



Chile's complete overhaul of data protection

Rodrigo Velasco A. Partner
rodrigovelasco@alessandri.cl

Sebastián Molina Associate
smolina@alessandri.cl

Francisco Silva V. Associate
fsilvavm@alessandri.cl
Alessandri, Santiago

In the past year, Chile has made significant progress towards its reform of the data protection regime, from establishing the right at a constitutional level to moving forward with a bill seeking to modernise the current law. Rodrigo Velasco A., Sebastián Molina and Francisco Silva V., Partner and Associates respectively at Alessandri & Compañía, discuss these developments and how they will change the data protection landscape in Chile.

Constitutional reform

Chile is currently undergoing a complete change of its data protection framework. This began last June, when an amendment to Article 19 No. 4 of the Constitution, Law No. 21.096 Establishing the Right to Protection of Personal Data was introduced ('the Amendment'). The Amendment specifically recognises the 'protection of personal data' within the scope of the constitutional guarantee of the protection of private life and honour, stating that the 'treatment and protection of this data will be subject to the forms and conditions established by law.'

The Amendment is the first tangible step, in a comprehensive overhaul of data protection rights, currently governed by a 20-year old law, which, since its enactment, has been heavily criticised for its low standard of protection for personal data holders. Among those that can be mentioned is the absence of a public and centralised authority that controls this matter, the absence of effective sanctions, and the lack of procedures

to safeguard personal data rights. The legislative efforts are aimed at creating a higher protection standard, in harmony with the Organisation for Economic Co-operation and Development ('OECD') directives, and represent a substantial change in the current regulatory scenario on data collection, processing, and cross-border transfers. Chile was the first South American country to join the OECD and pledge its full dedication to achieving the OECD's fundamental goals since its accession in 2010.

The data protection bill

The new data protection bill ('the Bill'), introduced by the Ministry of Finance in 2017, will completely change the current legislation. The legislative project was merged with the National Congress of Chile's own pending bill and then approved in general by the Senate of Chile ('the Senate') last April. One of the main effects that the new statutory regime will bring is a strengthening of the rights of data holders, together with better and more efficient enforcement

tools, and more robust sanctions for companies and institutions that infringe the law. These efforts are not only directed towards the empowerment of data holders, but are also aimed at creating a new regulation for the international transfer of personal data, which is seen as a way to create new business opportunities for the Chilean market by attracting companies that need to operate in countries considered 'safe harbours' for data processing.

The Bill, which seeks to modernise the Law No. 19.628 on the Protection of Private Life 1999, stands out for incorporating the following major changes:

A public and autonomous Personal Data Protection Agency will oversee the regulation, control and compliance

For these purposes, the Government has just introduced a proposal for these functions to be fulfilled by the current Chilean Transparency Council ('CPLT'), an independent public entity in charge of granting and guaranteeing everyone's

The new Agency will have a string of powers both to interpret and dictate regulations according to the law, as well as to approve and certify proposed data privacy policies and prevention models for up to three years.

continued

access to public or governmental information of any kind. This last move is considered to be a sign that the Government is trying to speed up the Bill and comply further with OECD international standards, by using a public entity that is already operating as a starting point for the new Personal Data Protection Agency that would otherwise have taken more time to implement.

Although some have criticised the proposed new entity, now named Council for Transparency and Personal Data Protection ('the Agency'), over its double tasks and possible incompatibilities due to the broad scope of its functions, there seems to be a general agreement regarding its independence.

The new Agency will have a string of powers both to interpret and dictate regulations according to the law, as well as to approve and certify proposed data privacy policies and prevention models for up to three years. The Agency will be entitled to process data holders' claims and investigate all sorts of possible infringements. It will have the authority to prosecute, inspect and impose fines, in coordination with the data processor's corresponding public regulator and even order the suspension of the data processing in case of recidivism or contempt. So, in practice, it will be a first instance court, giving the ordinary justice courts of appeals the authority to revise its decisions.

The Bill will create and strengthen data holders' rights, known as 'ARCO Rights'

The main characteristics of these rights are the following:

- Access: the right to request and obtain information regarding the personal data held by an institution and its origin, including portability (a copy of personal data managed by the corresponding organisation).
- Rectification: the right to request the correction of the personal data.
- Cancellation: the right to request the destruction of the personal data.
- Opposition: the right to demand that companies that have personal information not treat it or use it (including the so called 'right to be forgotten').

The Bill will establish a 15-day term to respond for entities that are required to apply one of the ARCO Rights, which will represent a challenge for companies handling significant amounts of personal data and that have not generated internal systems capable of promptly responding to these new types of requests.

Information regarding data relating to minors, ethnicity, race, sexuality, political affinity or religious beliefs will be considered 'sensitive data'

The custody, security and diligence standards for the treatment of sensitive data will be highly raised. Current discussion in the Senate includes geo-localisation, biometric data and even a general concept of 'habits' data to be considered as sensitive.

Prior consent for the treatment of personal data, which must be previously informed, unequivocal and specific

The Agency will be entitled to dictate guidelines for appropriate consent clauses, privacy policies and its conditions. In the case of sensitive data, this consent will be through an explicit written statement or by an equivalent technological procedure.

Conclusion

In sum, and although there are many other aspects of the Bill that are currently being discussed before Congress, these legislative efforts will definitely represent a new higher and more robust data protection standard, that will likely present many challenges for companies currently operating in Chile when it comes to reviewing their current personal data practices and policies. This new scenario will also guarantee the international 'safe harbour' standards for cross-border transfers of personal data to and from Chile, in order to attract foreign and local investment in technology, including data centres, but also in areas such as financial, insurance and retail in general. The recent meetings held in the US by the Chilean President with the CEO's of Apple Inc., Facebook, Inc. and Amazon. com, Inc., among others, have also been considered as a powerful example of the current Government's commitment to meet the OECD's data protection standards, in order to promote and facilitate foreign investment in Chile. This gives a good reason to believe that the Bill should be enacted by the end of this year or in the first semester of 2019 at the latest.

