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## ITI Comment to Brazil ANPD Consultation: Regulation on International Transfer of Personal Data and the Standard Contractual Clauses Model

October 13, 2023

*The Information Technology Industry Council (ITI) is the premier voice, advocate, and thought leader for the global information and communication technology industry. Our [members](#) include the world's leading innovation companies, with headquarters worldwide and value chains distributed around the globe.*

*Privacy and trust are central to our members' businesses and global operations. Together with our members, ITI works with governments, regulators, and stakeholders around the world to strengthen and align approaches towards data protection and privacy that safeguard individual rights and promote innovation.*

### **Introduction**

ITI welcomes the opportunity to comment on the Brazil Data Protection Authority (ANPD) draft Regulation on International Personal Data Transfers and the Standard Contractual Clauses Model. Cross-border data flows are critical to economic growth and we support ANPD's aim of developing a clear, interoperable framework that is aligned with global data protection standards and enables innovation and cross-border trade.

As more countries introduce national data protection frameworks, flexible and interoperable rules are required to ensure that companies have access to different avenues and mechanisms to move data between jurisdictions securely, providing value for consumers and certainty for business. ITI strongly supports proposals that will allow for the mutual recognition of existing privacy frameworks, transfer mechanisms and certification schemes so that companies of all sizes can uphold strong global data protection standards, while observing specificities of their national legal regimes, such as Brazil's General Data Protection Law (LGPD).

ITI submits the following comments highlighting areas where we believe the Draft Regulation could be further improved and we remain available to discuss each of our comments in greater detail.

One important acknowledgment that ANPD makes in its proposal is the recognition of the substantial difference between international data transfers and international collection of personal data, with the extraterritorial application of the LGPD, thus following similar interpretations issued by the European Data Protection Board on this matter<sup>1</sup>.

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<sup>1</sup> [https://edpb.europa.eu/system/files/2023-02/edpb\\_guidelines\\_05-2021\\_interplay\\_between\\_the\\_application\\_of\\_art3-chapter\\_v\\_of\\_the\\_gdpr\\_v2\\_en\\_0.pdf](https://edpb.europa.eu/system/files/2023-02/edpb_guidelines_05-2021_interplay_between_the_application_of_art3-chapter_v_of_the_gdpr_v2_en_0.pdf)

## **Article 2, Requirement to incorporate ANPD-approved SCCs within 180 days**

ITI recommends the ANPD consider extending the Regulation's deadline to incorporate ANPD-approved SCCs from 180 days to 18 months. This change would provide greater certainty to all businesses relying on SCCs. Extending the deadline would recognize the complex process to modify existing contracts for those organizations looking to rely on the new Brazil SCCs, as well as allowing sufficient time for ANPD approval of "Equivalent SCCs". We would also recommend the ANPD set out a clear timeline for when it intends to review and approve Equivalent SCCs so that organizations may prepare accordingly.

ITI's proposal of 18 months also takes account of international experiences in the EU and UK, where grace periods for adapting existing contracts were set at 18 months and 2 years, respectively.

## **Chapter III International Data Transfer, Section IV Legal Basis and Modality of Transfer (Article 9)**

Article 9 of the proposed Regulation appears to introduce a requirement for all international data transfers to explicitly demonstrate adherence to a legal basis. Article 7 and 11 of the LGPD framework law already require the processing of personal data to take place under a specified legal basis and we consider it would be duplicative and ineffective to have a requirement for companies to re-state a legal basis when transferring data outside of Brazil. In addition, the proposal exceeds the legal contours of the LGPD that foresees an ample menu of mechanisms for international data transfers and does not consider the need for an additional legal basis to be provided (this is separate from the fact that it may be a part of the registry of data processing activities to identify a legal basis for the transfer itself).

## **Chapter IV Adequacy Decision (Articles 10-13)**

ITI supports the introduction of a transparent and efficient system for the ANPD to designate countries or territories outside of Brazil as having adequate data protection standards. We encourage the adoption of a pragmatic and flexible approach to assessments of adequacy determinations of countries with comparable data protection standards, and for this to be communicated to the relevant stakeholders, as soon as practicable.

A "whitelist" approach to adequacy, whereby the ANPD actively conducts an in-depth assessment to approve a country's data protection framework, is likely to require a significant investment of resources. ITI would support the introduction of a simplified "fast track" adequacy assessment procedure for countries where existing assessments have already been made by other jurisdictions (e.g., for countries already found to be adequate by the EU). This structure would respect ANPD's legal authority to perform an assessment, while taking the benefit of the experience and validity already provided by jurisdictions that ANPD considers as being adequate.

ITI would also request that the ANPD provide early confirmation that key economies (such as the EU, US, Japan, and UK) would be deemed adequate under the Regulation, and that there will be no delay or regulatory gap for data transfers to these jurisdictions.

## **Chapter V Standard Contractual Clauses (Articles 14-19)**

ITI supports the draft Regulation's recognition of Standard Contractual Clauses (SCCs) as a critical tool for companies of all sizes looking to transfer data securely and responsibly across borders. SCCs are a globally accepted and secure mechanism that facilitates the transfer of personal data while not only meeting the needs of the contracting parties but also complying with the requirements under applicable data protection laws.

### ***Details of transfers to third countries (Article 16(1))***

The proposed regulation requires the processing agent designated in the SCCs to provide the data subject with details of the transfers to third countries. ITI considers this requirement overly burdensome and goes beyond what is required in the LGPD. Companies should have a level of discretion and flexibility so that they can communicate clearly and transparently with data subjects in ways that improve their understanding of how their data is used. ITI notes that the information relating to the sharing of personal data by the data controller, including the purpose, and the responsibility of the parties involved in each transfer, is already covered by Article 9 of the LGPD.

*Suggested amendment:*

*§ 1º O agente de tratamento referido no caput deverá ainda publicar em sua página na Internet documento contendo informações redigidas em língua portuguesa, em linguagem simples, clara, precisa e acessível sobre a realização da transferência internacional de dados.*

*I - a forma, a duração e a finalidade específica da transferência internacional;*

*II - o país de destino dos dados transferidos;*

*III - a identificação e os contatos do controlador;*

*IV - o uso compartilhado de dados pelo controlador e a finalidade;*

*V - as responsabilidades dos agentes que realizarão o tratamento; e*

*VI - os direitos do titular e os meios para o seu exercício, incluindo canal de fácil acesso e o direito de petição contra o controlador perante a ANPD.*

### ***Equivalent SCCs (Articles 17-19)***

ITI strongly welcomes the ANPD's recognition of "Equivalent SCCs" as a key mechanism to promote interoperability and alignment across different jurisdictions. Many companies use EU SCCs and we would request early confirmation that this be recognized by ANPD as a valid industry-wide mechanism for conducting data transfers pursuant to the LGPD. Early indication of Equivalent SCCs is especially important in light of the 180-day deadline for SCC compliance. As stated above, we would recommend the ANPD set out a clear timeline for when it intends to undertake and complete "ex officio" reviews of specific SCCs, including EU SCCs, so that organizations may prepare accordingly.

### ***SCC Model Template (Annex II)***

ITI takes note of the SCC model template set out in Annex II of the draft Regulation. While we welcome the creation of a pre-approved SCCs template that is aligned with other globally recognized SCCs, we note the following provisions that are likely to introduce additional compliance challenges for companies that could detract from established global data protection standards:

- **Requirement to state legal basis - Clause 2** requires the description of the international transfer including the legal basis for such transfer, which is not seen in any other model of SCCs when compared to other jurisdictions. As with Article 9 above, ITI considers it would be duplicative and ineffective to have a requirement for companies to re-state a legal basis when transferring data outside of Brazil.
- **Subsequent transfers - Clauses 3 and 18** require exporters to list in advance details about onward transfers to third party recipients instead of providing a general authorization for these data transfers. Such an approach would be very challenging to operationalize because it would require amending the contract each time the data importer makes a change to its list of suppliers, going against the dynamic nature of business. ITI supports greater alignment with the EU SCCs whereby the data exporter provides a general authorization for the engagement of sub-processors and the data importer agrees to maintain a list of sub-processors and inform the data exporter in advance of making any changes to that list. Clause 18 also introduces additional requirements for onward transfer safeguards that go beyond existing global standards for SCCs.
- **Interpretation - Clause 7** states that the Brazil SCCs must always be interpreted in a way that best protects the data subject and aligns with Brazilian law. This goes beyond the requirements of the LGPD which does not have a specific provision requiring data protection clauses to be interpreted in a way that best protects the data subjects. ITI recommends amending this Clause to reflect that the Brazil SCCs should be interpreted in accordance with Brazilian law and that the intentions of the contracting parties should prevail.
- **Identification of the parties – Clause 1** appears to only allow a selection of one exporter and one importer. In practice, there are multiple parties involved in a transfer and the SCCs should allow for the addition of multiple parties.

Please see Annex I for suggested amendments to the Model SCC template.

## **Chapter VII Binding Corporate Rules (Articles 24-27)**

ITI welcomes the Draft Regulation's explicit recognition of Binding Corporate Rules (BCRs) as a valid cross-border data transfer mechanism used by companies for transfers of personal data within a group of enterprises.

### ***Clarity on scope of BCRs***

Article 24 suggests that BCRs should be binding on *all* members of an economic group and apply to *all* international processing activities within a group. ITI recommends amending this language to recognize the flexible application of BCRs, and specifically that they can apply to only designated parts or a subset of an economic group and also to designated processing activities within a group (such as for the processing of HR data). Article 24 should also make clear that it applies to Binding Corporate Rules for Controllers (BCR-C) and Processors (BCR-P).

*Suggested amendment:*

*Art. 24. As normas corporativas globais são destinadas às transferências internacionais de dados entre organizações do mesmo grupo econômico, possuindo caráter vinculante em relação aos membros aplicáveis.*

*Parágrafo único. A ANPD poderá aprovar normas corporativas globais para controlador ou normas corporativas globais para operador baseadas no inciso II, alínea c, do art. 33 da LGPD.*

ITI also recommends that BCRs should authorize international data transfers between two independent economic groups as long as both have had approved BCRs, since both agents would be compliant to high privacy standards.

#### ***Recognition of existing BCRs***

We also recommend that the proposed regulation recognizes existing authorized BCR-Cs and BCR-Ps which have been reviewed and approved by the applicable Data Protection Authorities in jurisdictions such as the EU or UK. This would significantly facilitate compliance for companies active in the EU, the UK, and Brazil, promote greater opportunities for growth and innovation, and remove the need for a separate approval mechanism, reducing administrative burdens on ANPD. We anticipate that it could take up to 24 months to finalize the entire BCR approval process with ANPD.

One possibility could be for the ANPD to use an Addendum to recognize the equivalence of EU BCRs (Brazil BCR Addendum) making them legally binding on the corporate group and allowing data subjects to enforce their rights in accordance with the LGPD and the proposed Regulation. The ANPD could mirror the UK Information Commissioner's Addendum to the EU SCCs<sup>2</sup> as an example of how a Brazil BCR Addendum might operate (we provide suggested language in Annex II).

#### **Chapter VIII Approval Process for Specific Contractual Clauses and Binding Corporate Rules (Article 32)**

Article 32 of the proposed regulation requires that BCRs are provided to the data subject, upon request. We consider that organizations should have a degree of discretion on the types of information provided to data subjects so that they can be provided with a meaningful understanding of their transfer mechanism that is tailored and useful. As part of this, it is important to acknowledge the rights and freedoms of the corporate group (security measures, trade secrets or intellectual property and in particular the copyright protecting the software for example).

We suggest the removal of this article. Alternatively, we suggest that the proposed regulation permit companies to remove or redact certain parts, or inform data subjects through a description of the material scope of the clauses or BCRs available on the Internet or intranet (when data subjects are only the Group staff having access to the intranet).

#### ***Suggested amendment:***

*Art. 32. O agente de tratamento deverá disponibilizar ao titular, em caso de solicitação, uma descrição do escopo e do conteúdo geral das cláusulas contratuais específicas e das normas corporativas globais, e publicar em sua página na Internet documento redigido em linguagem simples sobre a realização da transferência internacional de dados, conforme previsto no art. 16 deste Regulamento, observadas as condicionantes estabelecidas na decisão de aprovação.*

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<sup>2</sup> See [international-data-transfer-addendum.pdf \(ico.org.uk\)](https://ico.org.uk/for-organisations/data-protection/data-transfer-addendum/)

With regard to Article 31, it should be clarified whether the ANPD's approval and publication of specific contractual clauses or BCRs means that these mechanisms can be used by other agents and that this would therefore remove the requirement for further review by the ANPD.

#### **Greater emphasis on Seals, Certifications and Codes of Conduct**

Article 33(II)(d) of the LGPD states that seals, certifications and codes of conduct are a valid mechanism for international data transfers. Certifications such as the Global Cross-Border Privacy Rules (CBPR) system are an important instrument for facilitating seamless cross-border data transfers across jurisdictions and ITI supports greater uptake of this flexible and scalable mechanism as more countries introduce national data protection frameworks. ITI welcomes Brazil's consideration of the Global CBPR Forum as a strong system for international transfers.

We support the Draft Regulation also placing emphasis on certifications as an additional mechanism for organizations to use to meet LGPD's data transfer requirements (for example, Japan's Act on the Protection of Personal Information (APPI) and Singapore's Personal Data Protection Act (PDPA) explicitly recognize CBPRs as a valid data transfer mechanism, as well as important regional trade treaties such as the United States-Mexico-Canada Agreement), even if further implementing regulation is still required.

## ANNEX I

### Main concerns regarding the wording of the Brazil Standard Contractual Clauses Template:

#### **1. Clause 2. Object.**

The SCC requires the description of the international transfer including the legal basis for such transfer, which is not seen in any other model of SCCs from other jurisdictions. This makes the international transfer more bureaucratic, and ITI considers it would be duplicative and ineffective to have a requirement for companies to re-state a legal basis when transferring data outside of Brazil.

Brazilian Draft SCCs	ITI suggestion
<b>Clause 2. Object</b>	<b>Clause 2. Object</b>
Description of the international transfer:  Purpose of the data transfer: Personal Data transferred: Category of Data Subjects: Legal Basis: Data Storage period: Information on the related contract: Data source: Transfer frequency: Duration of data transfers: Other information:	Description of the international transfer:  Purpose of the data transfer: Personal Data transferred: Category of Data Subjects: <del>Legal Basis:</del> Data Storage period: Information on the related contract: Data source: Transfer frequency: Duration of data transfers: Other information:

#### **2. Clause 3. Further transfers**

This clause only grants the contracting parties two options: the first (A) the exporter does not authorize the subsequent transfer; and the second (B) the exporter allows further transfers. However, it suppresses the possibility of the importer carrying out subsequent transfers that do not depend on the exporter's authorization, as can happen if some other appropriate mechanism (provided for in the other items of article 33 of the LGPD) supports the subsequent transfer. Thus, the following wording should be changed to add exceptions to the exporter's authorization:

Brazilian Draft SCCs	ITI suggestion
<b>Clause 3. Further transfers</b>	<b>Clause 3. Further transfers</b>
OPTION A. 3.1. The Importer may not carry out an Onward Transfer of Personal Data subject to the International Data Transfer governed by these Clauses.	OPTION A. 3.1. The Importer may not carry out a Successive Transfer of Personal Data subject to the International Data Transfer governed by these Clauses, <b>except for the cases presented in Clause 18.3.</b>

### 3. Clause 15.2. Data Subject Access Requests

With regard to Clause 15.2, and the deadline for responding the data subject requests, we consider there should be greater flexibility of at least 30 days for organizations to respond to complex Data Subject Access Requests.

Brazilian Draft SCCs	ITI suggestion
<b>Clause 15.2</b>	<b>Clause 15.2</b>
15.2. The deadline for responding the requests provided in this Clause and in item 14.3. is 15 (fifteen) calendar days, except for events in which a different period is established in specific regulations of the ANPD.	15.2. The deadline for responding the requests provided in this Clause and in item 14.3. is 15 (fifteen) calendar days, except for events in which a different period is established in specific regulations of the ANPD. <b>This deadline may be extended by a further 15 days for detailed, burdensome or complex requests.</b>

### 4. Clause 18.3. Further Transfer safeguards measures

In order to be consistent with the suggested amendment to Clause 3.1. - OPTION A -, there must be an exception to the exporter's authorization when subsequent transfers are based on the other safeguard mechanisms listed in the LGPD (art. 33 items I, and III to IX), therefore, it is suggested that this waiver of exporter authorization be made expressly.

Brazilian Draft SCCs	ITI suggestion
<b>Clause 18.3</b>	<b>Clause 18. 3</b>
The Onward Transfer will also be carried out based on another valid modality of International Data Transfer provided for in the National Legislation.	The Onward Transfer will also be carried out based on another valid modality of International Data Transfer provided for in the National Legislation, <b>regardless of the exporter's authorization.</b>

#### 5. Clause 20.1. End of processing and deletion of data

This clause disregards the possibility of the Controller requesting the return of transferred personal data, determining the obligation to delete the data by the original or subsequent importer at the end of the processing. This provision suppresses the Controller's discretion as well as its commercial interest in returning the data to its possession for any legitimate reason.

Brazilian Draft SCCs	ITI suggestion
<b>Clause 20.1</b>	<b>Clause 20.1</b>
20.1. Parties shall delete the personal data subject to the International Data Transfer governed by these Clauses after the ending of their processing, being their storage authorized only for the following purposes:	20.1. The Parties shall delete <b>or return, at the Controller's discretion,</b> the personal data subject to the International Data Transfer governed by these Clauses after processing is completed, their storage being authorized only for the following purposes:

## ANNEX II

### Brazil BCR Addendum

Suggested language for a Brazil BCR Addendum recognizing the equivalence of the BCRs approved by other jurisdictions, such as the EU and UK.

#### *CAPÍTULO VII DAS NORMAS CORPORATIVAS GLOBAIS (...)*

##### *Seção I Normas corporativas globais equivalentes*

*Art. XX. A ANPD poderá reconhecer a equivalência de normas corporativas globais aprovadas pela autoridade de proteção de dados, com um adendo (Brasil Normas Corporativas Globais Adendo).*

*§ 1º O procedimento de que trata o caput:*

*I - poderá ser instaurado mediante solicitação dos interessados;*

*§ 2º O requerimento encaminhado à ANPD deve ser acompanhado dos seguintes documentos e informações:*

*I - o modelo de adendo que será o instrumento vinculante para normas corporativas globais para o Brasil, juntamente com normas corporativas globais aprovadas por uma autoridade nacional de proteção de Dados, para a aprovação pela ANPD.*

*II. Se houver qualquer inconsistência ou conflito entre a LGPD e o adendo, a LGPD se aplica.*

*III - os documentos de constituição social do agente de tratamento ou grupo econômico;*

*§ 3º Na análise de normas corporativas globais equivalentes submetidas à aprovação da ANPD, poderá ser requerida a apresentação de outros documentos e informações suplementares ou realizadas diligências de verificação quanto às operações de tratamento, quando necessário.*

*Art. XX. Caberá pedido de reconsideração, devidamente fundamentado, no prazo de 10 (dez) dias úteis, em face da decisão do Conselho Diretor que negar a aprovação normas corporativas globais equivalentes.*

*Parágrafo único. O pedido de reconsideração será distribuído e tramitará na forma do Regimento Interno da ANPD.*

*Art. XX. A ANPD publicará em seu sítio eletrônico a relação das normas corporativas globais equivalentes aprovadas.*