PROCESS TRAIL

SANCTIONING ADMINISTRATIVE PROCESS

INITIATION AND INSTRUCTION OF THE PROCESS

 Guide 04

Authors:

Dandara Ramos Silvestre
Lucas Oliveira Balsamão Magela
Marina Almeida C. Muçouçah
Adele Mendes Weinberg

Reviewers:

Adriane Loureiro Novaes
Fernando Bousso

b/luz

SUMMARY



1. INTRODUCTION



2. STAGES OF INITIATION AND INSTRUCTION OF THE PROCESS



3. THE SANCTIONING PROCESS WITHIN THE GDPR FRAMEWORK



1. INTRODUCTION

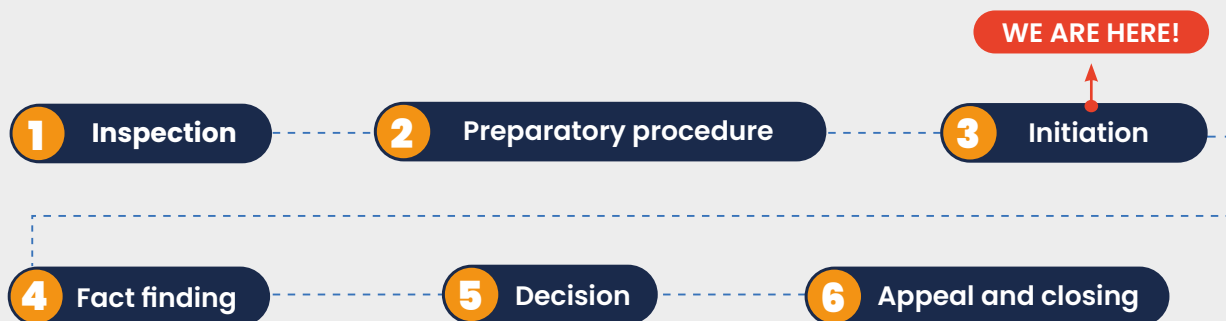
In the third [Guide of the Administrative Process Trail](#), we discussed the beginning of the ANPD's enforcement activities, including the initiation and preliminary stages of the administrative sanctioning process, its scopes, means, and requirements, as well as similarities and differences with the repressive activities of other supervisory entities.

In this fourth Guide, we will address the stages of initiation and instruction of the administrative sanctioning process. This includes the issuance of the notice of violation, the defense of the accused, the production of evidence, the involvement of interested parties, the applicable deadlines, concluding with the final arguments, and the preparation of the instruction report.



2. STAGES OF INITIATION AND INSTRUCTION OF THE PROCESS

2.1. INITIATION: NOTICE OF VIOLATION AND SUMMONING



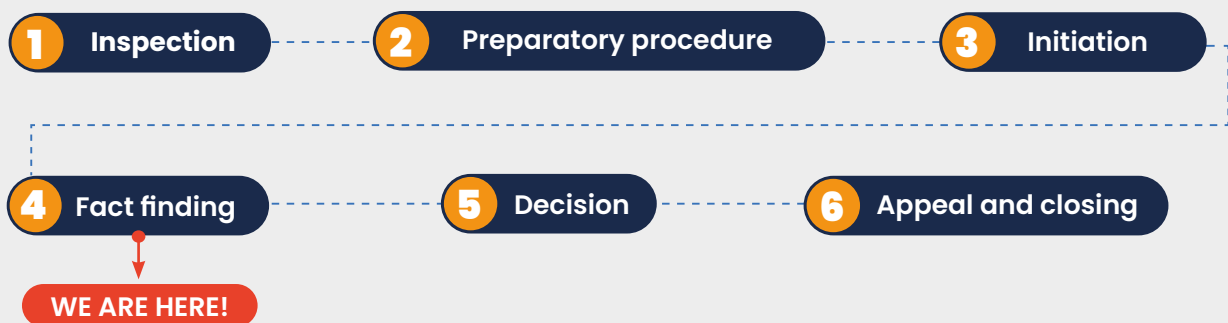
As discussed in the third Guide, the administrative sanctioning process can be initiated by the ANPD's General Coordination of Supervision.

Upon identifying a possible infraction, the ANPD issues a **notice of violation**¹, a formal document with the purpose of: **(i)** identifying the offending agent; **(ii)** indicating the alleged illicit conduct being attributed to the accused agent, as well as the facts determined; and **(iii)** pointing out the legal or regulatory provisions related to the alleged infraction.

¹ BRAZIL. Resolution CD/ANPD No. 1, 2021. Art. 46. Available at: <https://www.gov.br/anpd/pt-br/documentos-e-publicacoes/regulamentacoes-da-anpd/resolucao-cd-anpd-no1-2021>. Accessed on: July 12, 2024.

After the decision to issue the notice of violation, the General Coordination of Supervision will summon the accused to present their **defense within a maximum period of ten business days²**, in accordance with the guidelines presented in the summons itself. The accused agent may submit all evidence they consider relevant to their defense³.

2.2. PROCEDURAL INSTRUCTION



In accordance with the provisions of the LGPD⁴, Resolution CD/ANPD N°. 1/2021⁵ and Ordinance N°. 1/2021⁶, the ANPD has the prerogative to conduct investigations and add new evidence that may determine the validity or invalidity of the alleged facts and those attributed to the accused agent during the administrative process. Therefore, to ensure greater procedural speed and mitigate any risks observed regarding the facts under investigation, this addition of new evidence by the General Coordination of Supervision to the records may occur regardless of the accused's defense period.

In cases where additional information or the production of evidence by the accused or third parties is necessary, the ANPD may issue specific summonses for these purposes⁷. If the summons is not answered, the General Coordination of Supervision may, if it deems the matter important, take the initiative to resolve the issue on its own and issue a decision, even without the response to the summons⁸.

2 Resolution CD/ANPD No. 1, 2021. Art. 47, main text.

3 Resolution CD/ANPD No. 1, 2021. Art. 48, §1º.

4 BRAZIL. Law No. 13,709 of August 14, 2018. Available at: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm. Accessed on: July 12, 2024.

5 Resolution CD/ANPD No. 1, 2021. Art. 48, main text.

6 BRAZIL. Ordinance No. 1, of March 8, 2021. National Data Protection Authority. Available at: <https://www.in.gov.br/en/web/dou/-/portaria-n-1-de-8-de-marco-de-2021-307463618>. Accessed on: July 12, 2024. Art. 17, items XI and XV.

7 Resolution CD/ANPD No. 1, 2021. Art. 48, §2º.

8 Resolution CD/ANPD No. 1, 2021. Art. 48, §3º.

It is important to note that this supplementary action by the ANPD must observe two conditions⁹:



The factual possibility of subsidiary action, meaning the ANPD's capacity to perform the instructional act that was initially the responsibility of the summoned party; and



Verification that the matter is relevant to the object of the process.

In Administrative Law, relevance refers to matters deemed significant for the promotion and protection of primary public interests (society as a whole) and secondary public interests (the State)¹⁰. To assess relevance, the public purpose and the supremacy of public interests must be considered¹¹.

Therefore, the ANPD should evaluate the existence of alternative or similar sources in the face of the omission by interested parties or third parties in producing evidence, and may even accept evidence produced in other administrative or judicial processes, including those from data protection authorities in other countries¹².

This regulatory stance of the ANPD on instructional acts reflects the **principle of officialdom**, as provided in item XII of the sole paragraph of Article 2 of the Administrative Process Law. Unlike judicial processes, which are structured based on the principle of dispositive action¹³, the administrative process should be guided by a proactive stance of the Public Administration in seeking a result that serves the public interest. In this context, procedures should be conducted independently of the actions or participation of the interested party.

Another principle observed in the ANPD's regulatory structure is the **principle of mitigated formalism**¹⁴, which is manifested in the flexible approach adopted to produce evidence. This principle seeks the functionality of forms, meaning it prioritizes the objectives for which forms are designed, rather than simply requiring their strict compliance. It is important to note that this more flexible normative structure must fully preserve the right to a fair hearing and broad defense of the accused¹⁵.

9 NOHARA, Irene P.; MARRARA, Thiago. Administrative Process: Law No. 9.784/99 Commented. [S.l.]: Grupo GEN, 2009. E-book. ISBN 9788522467211. Available at: <https://integrada.minhabiblioteca.com.br/#/books/9788522467211>. Accessed on: July 7, 2024. p. 271.

10 NOHARA, Irene P.; MARRARA, Thiago. Administrative Process: Law No. 9.784/99 Commented. [S.l.]: Grupo GEN, 2009. E-book. ISBN 9788522467211. Available at: <https://integrada.minhabiblioteca.com.br/#/books/9788522467211>. Accessed on: July 7, 2024. p. 271. Law No. 9.784, of January 29, 1999. Art. 2º, main text.

11 Law No. 9.784, of January 29, 1999. Art. 2º, main text.

12 Resolution CD/ANPD No. 1, 2021. Art. 48, §4º.

13 According to Article 2 of Law No. 13,105, of March 16, 2015, Civil Procedure Code, "the process begins by the initiative of the party and develops by official impulse, except as provided by law."

14 Law No. 9.784, of January 29, 1999. Art. 2º.

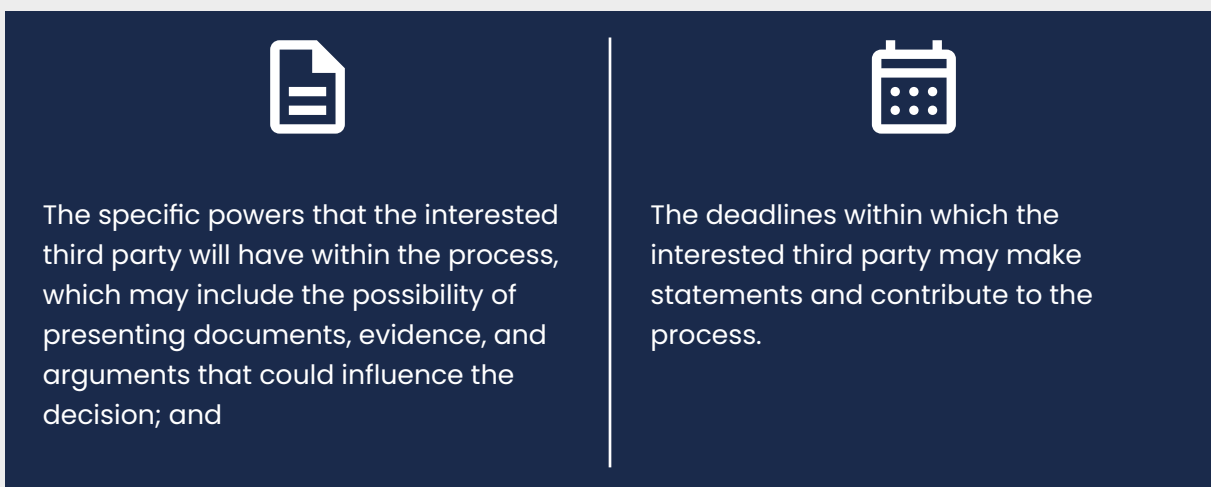
15 Resolution CD/ANPD No. 1, 2021. Art. 39.

2.2.1. PARTICIPATION OF INTERESTED PARTIES

During the instructional phase, the participation of third parties with appropriate representation in the sanctioning process may also be requested or admitted. Resolution CD/ANPD No. 1 establishes the following criteria and conditions for third parties to contribute to the resolution of the process¹⁶:



Once the relevance of participation is assessed, the ANPD will make a final decision on the admissibility of the interested third party in the process¹⁷. If participation is granted, the administrative decision will also establish:



The admitted third party will receive the process in its current state at the time of their admission. This means they will have access to all public documents and procedural pieces produced up to that point.

¹⁶ Resolution CD/ANPD No. 1, 2021. Art. 49.

¹⁷ Resolution CD/ANPD No. 1, 2021. Art. 49, §1º.

Participation of Third Parties in the Administrative Process Law

The Administrative Process Law also establishes the possibility of participation by interested third parties in the following situations¹⁸:

- Individuals or entities that, although not directly involved in the rights demanded in the administrative process, are affected by the decision made;
- Organizations and representative associations concerning collective rights and interests;
- Individuals or legally constituted associations regarding diffuse rights or interests.

The procedural substitution for the defense of collective interests and rights in administrative processes depends on fulfilling three requirements¹⁹: **(i)** legitimacy to represent the data subjects ; **(ii)** representation of rights and interests related to the subject matter of the process²⁰; and **(iii)** legal constitution of the representative entities.

2.2.2. DEFENSE OF THE ACCUSED

Article 48 of Resolution CD/ANPD N.º 1/2021 guarantees the accused the right to submit all evidence deemed necessary for their defense. Similarly, Article 50 of the same regulation specifies that it is the responsibility of the accused to prove the facts they assert.

The production of evidence is also a right guaranteed to the accused by the Administrative Process Law, allowing them to challenge the accusations and present elements that support their defense. This right includes the production of evidence in processes that may result in sanctions²¹, as well as the formulation of arguments and submission of documents before the decision, which must be considered by the Public Authority²².

¹⁸ Law No. 9,784, of January 29, 1999. Art. 9º.

¹⁹ NOHARA, Irene P.; MARRARA, Thiago. Administrative Process: Law No. 9.784/99 Commented. [S.l.]: Grupo GEN, 2009. E-book. ISBN 9788522467211. Available at: <https://integrada.minhabiblioteca.com.br/#/books/9788522467211/>. Accessed on: July 7, 2024. p. 120.

²⁰ BENJAMIN, Antônio Herman V. Article 81. In: MARQUES, Cláudia Lima; BENJAMIN, Antônio Herman V.; MIRAGEM, Bruno. Comments on the Consumer Protection Code. 2nd ed. São Paulo: Revista dos Tribunais, 2005. p. 975. In commenting on Art. 81, II, of the CDC, Benjamin states that "collective interests or rights [...] are characterized by the circumstance that they are held by a group, category, or class of people who have, between themselves or in relation to another person against whom they seek to demand, a legal link arising from a legal relationship base."

²¹ Law No. 9,784, of January 29, 1999. Art. 2º, sole paragraph, item X.

²² Law No. 9,784, of January 29, 1999. Art. 3º, item III.

In administrative processes, such as those observed by the ANPD, where the adjudicating authority is the same as the one conducting the instruction, the control of evidence admissibility is performed during the instruction phase. Thus, the inclusion of pre-constituted evidence and the production of evidence requested by the interested party will be analyzed and may be rejected by the General Coordination of Supervision, provided there is appropriate justification²³.

The criteria for conducting this examination in the administrative process can be found in Article 38, §2 of the Administrative Process Law, which establishes the inadmissibility of illegal, delaying, irrelevant, or unnecessary evidence.

It is important to note that without justification, it is not permissible to obstruct the interested party's ability to produce evidence ²⁴. The denial of necessary acts for evidence production by the interested party must be evaluated based on legality and reasonableness. Additionally, any denial of evidentiary acts will not be considered lawful if it contradicts the fundamental right to broad defense, guaranteed by Article 5, LV, of the Federal Constitution.

EXPERT EVIDENCE

In the case where the General Coordination of Supervision approves the production of expert evidence²⁵, the following must be observed:

- The General Coordination of Supervision will define the questions that the expert must answer and establish which requirements will be considered relevant for the procedural instruction;
- The accused may formulate supplementary questions and request clarifications from the expert;
- The accused, if desired, may appoint a technical assistant to accompany the expert's work.

Finally, the instructional phase also allows for the intervention of the defaulting party, for the purposes of controlling subsequent acts, in accordance with legal precepts, although without the right to repeat already performed acts.

23 Resolution CD/ANPD No. 1, 2021. Art. 51, §1º.

24 NOHARA, Irene P.; MARRARA, Thiago. Administrative Process: Law No. 9.784/99 Commented. [S.l.]: Grupo GEN, 2009. E-book. ISBN 9788522467211. Available at: <https://integrada.minhabiblioteca.com.br/#/books/9788522467211/>. Accessed on: July 7, 2024. p. 266.

25 Resolution CD/ANPD No. 1, 2021. Art. 50.

2.2.3. FINAL ARGUMENTS

Article 53 of Resolution CD/ANPD Nº. 1/2021 provides a discretionary period of ten business days for the accused to present their final arguments before the preparation of the Instruction Report, if new evidence is produced between the defense and the procedural instruction.

This is the last opportunity for the interested party to present their arguments during the instructional phase, occurring after the collection of evidence but before the final report and administrative decision.

In this sense, the final arguments are the statements the interested party must present to the ANPD to defend their interests and persuade the authority regarding the alleged facts²⁶.

COUNTING OF THE DEADLINE

The deadline for final arguments follows the general rules set out in Articles 66 and 67 of the Administrative Process Law. The deadline begins from the day following the notification and ends on the exact day of expiration. The counting includes all calendar days, but the deadline must start and end on a business day, that is, on working days at the institution responsible for the instructional phase, as determined by Article 66, §1 of the Administrative Process Law.

2.2.4. INSTRUCTION REPORT

After the deadline for final arguments, the General Coordination of Supervision will prepare the Instruction Report. This document aims to support the first-instance decision by providing an objective and detailed analysis of the evidence and arguments presented throughout the instructional phase.

The Instruction Report must cover all relevant elements for the administrative decision, including:



A summary of the allegations and defenses presented by the accused;



An analysis of the evidence produced during the process instruction; and



An assessment of the relevance and admissibility of the evidence presented.

²⁶ PIRES, Lílian Regina Gabriel Moreira. "On the procedural instruction (arts. 36 to 47)." In: FIGUEIREDO, Lúcia Valle (Coord.). Commentaries on the federal administrative process law. Belo Horizonte: Fórum, 2004. p. 182-183.

After the preparation of the Instruction Report, the instructional phase of the administrative process is concluded, as established in the sole paragraph of Article 54 of Resolution CD/ANPD N.º. 1/2021, and the decision-making stage begins

2.2.5. PRECAUTIONARY MEASURES

In addition to the previously mentioned institutes, it is crucial to consider precautionary measures within the scope of administrative procedures, which also cover administrative acts performed by the ANPD.

Article 45 of the Administrative Process Law allows the Public Administration to adopt precautionary measures motivated by imminent risk, without prior notice to the interested party. This institute is also present in ANPD Ordinance No. 1/2021²⁷, which grants Directors the authority to take preventive measures and set the amount, as detailed in Article 55 of the same regulation.

Through the precautionary measures, the Administration can take immediate actions without prior consultation with the interested party, prioritizing public interest due to the urgency of the situation²⁸.

Precautionary measures can be preventive, taken before the start of the administrative process, or incidental, decreed during the process²⁹.

Typically, the imposition of precautionary measures requires the presence of two conditions: *fumus boni juris* and *periculum in mora*. In Administrative Law, the imposition of preventive measures *inaudita altera parte* also requires the verification of a third condition: the presence of imminent risk, as determined by Article 45 of the Administrative Process Law. Each of these conditions will be briefly examined below:



FUMUS BONI JURIS: refers to the verification that there are likely legally protected rights or interests involved in the administrative process, justifying administrative action due to the principles of legality, administrative morality, and the supremacy and non-delegability of public interests³⁰.

27 BRAZIL. Ordinance No. 1, of March 8, 2021. National Data Protection Authority. Art. 55, §1º.

28 JÚNIOR, Edilson Pereira N.; CAVALCANTI, Francisco; Marcílio da Silva Ferreira; et al. Comments on the Federal Administrative Process Law. SRV Editora LTDA, 2016. E-book. ISBN 9788547202897. Available at: <https://integrada.minhabiblioteca.com.br/#/books/9788547202897/>. Accessed on: July 8, 2024. p. 52.

29 CARVALHO FILHO, José dos Santos. Federal Administrative Process. 3rd ed. Rio de Janeiro: Lumen Juris, 2007. p. 221.

30 NOHARA, Irene P.; MARRARA, Thiago. Administrative Process: Law No. 9,784/99 Commented. [S.l.]: Grupo GEN, 2009. E-book. ISBN 9788522467211. Available at: <https://integrada.minhabiblioteca.com.br/#/books/9788522467211/>. Accessed on: July 7, 2024. p. 299-301.



PERICULUM IN MORA: generally translates as “the risk of irreparable or difficult-to-repair damage,” meaning the damage that, if it occurs, would render the final decision of the administrative process practically ineffective; and



IMMINENT RISK: refers to the risk of losing the right due to delay in adopting preventive measures. When referring to imminent risk, the imposition of measures is limited to situations where it is not feasible to wait for the final decision of the process to act (*periculum in mora*), and the Administration cannot even wait for the response of the interested party.

It is important to note that the imposition of precautionary measures, whether preventive or incidental, does not exclude the fundamental right to a fair hearing and a comprehensive defense³¹, even if they occur after the adoption of the necessary precautionary measures to protect relevant rights or interests in the administrative process.

31 MOREIRA, Egon Bockmann. Administrative Process: Constitutional Principles and Law No. 9,784/1999. 2nd ed. São Paulo: Malheiros, 2003. p. 295.



3. THE SANCTIONING PROCESS WITHIN THE GDPR FRAMEWORK

Structure and Competences of Supervisory Authorities under the GDPR

To better understand the sanctioning process, it is necessary to grasp the system that governs oversight and enforcement within the European Union.

The General Data Protection Regulation (GDPR) mandates that each Member State designate one or more independent public authorities (DPAs – Data Protection Authorities) to enforce the regulation.

In the context of EU law, cooperation between DPAs is presumed to ensure a harmonized and effective application of the GDPR across all Member States. In this framework, the European Data Protection Board (EDPB) plays a crucial role. The EDPB is the supranational body responsible for issuing guidelines, directives, and public consultations, among other functions.

Article 52 of the GDPR³² ensures the independence of DPAs. Each DPA must operate with full independence while exercising its functions and powers under the regulation. DPA members must be free from external influence, whether direct or indirect, and must not seek or accept instructions from anyone. They must also avoid any actions or occupations incompatible with their roles during their tenure.

Member States must ensure that DPAs have adequate human, technical, and financial resources, as well as the necessary facilities and infrastructure to perform their tasks effectively. This includes the ability to provide mutual assistance, cooperate, and participate in the EDPB.

For competence purposes, Article 55 of the GDPR stipulates that each DPA is responsible for carrying out its tasks and exercising its powers under the GDPR within its Member State's territory.

32 EUROPEAN UNION. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016. On the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation – GDPR). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679>. Accessed on: July 12, 2024.

3.1. PROCEDURES FOR INITIATION AND INSTRUCTION OF ADMINISTRATIVE SANCTIONING PROCESSES UNDER THE GDPR

The process can be initiated by an individual complaint, an organization, or on the DPA's own initiative. In cases of cross-border violations, the Lead Supervisory Authority (LSA)³³ assumes a leadership role in the administrative process.

For investigative purposes, the DPA collects evidence, conducts inspections, and requests information from the investigated entity. If the violation affects multiple Member States, the LSA coordinates with other Concerned Supervisory Authorities (CSAs)³⁴ to ensure a consistent approach.

The investigated entity is notified of the allegations and has the right to defend itself and present its version of the facts. This process is known as notification and the right to defense.

Based on the collected information, the DPA drafts a decision. In cross-border cases, the draft decision is shared with the CSAs, which can raise relevant and substantiated objections. If significant objections arise, the EDPB may be called upon to resolve disputes and issue a binding decision.

The final decision may include the imposition of administrative fines, orders to cease illegal activities, or other corrective measures. The investigated entity is notified of the final decision and sanctions imposed, and has the right to appeal, ensuring that personal data violations are addressed consistently and fairly across the European Union.

³³ EUROPEAN UNION. FAQ of the European Data Protection Board. Available at: https://www.edpb.europa.eu/system/files/2021-09/20201110_art65_faq_en.pdf. Accessed on: July 12, 2024.

³⁴ Ibidem.

b/luz

we get it, we got you

To learn more, visit our website or
follow us on social media



baptistaluz.com.br