GUEST EDITORS' NOTE

Privacy Law in Chile: Recent Developments

I am truly honoured to contribute as Guest Editor to this issue of the Global Privacy Law Review (GPLR). My gratitude to Wolters Kluwer and especially to the Editor-in-Chief of the GPLR, Ceyhun Necati Pehlivan, for his kind invitation to participate in this publication.

As this special issue of the GPLR shows, privacy is a growing concern in Latin America. In Chile, among other reasons, because of the rapid expansion of the digital economy and the possibilities of big data analysis, it is becoming one of the main topics of attention in the public sector as well as for business and consumers.

The significance of privacy is demonstrated by the constitutional reform of 2018, which introduced the protection of personal data as a constitutional right, as a complement of the right to private life and to honour of the person and his family (Article 19(4)). Even though this reform had no immediate practical effect, since it delegates to legislation on the processing and protection of personal data, it has formally elevated the right to protection of personal data to an autonomous constitutional right.

This nature had been recognized before by the Chilean Constitutional Court, which held that the protection of personal data finds its source in the right to privacy (stated as a 'right to private life' in the Constitution), stressing the necessity of special protection for sensitive data, because of the potential risks that unauthorized access and disclosure of such data entails to the right to privacy.[1]

The Supreme Court has also delivered some important decisions on privacy issues, especially with regard to the protection of the personal data of consumers. In 2016, deciding a collective action brought by the *Servicio Nacional del Consumidor* (National Service of the Consumer, the public body in charge of the protection and enforcement of consumer rights), the Court ruled that some clauses of online standard contracts, regarding the collection, processing and use of consumers' personal data, could be considered unfair and therefore they were null and void.[2]

In that case, the Court stated that most of the privacy policy included in the terms and conditions of an online purchase of a music festival ticket, was unfair, since it was contrary to good faith to obtain the consent of the data subject through a standard term of a transaction, if that transaction has a completely different object or purpose (in the case, the purchasing of a ticket for a festival). The Court stressed that such a waiver of the privacy of personal data is only valid if the consent is given in explicit and specific manner. In other words, in the case of 'click contracts', the general consent given to the main transaction is not enough to satisfy the legal requirement of consent for the collection and processing of personal data.

Interestingly, the Court based its decision not only on the Chilean Act No. 19,628 on protection of private life and personal data (Data Protection Act), but also – and maybe mainly – on the Chilean Act No. 19,496 on the protection of consumers' rights, which for the Court can be used to protect the personal data of consumers, especially against unfair terms included in standard contracts.

There have also been some developments at the administrative level, especially with relation to cybersecurity, where some public agencies or bodies have issued public consultations on administrative regulations. These proposals aim to protect the security and integrity of the data managed by public or private companies or other entities. In general, the proposals require the implementation of a compliance scheme, with risk management planning and prevention measures. There is also an obligation to implement a Cybersecurity Unit in the organization, with the purpose of supervising compliance with regulations, identifying potential risks, reporting cybersecurity incidents to the authorities and coordinating the general risk management of the company. Any breach that compromises

Notes

[1] Constitutional Court, Decisions nos 1732-10-INA, 1800-10-INA and 1894-2011-CPR.

[2] Supreme Court, Decision no. 1533-2015 of 7 July 2016.

personal data of external users is considered a serious incident, that requires immediate action by the company in order to remedy the breach ant protect the affected data.

At this date, there are public consultations on Administrative Regulations on Cybersecurity applicable to casinos (gambling), health services, and insurance and reinsurance companies.

The increasing attention on privacy has also turned into legislative initiatives. To this date, the legal aspects of privacy are mainly regulated in the Data Protection Act. This Act was enacted in 1999, more than twenty years ago, a time when the most popular search engines where Yahoo! and AltaVista, and Big Data was more a dystopian concept rather than a reality. It is not surprising that its provisions are outdated and do not reflect the requirements of the present day.

For that reason, it is not surprising that the main purpose of the 'Reform Project' is the updating of Chilean legislation in order to meet international standards in this area, to make Chile a safe harbour. The leading point of reference has been the European Union's General Data Protection Regulation (GDPR), but the standards of the Asia-Pacific Economic Cooperation (APEC) and the Organisation for Economic Co-operation and Development (OECD) have also been considered.

The Reform Project sets up lawfulness, purpose limitation, proportionality, accuracy, liability, security, transparency and confidentiality as principles of data protection. The Project also expressly states the rights of data subjects: access, rectification, erasure, objection, and data portability.

But perhaps the most important innovations of the Reform Project are related to the creation of a new regime of administrative protection for personal data, including a new public authority (the Council for Transparency and Data Protection). The main functions of this Council are to interpret legal and administrative provisions related to the processing and use of personal data, to supervise and control the application of those provisions, and to know and decide the claims of data subjects in case of infringement of their rights. The Council has the power to impose fines on the data controllers, which can be very high for serious infringements (up to EUR 600,000). It is expected that the Reform Project will be approved by the Parliament during 2021.

I hope that this brief overview, and especially the papers included in this issue of the GPLR, will contribute to the awareness by a broader audience of the present state of affairs and future developments of privacy law in Latin America, fostering further collaboration with other regions of the world.

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