

# **“Data Transfers to Countries of the LAC Region after the Safe Harbor Decision of the CJEU”**

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## 1. Current State of Data Protection Laws in Latin America

**A large number of LAC countries have passed laws, regulations and policies to protect privacy and personal data as a fundamental human right in line with various international and regional instruments on data protection in the last 6 years.**

Currently **ten countries (Argentina, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, Mexico, Nicaragua, Peru and Uruguay)** have privacy and data protection laws, including supervisory or regulatory authorities in place.

## 1. Current State of Data Protection Laws in Latin America

**Brazil, Jamaica, Panama, Paraguay and Salvador** have widespread provisions on privacy and data protection in different sectorial laws, but not yet independent data protection laws.

**Brazil, Chile, Guatemala, Jamaica, Paraguay and Salvador** are in the process of consultation and drafting new data protection laws.

**Argentina, Mexico and Uruguay** are the only countries in the region with a fully independent and autonomous national DPA.

# 1. Current State of Data Protection Laws in Latin America

In other countries, the DPA is part of a Ministry such as **Colombia (Ministry of Economy)**, **Costa Rica** and **Peru (Ministry of Justice)** and **Ecuador (Ministry of Telecommunications and Information Society)**.

## 1.1. National Laws and Regulations on Privacy and Data Protection Approved between 2010-2016

### Colombia

- Statutory Law No. 1581 containing General Provisions for the Protection of Personal Data (17 October 2012)
- Decree No. 1377 that Partially Regulates Statutory Law No. 1581 of 2012 (27 June 2013)

# 1. Current State of Data Protection Laws in Latin America

- Decree No. 866 that Regulates the National Registry of Databases pursuant to Article 25 of Statutory Law No. 1581 (**13 May 2014**)

## Costa Rica

- Law No. 8968 of Protection of the Individual for the Processing of his Personal Data (**5 September 2011**)
- Regulation of Law No. 8968 contained in Executive Decree No. 37554-JP (**30 October 2012**)

## Dominican Republic

- Law No. 172-13 on Protection of Personal Data (**26 November 2013**)

# 1. Current State of Data Protection Laws in Latin America

## Mexico

- Federal Law on Personal Data Protection in Possession of Private Parties (**5 July 2010**)
- Regulation of the Federal Law on Personal Data Protection in Possession of Private Parties (**19 December 2011**)
- Self-Regulation Standards on Protection of Personal Data (**29 May 2014**)

## Nicaragua

- Law No. 787 on Protection of Personal Data (**29 March 2012**)

# 1. Current State of Data Protection Laws in Latin America

## Peru

- Law No. 29733 of Protection of Personal Data (**3 July 2011**)
- Regulation of Law No. 29733 of Protection of Personal Data (**22 March 2013**)
- Law No. 30024 that creates the National Registry of Electronic Health Records (**22 May 2013**)
- Regulation of Law No. 30024 that creates the National Registry of Electronic Health Records (**12 February 2016**)

## 2. International Data Transfers and Mechanisms

There are remarkable differences of approach to the regulation of transborder data flows (TBDF) and restrictions for the transfer of personal data from LAC countries to third countries.

Seven countries (**Argentina, Colombia, Costa Rica, Nicaragua, Mexico, Peru and Uruguay**) have provisions that stipulate special conditions for national and international transfers of personal data, as well as the use of mechanisms to export information to third countries, which includes **model contractual agreements and clauses and binding corporate rules.**

## 2. International Data Transfers and Mechanisms

**Peru and Colombia** establish conditions to conduct international data transfers to third countries based on the *adequacy level of protection* contained in the European Union Data Protection Directive of 1995 and the recently approved EU General Data Protection Regulation. **Paradoxically, neither Colombia nor Peru has met the adequacy level of protection standard of the European Commission yet.**

Only **Argentina and Uruguay** have **met** the **adequacy decision standard of the EU** in June 2003 and August 2012, respectively.

## 2.1. Countries with Provisions on International Data Transfers

### Argentina

- Law 25.326 on Protection of Personal Data (**Art. 12**)
- Commission Decision of 30 June 2003 pursuant to Directive 95/46 of the European Parliament and of the Council on the adequate protection of personal data in Argentina, published in the OJ L 168 on 05.07.2003

### Colombia

- Statutory Law No. 1581 containing General Provisions for the Protection of Personal Data (**Art. 26**)
- Decree No. 1377 that Partially Regulates Statutory Law No. 1581 of 2012 (**Chapter V, Arts. 24-25**)

## 2.1. Countries with Provisions on International Data Transfers

### Costa Rica

- Law No. 8968 of Protection of the Individual for the Processing of his Personal Data (**Art. 14**)
- Regulation of Law No. 8968 of Protection of the Individual for the Processing of his Personal Data (**Chapter Five, Arts. 40-43**)

### Nicaragua

- Law No. 787 on Protection of Personal Data (**Arts. 13-15**)

### Mexico

- FLPPDPPP (**Arts. 36 and 37**)
- Regulation of the FLPPDPPP (**Chapter IV Arts. 67-76**)

## 2.1. Countries with Provisions on International Data Transfers

### Peru

- Law No. 29733 of Protection of Personal Data (**Arts. 2(8), 11 and 15**)
- Regulation of Law No. 29733 of Protection of Personal Data (**Arts. 18-26**)

### Uruguay

- Law No. 18,331 on Protection of Personal Data and “Habeas Data” Action (**Art. 23**)
- Commission Executive Decision C (2012) 5704 of 21 August 2012 pursuant to Directive 95/46 of the European Parliament and of the Council on the adequate protection of personal data in the Republic of Uruguay published in the OJ L 227/11 on 23.08.2012

**General Requirements for  
International Data Transfers in  
Selected  
Countries of LAC**

Country	Consent of the Data Subject	Equivalent Level of Protection in the Country of Destination	Previous Communication to or Authorization from the NDPA
1. Argentina	Yes	Yes	No
2. Colombia	Yes	Yes	Only a Declaration when the Country of Destination does not provide an adequate level of protection
3. Costa Rica	Yes	No	No

	<b>Consent of the Data Subject</b>	<b>Equivalent Level of Protection in the Country of Destination</b>	<b>Previous Communication to or Authorization from the NDPA</b>
<b>4. Mexico</b>	Yes (Pursuant to the Privacy Notice)	No	No. Only an opinion from INAI when data controllers deem it as necessary
<b>5. Nicaragua</b>	Yes	Yes	Yes. Data controllers shall Inform DIPRODAP on any international data transfer
<b>6. Peru</b>	Yes	Yes	Yes. Data controllers shall provide info on TDF to the DGPDP and might request said authority to issue opinions on the legality of TDF

	<b>Consent of the Data Subject</b>	<b>Equivalent Level of Protection in the Country of Destination</b>	<b>Previous Communication to or Authorization from the NDPA</b>
<b>7. Uruguay</b>	Yes	Yes	Yes. Data controllers shall inform the URCDP about the destination of personal data when conducting international data transfers

## 2.2. What Happened in Latin America after the Invalidation of the EU-US Safe Harbor by the CJEU in October 2015?

- There was a lot of **uncertainty** with respect to the validity of the **adequacy decisions of Argentina and Uruguay**.
- DPA's of LAC did **not make official statements regarding the validity of standard contractual clauses, binding corporate rules and other legal instruments** to conduct international transfers of data to third countries.
- In practice, **said mechanisms continue to be valid and used among multinational corporations** with presence in Latin America for the international transfer of personal data to third countries including Europe.

## 3. Major Developments and Interoperability with DP Frameworks

### 3.1. Countries Promoting Self-Regulation Standards and Certification on Data Protection

**Mexico** is promoting the **use of self-regulation** through different legal instruments: (i) **FLPPDPPP** (Art. 43 fifth paragraph and 44), (ii) the **Regulation of the FLPPDPPP** (Articles 79 to 86); and (iii) the **Self-Regulation Standards on the Protection of Personal Data** published by the Ministry of Economy in DOF of 29 May 2014, which **includes three different types of binding self-regulation schemes.**

### 3. Major Developments and Interoperability with DP Frameworks

There are **two national certifying organizations** endorsed and **approved by INAI**:

**NYCE (Normalización y Certificación Electrónica, S.C.)** and **EMA (Entidad Mexicana de Acreditación A.C.)**.

**Telefonica Mexico**, was the **first company that obtained a certification on personal data protection in August 2015** from the certification entity NYCE and registered before INAI.

### **3. Major Developments and Interoperability with DP Frameworks**

**Currently eight companies have certified** Self-Regulation Standards on Protection of Personal Data before INAI.

**[http://www.rea.ifai.org.mx/\\_catalogs/masterpage/Sec6\\_1.aspx](http://www.rea.ifai.org.mx/_catalogs/masterpage/Sec6_1.aspx)**

## 3.2. Countries facilitating Interoperability with other Data Protection Frameworks

The concept of **accountability** has not yet gained **wide acceptance in the LAC region**. Only **two countries** are trying to implement this concept.

- **Mexico** incorporates this concept in its national data protection legislation (**FLPPDPPP Articles 6 and 14**) and its **Regulation (Arts. 47 and 48)**.
- **Colombia** recently published a **Guide for the Implementation of Accountability in Organizations** as part of the implementation of Arts. 26 and 27 of Decree No. 1377 of 27 June 2013 that Regulates Statutory Law No. 1581 of 2012.

## 3.2. Countries facilitating Interoperability with other Data Protection Frameworks

- **Only Mexico** participates in the **APEC's Cross-Border Privacy Rules (CBPR) System** and is the only country of LAC seeking the interoperability of its national framework on data protection -in particular the implementation of self-regulation schemes through certification agents- with some APEC economies.
- **Chile and Peru** are also members of the APEC but **do not yet officially participate in APEC's Cross-Border Privacy Rules (CBPR) System.**

### 3.3. Countries with Cross-Border Cooperation Agreements for the Enforcement of Data Protection Laws

–Only **Argentina, Colombia and Mexico** though their respective national DPA are part of the **OECD's Global Privacy Enforcement Network (GPEN)**.

–**Mexico through INAI** participates in the **APEC's Cross- Border Privacy Enforcement Arrangement (CPE)**, which is a vehicle for regional cooperation in the enforcement of privacy laws among country members of the APEC.

## 4. Other Recent Developments

### 4.1. Organization of American States (OAS)

Said regional organization is currently analyzing the creation of a **Model Law on Data Protection for the Americas (Why a Model Law and not an Inter-American Convention?)**.

The process commenced in March 2012 with the adoption of a *Proposal for the Adoption of Privacy and Data Protection Principles for the Americas* in March 2012.

## 4. Other Recent Developments

The Final Model Law is **expected for approval and adoption** by a Group of Experts **in June 2017** and the **implementation by the Member States** will possibly take place during the **second quarter of 2017**.

### 4.2. Mexico

The National DPA (INAI) is perhaps one of the leading enforcement authorities in the region. **INAI reports a total of 21 sanction procedures** for an estimate amount of **EURO 5,171,727** (MXP\$108,381,599.16) **from January 2012 to 22 May 2015** divided in the following segments:

## 4. Other Recent Developments

- **Insurance and Financial Services: EURO 2,480,315** (MXP \$51,985,507.65) (**14 sanction procedures**).
- **Massive Media and Information Sector: EURO 1,456,814** (MXP \$30,549,165.00 (**4 sanction procedures**).
- **Education Services Sector: EURO 477,750** (MXP \$10,021,400.00 (**3 sanction procedures**).

Among the most frequent sanctions are:

- Processing data in violation of the data protection principles (**24 times**).

## 4. Other Recent Developments

- Obtaining or transferring personal data without the express consent of the data subject (**16 times**).
- Lack of some of the legal requirements to disclose the Privacy Notice (**11 times**).

**INAI published Guidelines for the Use of Hyperlinks to disclose Privacy Notices through Compensatory Measures (DOF 18 January 2016).**

Its **purpose is to establish the criteria**, the **conditions and the procedure** for the processing of personal data (**for both data controllers and data processors**) in order for them **to be able to disclose privacy notices** through the implementation of compensatory measures **through hyperlinks**.

## 4. Other Recent Developments

### 4.3. Peru

Despite the recent enactment of the Regulation of Law No. 29733 of Protection of Personal Data, **the DPA in Peru reports five procedures** resulting in economic sanctions and fines **against data controllers** as of 2015

## 5. Final Conclusions

- Although some DPA's are starting to levying fines, the **enforcement of DP laws continues to be an ongoing challenge** in countries of LAC.
- **The implementation of a privacy management program** is not compulsory under most DP laws in countries of LAC, this **should** change and **be made compulsory** in particular **to include obligations to respond, notify and provide redress to data subjects** in case of **a security breach** affecting personal information.

## 5. Final Conclusions

- There is the **urgent need to harmonize cross-border privacy cooperation with other DPA's and LEA's**, and to **encourage the interoperability with other regional and national frameworks** on privacy and data protection (e.g. APEC's Privacy Framework and most recently with the TPP).
- There is the need to **strengthen the role of the Data Protection Officer** to educate and train employees and to foster a culture of data protection within companies and organizations.

## 5. Final Conclusions

- **Foster active participation of DPA's in international and regional enforcement networks on cross-border privacy networks** such as the GPEN and APEC's Cross-Border Privacy Enforcement Arrangement to reinforce the protection of personal information of data subjects across borders.
- Last, there is the need for **more national campaigns for the protection of personal data in countries of LAC** that help to support compliance with the legal framework and **to inform users about the available mechanisms to exercise their data protection rights.**

**Vielen Dank!**

**Time for Questions?**

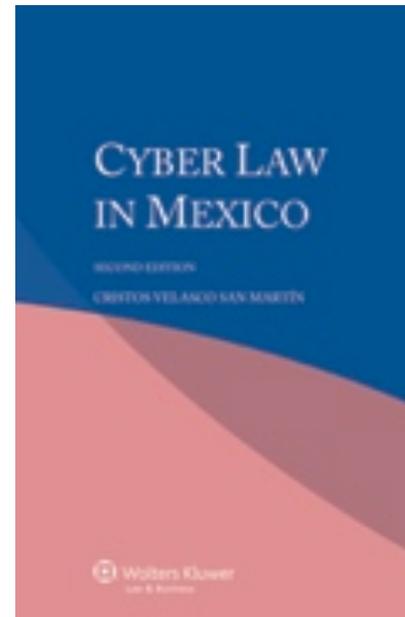
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