



Information Accountability Foundation

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The Information Accountability Foundation (IAF) thanks the ANPD for the opportunity to comment on international transfers of data from Brazil in a safe fashion for Brazilians while facilitating commerce. The IAF is a non-profit research and education organization located in the United States. It is focused on complex global policy issues, fostering effective and accountable information governance systems, while facilitating a trusted digital ecosystem that serves people and is respectful of their fundamental right to fair processing.

The IAF is the incorporation of the Global Accountability Dialog that created the modern definition for the accountability principle that is incorporated in the Brazilian privacy law. The genesis of the Global Accountability Dialog was the roadblocks to transfer mechanisms beyond adequacy. European binding corporate rules first had been proposed in 2004, and accountability was defined as the mechanism for transfers under APEC's privacy guidelines, but there was a question about how regulators could be confident when data was transferred over time and distance. The answer was to define accountability through [five essential elements](#). As it works out, whether binding corporate rules, cross border privacy rules, or standard contractual clauses are being discussed, they are all accountability mechanisms. An organization binds itself to be responsible, and a mechanism is laid out for the organization to be answerable for that responsible behavior.

Being responsible begins with an organization doing the due diligence to make sure the data is flowing to a safe place. This requirement means understanding the parties that will receive the data in some form or fashion and whether the location is safe for the type of data being transferred. This assessment is less about the laws on how data is processed in this new location on persons that are resident there and more about whether there is a legal structure that respects contracts and will hold parties to the terms of contracts that require data pertaining to Brazilians be processed with a respect for Brazilian norms. That basic concept, respect for the terms that come with the data, was the basis for transfers under APEC Cross Border Privacy Rules, and particularly on the processor rules. However, they also are the basis for the transfer mechanisms, beyond adequacy, used in the European Union.

The burden on business is reduced if the rules for transfers are consistent from jurisdiction to jurisdiction. The European Commission has issued updated standard contractual clauses that bind organizations under the accountability principle. Like Article 46 of the General Data Protection Regulation (GDPR), Article 33 of the LGPD provides for the international transfer of personal data when the controller proves compliance with the relevant provisions of the LGPD through Standard Contractual Clauses (Brazilian SCCs). The Standard Contractual Clauses issued by the European Commission in June 2021 (EU SCCs) for international transfers are comprehensive. The EU SCCs address, among other things:

- The obligations of the parties when personal data is transferred
- The use of sub-processors
- Data subject rights (including third-party beneficiary rights)
- The ability to seek redress

- Allocation of liability between the parties
- Supervision by regulatory authorities
- Applicability of local law (including the requirement to assess the impact of such laws and practices on compliance with the SCCs)
- Obligations when public authorities in third countries seek access to personal data

Rather than draft their own SCCs, the UK has issued an Addendum which organizations that want to use the EU SCCs utilize in order to incorporate UK law into the EU SCCs. Likewise, Swiss organizations attach a rider or an addendum to the EU SCCs which incorporate Swiss law as needed. It is recommended, given the similarities between the GDPR and the LGPD, that ANPD not draft Brazilian SCCs, but rather it do as the UK and Switzerland have done, and in order to foster and encourage international trade, adopt the EU SCCs and, to the extent necessary, issue an addendum incorporating Brazilian law.

Finally, concerns about governments' use of private sector data for national security purposes has become an impediment to private sector data flows for important purposes such as employment. The IAF has long believed that there should be accountability principles specific to this government use of private sector data. However, when there is a low level of risk to data subjects from a specific flow of data, that miniscule risk should not impede the flow. Furthermore, there is an understanding the keeping people safe, when well controlled, is a fundamental right as well. The IAF's view is explained in this blog: [The Right to Data Sharing for Security is a Fundamental Human Right](#).

If you have questions please direct them to Martin Abrams at [mabrams@informationaccountability.org](mailto:mabrams@informationaccountability.org).