



DEVELOPMENT OF REGULATIONS AND HARMONISATION

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SUMMARY: I. INTRODUCTION: Need to harmonise regulations on data protection, between the States forming the Latin American Community: International Instruments, principles and basic rights of personal data protection. **II. BASES FOR HARMONISATION. III. COMPOSITION AND OPERATION OF THE WORKING GROUP. IV. PROPOSAL OF DIRECTIVES FOR HARMONISATION OF DATA PROTECTION REGULATIONS IN THE LATIN AMERICAN COMMUNITY.**

On the occasion of the 4th Latin American Conference on Data Protection held in Mexico in November 2005, it was resolved to create several Working Groups, among which there is the Permanent Group on Development of Regulations, and this was recorded in the Mexico Declaration, according to the terms established in the document on “Network Strategy”, approved by that Conference¹.

That document affirms that “... the Network must assume the role of advisor to the governmental and legislative figures in each country. An essential value of the Network is that its members are qualified experts and key players in data protection matters, who understand the legislative situation in their respective

¹ The Latin American Data Protection Network, open to all the countries in the Latin American Community, and specifically recognised at the 13th Latin American Summit Meeting of Heads of State and Government, held in Santa Cruz de la Sierra, Bolivia, in November 2003, was created by the Declaration of La Antigua, Guatemala, in June 2003



countries, whilst also having access to the experience and knowledge of the rest of their colleagues in the Network who play the same roles in their countries of origin”.

Thus, an agreement was reached over the convenience of creating a Permanent Working Group to “Boost Regulation and Harmonisation”, to serve the Parliaments and national Governments to develop that task, and it was agreed that, in order for the group to be able to achieve its objectives with the greatest efficiency, it is convenient for the greatest number of members to take part in forming it, so the different sub regions of the Latin American Community are technically covered and represented by an expert in the relevant area, in order to provide greater knowledge in keeping with the statutory and factual reality of the matter to be analysed.

It was finally agreed that this Group be chaired by the Chairman of the Network and that the work would be co-ordinated by the *Pro-tempore* Secretary.

Due to that commission, the Working Group met to prepare this document in Santa Cruz de la Sierra (Bolivia), from 3 to 5 May 2006.

I. INTRODUCTION

In the different sectors of economic and social activity, one resorts increasingly more to processing personal data that, moreover, is facilitated by the state of development achieved by the new information technologies.

On the other hand, development of the markets and international trade involves an increase in the cross-border flows of personal data between all the financial



and social agents in the different countries that perform their activity in an increasingly more globalised world.

However, the existing differences between the levels of protection of fundamental rights and, in particular, the right to personal data protection, may give rise to a certain obstacle to transmission of such data between the different States and, thus, to performing economic activities.

In order to avoid such an obstacle, it is convenient that the level of personal data protection be equivalent in the diverse countries, so that any initiative aimed at approach or harmonisation between the national laws on such matters will undoubtedly lead to improved international commerce.

This is precisely the essential idea in which the main international instruments produced throughout the last years of the 20th Century are based, being developed in step with international commerce and the new communication technologies and the gradual configuration of the fundamental right to personal data protection, especially in the European setting.

Among these instruments, the following must be mentioned:

- The OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data known as **THE OECD GUIDELINES**, of September 1980. These Guidelines are based on the will to encourage free circulation of information between member countries and avoid creation of unjustified obstacles to development of economic and social relations between those countries, based on the recognition that “(...) that automatic processing and transborder flows of personal data create new forms of relationships among countries and require the development of compatible rules and



practices; that transborder flows of personal data contribute to economic and social development, and that domestic legislation concerning privacy protection and transborder flows of personal data may hinder such transborder flows”.

- **Council of Europe Convention 108**, of January 1981, for the protection of individuals with regard to the automatic processing of personal data, that is based on recognition of the need to reconcile the fundamental values of respect for private life with free flow of information between peoples.
- Resolution 45/95 by the General Assembly of the United Nations, of 14 December 1990, that establishes the **UNITED NATIONS DATA PROTECTION GUIDELINES**, that had the virtue of being the first worldwide text on the matter.
- **Directive 95/46/EC, by the European Parliament and the Council, of 24 October 1995**, on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

This Directive is also based on the need, within the setting of the European Union, to avoid any obstacle to free flow of personal data between the Member States due to protection of the rights and liberties of individuals and, in particular, the right to privacy, based on the consideration that the differences between the levels of protection of those rights might constitute a hindrance to exercise of a series of economic activities throughout the Community and interfere with competition.



- **The Charter of Fundamental Rights of the European Union**, adopted in Nice on 7 December 2000, that proclaims the fundamental right to data protection as an autonomous fundamental right and ratifies that respect for data protection laws must be subject to control by an independent authority.

To that end, these texts have gradually established a series of basic principles for personal data processing and to govern the relevant national laws, and nowadays these make up the content of the fundamental right to personal data protection, that may be summed up as follows:

- The principle of information
- The principle of informed consent, with acceptance of specified exceptions
- The principle of quality data: proportionality, exactness, updating
- The principle of purpose
- The principle of security and confidentiality
- The principle of control by an independent authority

The system must also lead to recognition of a series of rights in favour of the data subject, which must include at least the following:

- The right to access, correction, cancellation and opposition.
- The right not to be submitted to a decision with legal effects on the person, or that significantly affects him, that is based solely on automatic processing of data intended to evaluate certain aspects of his personality, his performance at work, credit, reliability, conduct, etc.

One must remember that in the Declaration of La Antigua, of June 2003, after the participants recognised that in Latin America there are still situations that prevent



or hinder effective exercise of the right, they recorded the need to take measures to guarantee a high level of data protection and to adopt statutory mechanisms to guarantee adequate protection in all the Latin American countries, that must take into consideration the essential principles of data protection recognised in the International Instruments.

Moreover, one must not forget the content of section 45 of the Declaration of Santa Cruz de la Sierra, issued after holding the 13th Latin American Summit Meeting of Heads of State and Government, in November 2003, that specifically stated as follows:

“Likewise, we are aware that the protection of personal data is a fundamental right of all persons and we highlight the importance of Ibero-American regulatory initiatives for protecting the privacy of citizens contained in La Antigua Declaration creating the Ibero-American Data-Protection Network, open to all the countries of our Community.”

The International Instruments mentioned are of major importance in relation to harmonisation of the laws of the different States, as a basic principle to facilitate international data transfers and which is so relevant in relation to the very existence of the actual Latin American Data Protection Network.

On the other hand, just as set forth in the Declaration of Cartagena de Indias, signed at the 3rd Latin American Conference, in the relevant section on international data transfers, the Community Directive on data protection grants “the European Commission the power to decide when a country that has established data protection legislation that meets European standards and created an independent supervisory authority is a secure destination for personal data from EU Member States. This recognition is equivalent to the full



liberalisation of exchanges of personal data between the European Union and the country in question, which greatly favours commercial exchanges and, more specifically, the development of electronic commerce and Information Society services.”

As we know, in 2000, the Republic of Argentina enacted the National Data Protection Act, regulated by a Decree in 2001. The guarantees afforded by that legislative and controlling body were recognised by the European Commission when it considered, in its Decision 2003/490/EC of 30 June 2003, that the Argentinean laws offer an adequate level of data protection.

This Decision places special emphasis on the fact that the Argentinean Law contains regulations on the general principles of data protection, the rights of data subjects, the obligations of the controllers and users of dates, the controlling body, penalisations and the *habeas data* judicial appeal procedure.

Other countries, such as Mexico or Peru, are now preparing bills for laws on the matter.

At this point, it is worth remembering the existence of two European Union Association Agreements with Mexico and Chile, that contain specific references to the right to protection of personal data.

The Mexico-EU Global Agreement, dated 8 December 1997, provides in its article 51 that “The Parties agree to accord a high level of protection to the processing of personal and other data, in accordance with the standards adopted by the relevant international organisations and the Community”, establishing in its article 41 that "With regard to Article 51, the Parties agree to cooperate on the protection of personal data in order to improve the level of protection and avoid obstacles to trade that requires transfers of personal data. Cooperation on



personal data protection may include technical assistance in the form of exchanges of information and experts and the establishment of joint programmes and projects.”

On the other hand, the Association Agreement with Chile, of 18 November 2002, provides in its article 30 that “The Parties agree to cooperate on the protection of personal data in order to improve the level of protection and avoid obstacles to trade that requires transfers of personal data. Cooperation on personal data protection may include technical assistance in the form of exchange of information and experts and the establishment of joint programmes and projects.”, and establishes in its article 202 that “The Parties agree to accord a high level of protection to the processing of personal and other data, compatible with the highest international standards”.

Both agreements include an Addendum that states that, in order to apply the articles cited, the parties will take the Directives to regulate computerised personal data files into account as an integral part of the Agreement, as amended by the General Assembly of the United Nations on 20 November 1990, the OECD Council Guidelines on the directives concerning protection of privacy and transborder flows of personal data, of 23 September 1980, the Council of Europe Convention on protection of individuals with regard to automatic processing of personal data, of 28 January 1981 and Directive 95/46/EC by the European Parliament and Council, of 24 October 1995, on the protection of individuals with regard to processing personal data and the free flow of such data.

On the other hand, at regional level, in MERCOSUR, with the same need to avoid obstacles to free commerce considering the respect for the rights of all persons, within the scope of the WSG 13 (Working Subgroup 13 Electronic



Commerce) a draft bill is under consideration, presented by the National Personal Data Protection Directorate of the Republic of Argentina, to ensure progress in statutory harmonisation in matters of personal data protection, that covers the generally accepted principles of data protection.

Taking the foregoing into account, the members of the Network have committed themselves to the Latin American countries enacting laws on data protection and establishing independent control mechanisms that promote effective implementation of the fundamental right to personal data protection that, at the same time, facilitate free flow of personal data between the countries.

II. THE BASES FOR STATUTORY HARMONISATION.

The International Instruments cited in the preceding section and, especially, European Council Convention 108 and its Additional Protocol of 2001, as well as the Community Directive on Personal Data Protection, contain a series of principles that now enjoy widespread acceptance and provide an unarguably valuable guideline for States outside the European geographic and cultural area, when establishing legal regulations on these matters.

This guide is not only formed by the main content of those Instruments and the actual Directive, but also by the enormous experience accumulated by the different States of the EU, both with regard to preparation of regulations, as well as with regard to practical application of its principles and rights.

That regulation and its practical application, along with the intense, highly important task that is being performed by the European Group of Controlling Authorities or the Article 29 Group, (thus named for said principle of the



Community Directive) through its already numerous working documents and findings on such varying matters that affect personal data protection, provide a highly valuable body of experience that must be taken advantage of by countries that, due to diverse reasons, have not regulated this fundamental right.

In addition to the International Instruments mentioned, one would also have to consider the opportunity to embody the Declarations and Documents produced by the Latin American Data Protection Network, the content of which will also provide a major base for such statutory harmonisation.

To cite only some of them, section III of the Declaration of Cartagena de Indias, of 2004, on “International data transfers: European and Ibero-American Perspectives”, the last paragraph of which may summarise the opinion of the Network on this point, when it affirms, as stated above, that “...the participants in the Third Ibero-American Meeting on Data Protection earnestly hope that the Ibero-American countries will enact data protection regulations and establish independent supervisory mechanisms that promote an effective introduction of the fundamental right to protection of personal data and, at the same time, facilitate the free flow of personal data between countries.”

Special mention may also be made of section III of the Mexico Declaration of 2005, on “Legislative developments and globalisation”, or the documents prepared by the working groups formed *ad hoc* at the 3rd Latin American Conference and, especially, concerning the “Feasibility of creation of controlling authorities in the Latin American Community” or that prepared on “Access to Public Information and Protection of Personal Data”.

The whole of this documentary base will have to be taken into account when arranging adequate advice on the matter for Governments and Parliaments when



undertaking the legal regulation of this fundamental right, as well as the documents that might arise from the temporary working group formed in Mexico on “Self-regulation Instruments”.

III. COMPOSITION AND DUTIES OF THE WORKING GROUP

a) Composition

Just as already stated and set forth in the Mexico Declaration, as well as in the document on Strategy of the RIPD, this group must be formed by the largest possible number of members of the Network, without distinction as to their status as founding, full, or associate member, so the different sub regions of the Latin American Community are technically covered and represented by an expert in the relevant area, in order to provide better knowledge according to the legal and factual reality of the subject to be analysed.

Observers may also join these, as long as that status as an observer arises from the transitory situation foreseen in that strategy document, concerning the period of time between application to join the Network and the relevant decision being taken by the General Meeting.

b) Operation

As to the duties of this group, special importance is placed on preparing a proposal of Directives to Harmonise Data Protection laws in the Latin American Community.



On the other hand, the group may play an advisory role in relation to planned laws and answer specific queries that might be submitted by the different countries that are represented on the Latin American Data Protection Network.

To that end, prior distribution of duties within the working group must be performed, among the political, governmental and legislative officers, in the different Latin American countries, as well as the other entities, among which emphasis must be placed on the Latin American Secretariat General, in order for them to be aware of their existence and operation.

To these ends, it seems essential to link this working group to the tasks by the permanent working group, with regard to the On-line Network. The web site of the Network must thus be used to gather a documentary archive to facilitate performance of the work, as well as to host a forum that allows the members to intervene in an agile, quick, secure manner.

IV. PROPOSAL OF DIRECTIVES FOR HARMONISATION OF DATA PROTECTION REGULATIONS IN THE LATIN AMERICAN COMMUNITY

At the preparatory meetings held by the Working Group seminar in Santa Cruz de la Sierra, Bolivia from 3 to 5 May 2006, it committed itself to preparing the Directives to Harmonise regulation of Data Protection in the Latin American Community, to be submitted for consideration by the General Assembly of the Network.