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Ecuador: The significance of data protection

Data protection is without doubt one of the most relevant regulatory matters waiting to be correctly addressed in Ecuador. The topic has gained even more relevance since May 2018, when the General Data Protection Regulation (Regulation (EU) 2016/679) ('GDPR') came into force with extraterritorial effects. Jaime Mantilla Compte, Partner at Falconi Puig Abogados, explores the existing legislation that applies to data protection in Ecuador, and considers the potential for the evolution and content of more specific data protection legislation.

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Article 3 of the GDPR states that it is applicable to 'the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to (a) the offering of goods or services [...]; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.'

This means that the GDPR may have implications in Ecuador, a country that does not have a specific regulation for data privacy and its different elements, such as consent, confidentiality, conservation, quality, etc.

Fortunately, such effects are not noticeable yet, as there have been no public cases or court decisions related to the matter that would, evidently, have a huge contrast with the limited available regulation on data protection in Ecuador.

Current situation

Ecuador does not have a data protection law, however, the Constitution of the Republic of Ecuador 2008 ('the Constitution') recognises and guarantees the protection of personal data in Article 66(19). It states that people are recognised and guaranteed the right to the protection of personal data, which includes access to and decision on information and data of this nature, as well as its corresponding protection. The collection, filing, processing, distribution or dissemination of these data or information will require the authorisation of the owner or the mandate of the law.

In accordance with Article 92 of the Constitution, the authorisation of the data owner will be necessary for data to be collected and shared. Article 92 covers *habeas data*, which states that every person, by his/her own rights or as a representative legitimated for this purpose, will have the right to know of the existence, and access to documents, genetic data, banks or personal data records and reports about themselves, or about their assets, consisted in public or private entities, in material or electronic support. Likewise, he/she will have the right to know what the data is to be used for, the origin and destination of personal information, and the time of validity of the record or databank.

The aforementioned is in accordance with the provisions of the Organic Law on Jurisdictional Guarantees and Constitutional Control, which, when regulating the *habeas data* action, includes the following specifications in Article 49:

- the purpose of the *habeas data* action is to judicially guarantee all persons access to documents, genetic data, banks, or records of personal data and reports that are about themselves, or about their assets, that are in possession of public or private entities or individuals, in material or electronic format. Likewise, every person has the right to know what the information's purpose is, the information's origin and destination, and the duration of the record or data bank;
- the data owner may grant the person responsible for the record or data bank access without cost to the aforementioned information, as well as updating the data, its rectification, elimination or cancellation. It will not be possible to request the elimination of personal data that, by legal mandate, must be kept in public records; and
- the persons responsible for the banks or personal data records may only disseminate the information stored with the authorisation of the owner or the law.

In addition to the constitutional regulations, there are scattered regulations in various legal bodies that refer to the protection of personal data for specific issues, with some inconsistencies and without procedural rules, such as:

- the Organic Law on Telecommunications 2015;
- the Monetary and Financial Organic Code; and
- the National Directorate of the Public Data Registry ('Dinardap').

Also, there are a couple of decisions from the Constitutional Court of Ecuador that deal with the issue of personal data protection, but more so, from the point of view of *habeas data* and the right to privacy.

In any case, the current course of action to enforce data privacy rights in Ecuador relies on sending a request to the data controller or processor to access, update, rectify, eliminate or cancel the data, and if such request is not favourably addressed, then the data subject can file a habeas data action before a competent judge.

It is important to mention that although *habeas data* actions do not have a complex procedure, they have an important procedural burden since they involve hearings and submitting evidence, and it is not always a plain compliance proceeding.

Therefore, the absence of specific technical regulation on the matter, and the lack of an expedited course of action to enforce rights, have left Ecuador behind in data privacy with almost a non-existent genuine protection to the data owner.

What's coming

An attempt to have a specific personal data protection law was presented to the National Assembly on 12 July 2016 by an assemblywoman from the then governing party, but it did not reach the first debate. This project was highly criticised due to its lack of clarity on certain concepts, and its restrictiveness, therefore it has been abandoned and will not be retaken.

By the end of 2017 the new Government realised the importance of regulating data privacy in Ecuador, so Dinardap was assigned the task of drafting a new bill ('the Draft Bill') and presenting it to the National Assembly.

The Draft Bill, after several public discussions, is now pending approval from the President of the Republic of Ecuador in order to continue its way to the National Assembly, where it will be discussed by its members, amended if deemed necessary, and then voted on, all of which could take several months more to occur.

Among the highlights of the Draft Bill are the definitions of the different elements that make up data protection itself, which will clarify the matter for the authorities, the data owners, and for the exercising of such rights.

Also, the Draft Bill expands the current constitutional rules by explaining in detail the meaning of consent and its characteristics in order to be considered valid to process, communicate or transfer data.

Furthermore, it regulates, *inter alia*, specific matters such as:

- the timeline for data conservation;
- the data quality required for processing;
- the data owner's rights, data security and responsibilities;
- international data transfers; and
- establishing an administrative procedure for enforcing data privacy rights before a National Authority of Personal Data Protection, who would be entitled to apply penalties without it being necessary to turn to a judicial *habeas data* action.

However, one of the main concerns for this is the fact that Dinardap is appointed as the authority in control of personal data, when it is also the authority in charge of public data registration in Ecuador, hence it is one of the main entities treating personal data in the country.

Consequently, Dinardap would be the judge, and also likely to be judged, whenever a claim is presented regarding any mistreatment of personal data by public entities. This point has been constantly cited during the public discussions of the Draft Bill, however, Dinardap so far has not given in and is determined to hold its position until the Draft Bill is presented to the National Assembly.

Thankfully, the Draft Bill will still be openly discussed at the National Assembly and there is the possibility for a rectification to be made on this part by establishing another authority in control of personal data that is independent and has no interference with public data registration.

Another issue that has raised concern is the penalties established in the Draft Bill, which could end up being too high as they are calculated based on a percentage of the total business turnover of the data controller.

While penalties should be dissuasive, the current proposal in the Draft Bill could be too restrictive, and even take a company to bankruptcy which is why different opinions have been presented on how to calculate them, such as using a fixed fee, a percentage on sales volume, and a percentage on income tax paid, among others. However, Dinardap has kept its original standing on this matter as well.

Recommendations

Despite the scarce current legal framework in Ecuador on data privacy, we advise organisations to follow the subsequent points when regarding data subjects in Ecuador:

- make available exactly what personal information the users will be providing;
- disclose what the use and destination of the data will be;
- users must expressly authorise that their data may be shared with third parties; and
- users must be able to access the database that contains their data and request its update, correction or elimination if it is their will.

Also, considering the expected changes to come with the Draft Bill, although it could take a while, it would be worthwhile to start implementing the following:

- detailed and specific contracts on data collection, use and transfer;
- public and well-known notices about the collection and use of personal data;
- technological measures to prevent hacking, theft and alteration of information;
- internal preventive measures on data management and security; and
- compliance from suppliers on data protection and how to obtain them.

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