

IRIS contributions to ANPD Subsidies Collection

# Regulatory Project on the Processing of Children and Adolescents Personal Data



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# Presentation

The Institute For Research on Internet And Society (IRIS) is an independent and interdisciplinary research center founded in 2015 and dedicated to producing and communicating scientific knowledge on internet and society issues, as well as defending and promoting public policies that advance human rights in the digital sphere. Our efforts seek to qualify and democratize debates about internet, society and new technologies by bringing scientific inputs to internet users and the different society sectors: government, civil society, private sector, technical community and academia.

In our project **Security of Information and Protection of Children and Teenagers: Speeches and Regulatory Proposals in MERCOSUR** we analyze the debates about the protection of children and adolescents in spaces with encryption, from the perspective of the Global South and going beyond the polarization of technological security vs. protection of children and adolescents. At IRIS, we want multisectoral dialogue on these two fields, based on scientific evidence and respect for human rights. Based on the input gathered, our intention is to monitor and influence the legislative debate on the topic, offering recommendations for MERCOSUR States and digital technology companies operating in the region.

From this perspective, we launch contributions to the **Subsidies Collection: Processing of Personal Data of Children and Adolescents**,<sup>1</sup> from the Brazilian National Data Protection Authority (*Autoridade Nacional de Proteção de Dados*) – ANPD. The call published by the Authority was based on the presentation of three macro premises, of which we present contributions in two, which are: “consent” and “Internet games and applications”. In this document we report our contributions, and the guiding questions. It is important to mention that such a contribution is relevant to this project, since the handling and processing of children and adolescents’ data has a special nature provided for in the General Personal Data Protection Law (*Lei Geral de Proteção de Dados Pessoais*) – LGPD (Act nº 13,709/2018), with a specific section dedicated to providing rules for their processing. Therefore, IRIS, committed to the scientific and technical development of Brazil, presents its contributions<sup>2</sup> in this Subsidy Collection, from the perspective of civil society, for the development of the ANPD agenda in line with the Authority’s priority action planning for the 2024-2025 biennium.

## Consent

Consent presupposes a free, informed and unequivocal expression by the rights holder, through which one agrees to the processing of their personal data for a specific purpose

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1 Available at: <https://www.gov.br/participamaisbrasil/tscriancaeadolescente>

2 Empirical data and other foundations for our contributions, including bibliographic references, are available on the research project page on our website: <https://irisbh.com.br/projetos/seguranca-da-informacao-e-protecao-de-criancas-e-adolescentes-discursos-e-propostas-regulatorias-no-mercosul/>.

(art. 5º, XII, LGPD). When this legal hypothesis is used, the controller has the burden of proving that consent was obtained in accordance with the provisions of the LGPD (art. 8º, § 2).

In addition to the general rules applicable to any processing of personal data, the use of the legal hypothesis of consent as support for the processing of children and adolescents personal data requires compliance with specific precautions and rules, imposing a series of additional challenges for controllers.

In this sense, art. 14, § 1º, of the LGPD establishes that, in the case of processing children's personal data, "specific and prominent" consent must be provided by one of the parents or legal guardian. To this end, according to § 5º of the same article, controllers must make "all reasonable efforts" to verify that consent was provided by parents or legal guardians, "taking into account available technologies".

In view of what these normative provisions establish, the question arises:

## 1. What criteria or parameters must be observed to obtain "specific and prominent" consent from parents or legal guardians?

Article 14, §6º, of the LGPD is clear in terms of the presentation of the information criteria on data processing, they are "[...] a simple, clear and accessible way, taking into account the physical-motor, perceptive, sensory, intellectual characteristics and mental health of the user, using audiovisual resources when appropriate [...]". Therefore, these elements must be respected as conditions for recognizing the validity of the consent to the processing of data of children and adolescents.

In addition, we reinforce as a parameter the minimum analysis criteria regarding necessity and correlation with the service provided. In other words, it is not in the interest of the company to process a child's or adolescent's height, weight, age, and measurements for a game-related service, for example. It is necessary that the best interests of the child or adolescent be considered in accordance with these two criteria.

### 3. In the case of adolescents, must obtaining consent, especially in the digital environment, comply with the provisions of civil law regarding civil capacities, following the general rule of representation and assistance from parents or guardians? Or is it possible to consider, in line with the principle of best interests, the progressive autonomy of these holders to, in certain contexts and situations, provide consent to the processing of their personal data without the need for representation or assistance from parents and legal guardians?

Brazilian legislation does not follow the universal classification of the Convention on the Rights of the Child, according to which children are all persons between the ages of 0 and 18. According to art. 2 of the Child and Adolescent Statute - ECA, a child is “*a person up to twelve years of age*” and an adolescent is “*a person between twelve and eighteen years of age*”.

Thus, the LGPD legal rule itself is aligned with progressive autonomy, by establishing different rules for the processing of personal data of children and adolescents, with stricter requirements only for children, in accordance with the paragraphs of art. 14, which do not refer to adolescents.

Therefore, it can be said that the principle of best interest is directly related to the principle of progressive autonomy, since there is no best interest that does not expand the possibilities of adolescents, for example, to express their own consent to the processing of personal data, as long as other relevant normative principles are respected and duly applied. In any case, such consent could be given by the legally responsible person, taking into account their relative civil capacity, as provided for by art. 4º, I, of the Civil Code, there must be a clear distinction between young people aged between 12 and 16 and those aged between 16 and 18.

It is also important to emphasize that, according to the legal provisions of art. 14, § 6º, of the LGPD, the information regarding the processing of data of children and adolescents must follow some elements of accessibility, clarity, simplicity and take into account the physical-motor, perceptual, sensory, intellectual and mental characteristics of the user. Therefore, the absence or disregard of these elements would result in an obstacle to the

full exercise of the adolescent's autonomy, a fact highlighted in the ANPD Guidelines on Legitimate Interest.

## Internet games and applications

Digital games and Internet applications, including social networks, are environments where, without adequate safeguards, the excessive collection and unnecessary disclosure of personal data of children and adolescents may occur. This situation is exacerbated by the growing participation of children and adolescents in the digital environment and the fact that some of these digital platforms were not specifically designed for this audience. In another way, some digital platforms have been designed to encourage their constant use and overexposure of users, allowing the massive collection of their personal data and exposing them to the monitoring of their behavior.

Given this scenario, it is essential to establish appropriate principles, parameters and safeguards so that the processing of personal data of children and adolescents in the digital environment is carried out in accordance with their best interests, in order to eliminate or mitigate the risks arising from these operations.

In this context, the principles of purpose, necessity and adequacy stand out (art. 6º, I, II and III, LGPD), which together limit the processing of personal data to the minimum necessary to achieve the specific, legitimate and informed purposes, without the possibility of further processing in a manner incompatible with these purposes. In particular, art. 14, § 4º, of the LGPD prohibits requiring the provision of personal information as a condition for children's participation in games, Internet applications and other activities, except for information "strictly necessary for the activity".

It is also worth highlighting the principle of transparency (art. 6º, VI, LGPD), according to which the controller must provide clear, precise and easily accessible information on the carrying out of the processing and the respective processing agents, observing commercial and industrial. The art. 14, § 6º, of the LGPD establishes specific rules to be observed when processing the personal data of children and adolescents. Thus, transparency measures must take into account "the physical-motor, perceptual, sensory, intellectual and mental characteristics of the user, with the use of audiovisual resources when appropriate, in order to provide the necessary information to parents or legal guardians and appropriate to the understanding of the child".

Also relevant to the protection of personal data of children and adolescents in the digital environment is the adoption of normative principles, technologies and design measures that promote and ensure high levels of privacy and protection of personal data. In this regard, issues such as: (i) the definition and implementation of good practices and technical standards that prioritize the guarantee of the best interests and privacy as a standard; (ii) the appropriate techniques for verifying the age of users; (iii) the limitations

to be observed in the collection of personal data from children and adolescents, especially for the formation of behavioral profiles; and (iv) the mechanisms to increase the control of parents and guardians over the processing of personal data of children and adolescents.

In this sense, taking into account the provisions of the LGPD and the international experience around the topic, questions:

## **1. What principles, parameters and safeguards, including design measures, must be observed when processing personal data of children and adolescents by digital platforms, in order to ensure respect for their best interests, promote and ensure high levels of privacy and data protection and mitigate the risks arising from the use of these platforms?**

When developing digital projects and products for use by children and adolescents, digital platforms must ensure full protection in the processing of personal data. To this end, they must implement effective technological means to ensure, for example, that there is no unauthorized access to the database, an issue in which the adoption of strong encryption techniques is recommended as an ally in the protection of the rights of children and adolescents, the full exercise of which is promoted by technological security mechanisms without vulnerabilities.

Therefore, for no reason should there be any design of clandestine doors to access the personal database. If it is appropriate for guardians to have access to the stored data, including parents or educators, this mechanism must be foreseen and implemented in an open and transparent manner, with prior information about the possibility of using parental control techniques for children and adolescent users, without any concealment or concealment of information from children and adolescents.

Furthermore, it is imperative to ensure that all applications aimed at children and adolescents integrate, from the design phase, the principle of “privacy by design”. This implies that the development of platforms and games must be conceived from the perspective of comprehensive child and youth protection, as stipulated by the Federal Constitution, the Convention on the Rights of the Child and the Statute of Children and Adolescents. These guidelines are reflected in the exceptional provisions of the General Data Protection Law (LGPD) regarding the processing of personal data of children and adolescents.



Furthermore, in addition to the general requirements established by article 14 of the LGPD, any application that deals with sensitive data must observe both the general and specific requirements applicable to the processing of data of this nature, as provided throughout Brazilian data protection legislation.

## 2. Considering that the processing of personal data must be limited to that strictly necessary for the purpose for which it is intended, what are the good practices and techniques available and appropriate for verifying the age of users of digital platforms?

Digital platforms should not view age verification only as a formal means of exempting them from liability, but as a necessary instrument for the full protection of children and adolescents. Access control to online applications must operate using reliable authentication and certification tools, with technology that is constantly updated.

At the same time, they must be careful not to allow such an instrument to become a surveillance mechanism, weakening the legal guarantees and freedoms of children and adolescents. It should also be noted that good practices for verifying the age of users should not be used as a strategy for capturing and handling new data, such as, for example, the requirement to present public documents, such as the General Registry, and its subsequent archiving on the platform to use the data present there for commercial profiling.

Therefore, there must be no link between prior age verification and the subsequent processing of personal data, so that disproportionate monitoring of online communications or information accessed during the use of digital platforms is not possible.

## 3. What mechanisms and good practices can be adopted to increase the control of parents and guardians over the processing of personal data of children and adolescents in the digital environment?

In their special condition as developing human beings, children and adolescents have the right to material, moral and educational assistance from their guardians. Thus, supervision by the family is inherent to the full protection and best interests of children and adolescents and serves as a preparation for social coexistence and the full exercise of their rights.

Therefore, supervision by parents and guardians should not be seen as an excuse, but rather as a guarantee in favor of children and adolescents. Therefore, there should be no hidden doors to access the personal database for any reason. If it is appropriate for guardians, including parents or educators, to have access to stored data, this mechanism must be foreseen and implemented in an open and transparent manner, without any concealment or withholding of information from children and adolescents.

Furthermore, the recognition of the growing autonomy of children and adolescents and their position as citizens, as opposed to the old condition of subjection provided for in the Minors Code of the 1970s, offers new perspectives for the protection of children and adolescents, clearly distinguishing care from mere surveillance. Therefore, good practices in the protection of the data of children and adolescents, in dialogue with their parents and guardians, must take into account the characteristics of “parental mediation”. In this context, the responsible adult is no longer seen as the direct “owner” of the child or adolescent, but rather as a promoter of their rights. Therefore, decisions about the processing of children’s data must be guided not only by the consent of the parents or guardians, but also by the best interests of the children and adolescents involved.

## 5. What good practices related to transparency and providing information in a simple, clear and accessible way can be observed by digital platforms regarding the processing of personal data of children and adolescents?

Platforms whose purposes are aimed at children and young people can and should articulate, based on art. 14, §6º of the LGPD, models different from the traditional one, for presenting their terms of use, especially those relating to data handling. Therefore, in terms of good practices, the adoption of measures that simplify the language from visual and/or audiovisual materials, including animations, that have to do with the context of the platform, and adopt measures to present the terms of use in accessible language.

As good practices, mention is made of the possibility of using comics, anime, game animations, among other playful techniques to present the terms of handling data from data processing services. These practices even strengthen the character of progressive autonomy of children and adolescents, as well as the precepts of digital literacy, instigated by the Marco Civil da Internet.



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