



ADMINISTRATIVE PROCESS TRAIL

COMPLIANCE WITH THE DECISION AND REVIEW

 Guide 08

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SUMMARY



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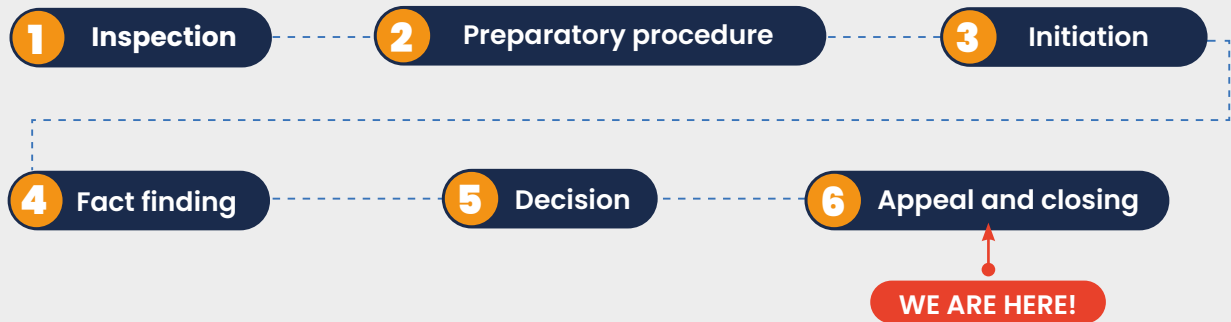


1. INTRODUCTION

In this Guide, we move on to the enforcement phase of the decision, which begins after the conclusion of the appeal stage, analyzed in detail in the seventh Guide of the Administrative Process Trail. We will examine the importance of this phase, highlighting the fundamental role of the General Coordination of Inspection and the administrative and coercive measures necessary to ensure the effective implementation of sanctions imposed by the ANPD.

We will also discuss the possibility of reviewing the sanctioning decision by the ANPD if new facts or relevant circumstances arise that may justify a re-evaluation of the imposed sanction.

2. COMPLIANCE WITH THE DECISION



The decisions of the National Data Protection Authority (ANPD) may involve sanctions ranging from fines to data blocking or temporary suspension of data processing activities, as well as measures in the form of obligations to act or refrain from acting. More than just penalties, ANPD's decisions aim to correct inappropriate practices and promote ongoing compliance in the processing of personal data.

In the context of the sanctioning administrative process, the phase of decision compliance is crucial to ensuring that ANPD's decisions are effectively enforced. This stage aims to transform the defined sanctions into concrete actions, reinforcing the responsibility of data processors to adhere to data protection regulations.

The enforcement phase of the decision begins after the final decision becomes *res judicata*, at which point the process is forwarded to the General Coordination of Inspection, which assumes responsibility for monitoring the compliance with the decision, ensuring that the outcome of the process is effectively implemented. The General Coordination of Inspection thus plays a central role in the decision compliance phase.

2.1. MONITORING COMPLIANCE WITH THE DECISION

According to Article 67 of the ANPD's Regulatory Framework for the Inspection and Sanctioning Administrative Process ("Regulation")¹, it is the responsibility of the General Coordination of Inspection to take all necessary measures to ensure compliance with decisions.

¹ BRAZIL. Resolution CD/ANPD No. 1/2021. Official Federal Gazette: Brasília/DF. Available at: https://www.gov.br/anpd/pt-br/aceso-a-informacao/institucional/atos-normativos/regulamentacoes_anpd/resolucao-cd-anpd-no1-2021. Accessed on: November 8, 2024.

In the case of pecuniary decisions that are not paid by the due date established in the final decision, the General Coordination of Inspection must notify the debtor party of the outstanding debt and the registration of the debt in the Informative Registry of Unpaid Credits of the Federal Public Sector (Cadin), which must occur within 75 (seventy-five) days from the notification, in addition to sending the debt for registration in the Union's Active Debt.

Through these measures, if the overdue debt is not settled by the debtor, the case will be forwarded to the Attorney General's Office of the Union (AGU). Within the AGU, the Federal Attorney General's Office, which is responsible for judicial representation of autonomous agencies and foundations, will assess and, if applicable, propose a collection action for the enforcement of the debt. The decision to file or dismiss a collection action will be subject to the criteria defined by the AGU.

Currently, the total updated value of the Union's credits related to the same debtor for initiating a collection action by the Federal Attorney General's Office, in accordance with AGU Normative Ordinance No. 90/2023², must exceed R\$ 20,000.00³. It is important to note that if the total debt value does not exceed the amount defined by the AGU Ordinance, the debt will remain registered in the Union's Active Deb.

Regarding non-pecuniary obligations, if the data processor fails to comply with the terms and deadlines defined in the final decision, the General Coordination of Inspection may adopt other measures to encourage the debtor to fulfill the imposed obligation, preventing illegal delays in decision compliance. For this, the General Coordination of Inspection may use coercive tools, such as astreintes – an indirect enforcement measure applicable to administrative processes conducted by the ANPD due to the subsidiary nature of the Civil Procedure Code⁴, which involves imposing a fine for non-compliance or delay in fulfilling the decision⁵.

The fine to be applied by the General Coordination of Inspection for non-compliance should be proportional to the severity and impact related to the recalcitrance of the data processing agent.

² BRAZIL. Attorney General's Office of the Union (AGU). Normative Ordinance AGU No. 90, of May 8, 2023: Brasília, 2023. Available at: <https://legis.agu.gov.br/intralegis/Atos/TextoAto/246637>. Accessed on: November 18, 2024.

³ Normative Ordinance AGU No. 9. Art. 4. Notwithstanding the provisions in Article 3, the filing of legal actions for the collection of the credits referred to in this Normative Ordinance is authorized not to proceed when:

- I - the total updated value of the Union's credits related to the same debtor, collected by the Attorney General's Office of the Union, is equal to or less than R\$ 20,000.00 (twenty thousand reais);
- II - the total updated value of the credits registered in the active debt, due and pending legal action, of a federal public agency or foundation creditor, collected by the Federal Attorney General's Office, consolidated and owed by the same debtor, is equal to or less than R\$ 20,000.00 (twenty thousand reais); or
- III - the updated value of the credit is equal to or less than R\$ 10,000.00 (ten thousand reais), in the case of credits arising from fines imposed by the Federal Court of Accounts (TCU).

Sole paragraph. In the case of necessary passive litisconsortium involving non-joint debtors, the total sum of credits should be considered as the limit.

⁴ Law No. 13,105/2015. Art. 15. In the absence of regulations governing electoral, labor, or administrative processes, the provisions of this Code shall be applied supplementary and subsidiarily.

⁵ Law No. 13,105/2015. Art. 536. In the enforcement of a judgment recognizing the enforceability of an obligation to act or refrain from acting, the judge may, ex officio or upon request, determine the necessary measures for the specific enforcement or to achieve an equivalent practical result, in order to satisfy the party seeking enforcement.

Technical Note ANPD No. 49/2022⁶:

In this Technical Note, it is possible to observe examples of how the ANPD monitors the implementation of corrective measures applied. In the case analyzed, Meta, the company responsible for the WhatsApp messaging app, had to meet requirements that included:

- **Presentation of Evidence:** the ANPD required WhatsApp to present evidence regarding the adjustments made, including updates to the privacy policy and improvements in transparency measures related to its data processing practices.
- **Development of a Data Protection Impact Assessment (DPIA):** the ANPD recommended that WhatsApp develop a specific DPIA for the processing of data related to children and adolescents in connection with the case.
- **Transparency:** the ANPD suggested that the platform improve the transparency of the information provided to users, especially regarding data sharing with third parties and the use of encryption to protect communications.

After receiving the requested documentation, the General Coordination of Inspection, with the support of the General Coordination of Technology and Research, conducted a detailed analysis of all the submitted documents. A thorough assessment was made of the fulfillment of the ANPD's recommendations, with appropriate justification.

By way of example, in a recent decision involving IAMSPE, the ANPD required the presentation of a timeline, limited to a maximum period of 1 (one) year for completion, with an indication of the measures to be adopted by the entity. This planning allows the General Coordination of Inspection to monitor the progress of the implementations in an organized and transparent manner, ensuring that the data controllers follow a clear and realistic plan to correct the identified deficiencies.

Actions like those observed in the IAMSPE case and in Technical Note ANPD No. 49/2022 exemplify the ANPD's rigorous approach and continuous oversight to ensure that its decisions and recommendations are implemented satisfactorily.

6 BRAZIL. National Data Protection Authority (ANPD). Technical Note No. 49/2022/CFOI/ANPD: Guidelines on the Application of the General Data Protection Law (LGPD). Brasília, 2022. Available at: https://www.gov.br/anpd/pt-br/documentos-e-publicacoes/nt_49_2022_cfg_anpd_versao_publica.pdf. Accessed on: November 18, 2024.

2.2. STRUCTURING INTERNAL PROCESSES FOR COMPLIANCE WITH DECISIONS

To ensure compliance with the ANPD's determinations, the data controller must establish solid internal processes that guarantee the implementation of the imposed measures.

In this regard, it is essential to understand the measures required by the ANPD and have clarity regarding deadlines and the departments responsible for their execution. Below, we outline key steps for this planning.



STEP 01

Identification of necessary measures: after a detailed analysis of the decision issued by the ANPD, all necessary measures to correct the non-compliance situations must be identified, as well as the settlement of any pecuniary obligations within the deadline defined in the decision.



STEP 02

Allocation of responsibilities: once the measures to be implemented are identified, it is important to define which departments or employees will be responsible for executing each action, as well as assess the need to hire third-party specialists. The allocation of responsibilities may include, for example, departments such as Information Technology (for system adjustments and security), Compliance (for compliance reviews), and Human Resources (for training and internal communication). Each responsible team or employee must receive clear instructions with defined deadlines to ensure that the ANPD's determinations are met appropriately.



STEP 03

Compliance indicators and metrics: to monitor the effectiveness of the actions implemented, it is important to define performance indicators and compliance metrics. These indicators allow for the assessment of whether the adopted measures are, in fact, enabling compliance with the ANPD's requirements. They also create an internal record of the actions taken in strict observance of the principles of accountability and transparency⁷.



STEP 04

Comunicação com a ANPD: proactive communication with the ANPD is crucial to demonstrate cooperation and commitment to fulfilling the determinations. Keeping the General Coordination of Inspection informed about the progress of the implementations is a recommended practice and can be done through the submission of reports that highlight the efforts made. If technical or financial limitations arise, these aspects should be communicated to the ANPD in a well-founded manner, so that deadlines and conditions for implementation can be reassessed, considering the right of review, which will be addressed in more detail later.

⁷ See Article 6, X, of the LGPD.



3. CRITERIA AND PROCEDURES FOR DECISION REVIEW PROCESS

After the initial compliance with the determinations imposed by the ANPD, it is possible that new facts or evidence may justify the re-evaluation of the imposed sanction. In this regard, Section VI of the Regulation establishes the possibility of reviewing the sanctioning decision to ensure fairness and the appropriateness of the sanctions imposed, using the review mechanism.


In the context of the administrative process, the request for review represents a formal request by the interested party for a previously issued decision by an authority to be revisited. Unlike appeals, which challenge the interpretation of a decision based on the evidence and facts already considered, the request for review is based on new information or relevant circumstances that could justify the inadequacy of the sanction applied.


The review is seen as a more comprehensive type of administrative remedy because it allows the authority to re-examine the case without the need to initiate a new process, unlike the judicial rescission action⁸.


The review process has specific criteria that distinguish it from appeals:

- **Applicability:** the review is limited to sanctioning processes.
- **Grounds:** the applicant must demonstrate new facts or relevant circumstances that reveal the inadequacy of the decision issued.
- **Filing:** the review can be voluntary, requested by the interested party, or ex officio, initiated by the authority itself.
- **Deadline:** no time limit is established for filing the review.
- **Partial devolutiveness:** the authority cannot increase the sanction during the review process; it can only maintain or reduce it.

To submit a request for review within the ANPD's inspection process, Article 68 of the Regulation provides that sanctions may be reviewed when new facts or relevant circumstances arise that justify the re-evaluation of the sanction imposed.

 **New Facts:** relevant evidence that was not considered in the original decision and that may substantially alter the interpretation of the case. These facts must be documented and directly related to the sanctioning decision.

 **Relevant Circumstances:** contextual or environmental factors that, although existing, were not analyzed or known at the time of the decision and may require review due to public interest considerations.

 **Inadequacy of the Sanction:** it must be demonstrated that there is a causal link between the new fact or relevant circumstance and the inadequacy of the sanction previously imposed. In other words, the new fact or circumstance must make it clear that the sanction constitutes an inappropriate restriction of the freedoms or property of the sanctioned party.

The initiative for the review can come from either the interested party or the authority. In line with Article 65 of the Administrative Process Law⁹, the ANPD's Inspection Regulation allows for the submission of a review request at any time, without a time limit, enabling the ANPD to correct illegal restrictions in defense of the freedom and property of regulated agents.

According to Article 69 of the Regulation, the review request is treated as a new procedure, filed in its own records, and the interested party is responsible for providing the key documents. The request is assigned to an ANPD Director who did not act as the rapporteur in the original process. Importantly, the submission of a review request does not suspend the effects of the applied sanction, including the execution of measures resulting from fines. Subsequently, the General Coordination of Inspection analyzes the admissibility and forwards the case to the Board of Directors, consolidating it with the main process.

Finally, it is important to emphasize that *reformatio in pejus* is prohibited; that is, the ANPD can only maintain or reduce the sanction, and its aggravation is not allowed in the review process.

9 BRAZIL. Law No. 9,784, of January 29, 1999. Regulates the administrative process within the scope of the Federal Public Administration. Official Gazette of the Union, Brasília, DF, February 1, 1999, Article 65, Sole Paragraph. Available at: https://www.planalto.gov.br/ccivil_03/leis/19784.htm. Accessed on: November 8, 2024.

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