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Tracking privacy trends in Latin America in the age of the GDPR

In the last few years, data protection laws have been passed in several Latin American countries. The protection of personal data is therefore becoming increasingly significant on this side of the world. With the aim of supporting a growth in the interest of protecting personal data, the Ibero-American Data Protection Network ('RIPD') has promoted several initiatives, dialogues, policies, and technologies to guarantee this fundamental right in the region. Florencia Rosati and Ludmila Petrinelli, Partner and Associate respectively at Estudio Beccar Varela, provide an overview of the main trends in Argentina and the rest of Latin America at a time when the EU has adopted the General Data Protection Regulation (Regulation (EU) 2016/679) ('GDPR').

Argentina

Argentina has been a pioneer in the region regarding data protection. Indeed, the protection of personal data has been guaranteed since 1994. Specifically, Section 43(3) of the Argentine Constitution foresees a *habeas data* judicial remedy allowing any person to gain knowledge of their data stored in either public or private records or databases and to request their deletion, correction, confidentiality or update.

Further, Law No. 25.326 on Personal Data Protection 2000 ('Law No. 25.326'), its regulatory Decree 1558/2001 as amended by Decree 1160/2010, Law No. 26.951 on the Do Not Call Registry, and the regulations issued by the Argentinian Data Protection Authority ('PDP'), strictly regulate the collection and processing of personal data in Argentina.

In 2003, the European Commission's ('the Commission') Decision C(2003)1731 recognised Argentina as providing an adequate level of personal data

protection, and, since then, European data transfer restrictions are not applicable to data transfers from Europe to Argentina. It is worth noting that, to date, Uruguay and Argentina are the only Latin American countries considered by the Commission to provide an adequate level of protection. However, these decisions are subject to supervision and can be revised at any time. Consequently, they might suffer revisions as a result of the GDPR.

Taking the above into consideration and the need to revise Argentinian law, the PDP published in February 2017 a draft bill to amend Law No. 25.326 ('the Bill').

In view of this, and even though the Bill has to be analysed by the Argentinian Congress, the Bill tends to follow the principles set forth in the GDPR, some of the principles contained in the Asia-Pacific Economic Cooperation ('APEC') Privacy Framework, the APEC Cross-Border Privacy Rules ('CBPR') system, and the Trans-Pacific

Economical Cooperation Agreement, as well as some aspects included in the Colombian, Canadian, Mexican, Nicaraguan and Philippine legislation. Thus, new principles would complete the cornerstone of the Argentinian personal data protection framework.

Among others, the new principles and regulations that comprise the Bill are: the inclusion of tacit and electronic consent; the insertion of an obligation to notify the PDP of security breaches that could significantly affect data owners; the inclusion of an additional set of security measures; the inclusion of an express reference to cloud computing; the inclusion of the data subject's opposition right, as well as a portability right; express regulation of the consent of minors for the use of social media; a new definition of data (removing the reference to legal entities) and sensitive data; a definition of genetic and biometric data; the figure of the data protection officer (in some specific cases); and the possibility to create certain



binding self-regulation mechanisms.

Other than the bill amending Law No. 25.326, it is expected that the PDP will strengthen its auditing functions. It is, and will continue, working hard to maintain Argentinian data protection regulations as pioneering legislation so as not to lose the Commission's adequacy decision.

Bolivia

In Bolivia¹ it is important to highlight that there is a bill that would create three criminal offences to punish users of social networks that commit infringements. However, the Bill is still under consideration.

Furthermore, within the Electronic Government framework, it is worth mentioning Bill C.S No. 009/2015-16 of 30 March 2016, which provides for the creation of a technological platform on services and data storage named Sovereign Cloud Sumaq Waqaychay a national priority². Even though the bill was approved by the House of Senators, it must be approved by the House of Representatives to become law.

Brazil

To date Brazil does not have a general data protection law. Indeed, Brazil only has sectoral laws regarding this issue.

Currently, there are three data protection bills in the Brazilian Congress, and two of them are under analysis by a special committee of the House of Representatives. Hopefully, during 2017, the special committee will finish its assessment and pass the final text of one of the bills to the Senate for approval, creating a Brazilian general law on personal data protection.

Chile

As to the newest developments in data protection in Latin America, Chile will hold the XV Ibero-American Meeting on Data Protection.

The Chilean Government has announced that it is expecting to send Congress a bill to update Law No. 19.628 on Personal Data Protection ('Law No. 19.628'), since this Law dates back to 1999, and adapt it to meet the Organisation for Economic Co-operation and Development's standards. Even though the bill is not public, official sources confirmed that data subjects' rights to access, amend and eliminate their data might be contemplated in the bill, as well as a data portability right, and the creation of a new supervisory authority.

On 17 January 2017, Senator Felipe Harboe presented an alternative bill to amend Law No. 19.628. Even though this bill regulates the processing of children's data, the right to data portability, and gives further protection to certain kinds of data, it is expected that the bill the Government intends to present will regulate data protection further than the one presented by Senator Harboe.

Colombia

Currently, one of the most important topics in Colombia is the extension of the deadline for database registration. On 3 November 2015, the Colombian data protection authority ('SIC') imposed, through External Notice No. 2, the obligation to register databases in the National Register of Databases.

Although the registration deadline expired on 8 November 2016, the Ministry of Industry, Commerce and Tourism extended the deadline until 30 June 2017 through Executive Order 1759/2016.

Guatemala

To date, Guatemala is one of five countries in Latin America that does not have specific data protection regulations, though certain data protection matters are regulated in other pieces of legislation. It appears that there is no legislative interest in enacting a specific data protection law.

Nevertheless, a bill was introduced by representatives Mariano Rayo and Gustavo Blanco, known as the draft Law on Protection of Personal Data. Even though this bill is from 20 August 2009, its treatment has been delayed for an indefinite period in the National Congress of the Republic of Guatemala.

Honduras

Similarly, in 2017, Honduras may continue the legislative process to finally approve the Personal Data Protection Law, drafted in 2014, which includes a prohibition on commercialising personal information.

Mexico

In Mexico, the General Law on the Protection of Personal Data Held by Mandated Subjects was published, on 26 January 2017, in the Official Gazette. This law sets forth the general principles and procedures for guaranteeing the protection of personal data held by, among others, federal, national and municipal authorities.

Over the last few years, the National Institute for Access to Public Information and Data Protection ('INAI') has taken several measures to raise awareness on the importance of data protection rights, and this is expected to continue. For instance, INAI has purchased a license for the children's television programme Sesame Street to educate minors about the internet, data protection, and the risks

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associated with using social networks.

Finally, it is also expected that INAI will ensure compliance with the Federal Law on Protection of Personal Data Held by Private Parties 2010 by increasing its investigations and sanctioning proceedings, and continuing to analyse individuals' complaints.

Nicaragua

With respect to Nicaragua, even though Law No. 787 on the Protection of Personal Data 2012 is in force, the formation of a data protection authority is still pending, and there is no clarity as to when this will occur.

Paraguay

In Paraguay, there is strong intent to regulate the protection of privacy rights to mitigate the risks posed by new technologies. Added to this, the Government wishes to impose, as soon as possible, the obligation on public institutions to use computers to process information so that all public information is available on the internet. Moreover, the National Information, Technologies and Communications Agency has established certain priority projects to consolidate the Electronic Government Program.

Peru

Data protection legislation has been developed in the last few years. Law No. 29.733 on Personal Data Protection ('Law No. 29.733') was enacted on 3 July 2011, and passed on 22 March 2013 by means of Executive Order No. 003-2013-JUS.

In 2017, by virtue of the powers delegated by the Legislative to the Executive, Legislative Decree No. 1353 Which Creates an Authority on Transparency and Access to Public Information, Strengthens the Personal

Data Protection Regime and the Regulation of Interest Management was published. This decree partially modifies Law No. 29.733, as well as clarifies and extends the principles stated in said law. However, it does not essentially modify Law No. 29.733. Indeed, it just complements and extends it.

Uruguay

The Uruguayan data protection authority ('URCDP') is expected to continue having an active role, holding engagement meetings and training workshops, and intensifying its audit role.

The URCDP is also expected to issue a report on the impact of the GDPR on Uruguayan data protection regulations.

In addition, it is worth mentioning that the URCDP has assumed the presidency of the RIPD from 2017-2019. Thus, Uruguay may also have a more active role in initiatives and projects related to the protection of personal data, both in Uruguay and Latin America.

Conclusion

One could say that in the next few years Latin America is expected to experience a data protection breakthrough.

Most Latin American countries have been very active passing, amending or complementing their data protection regulations, though, as seen above, there are still several countries that need a boost in this respect.

1. Despite the fact that there is no data protection law, personal data is protected by different pieces of legislation, such as by the Bolivian Constitution and the General Law on Telecommunications, Information and Communication Technologies 2011. In 2004, Law No. 2631 amended the Bolivian Constitution, and the habeas data process became an extraordinary constitutional proceeding. In addition, the habeas data process is regulated by Supreme Decree No. 28.168 2005 on access to information.
2. <http://www.diputados.bo/images/Docs/PL/PL-inicial/2016-2017/PL-CS-009-16.pdf>

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