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Cross-border data transfers under the Colombian data protection regime

In August 2017, the Colombian data protection authority ('SIC') issued Circular No. 05 of 2017, which develops the regulation of cross-border data transfers in Colombia ('the Circular'), following consultations held in February and July to seek comments on the criteria SIC should use to determine which countries provide an adequate level of data protection. Ivan Dario Marrugo Jimenez and Andres Felipe Contreras Poveda, Partner & CEO and Associate Consultant at Marrugo Rivera & Associates - FuturLex respectively, analyse the Circular and what it means for the transfer of personal data outside of Colombia.

Determining adequacy

By approving the Circular, SIC took one of the most controversial decisions in years related to data protection, not only in Colombia but internationally, by declaring that the US provides an adequate level of data protection. Independently of the criticism that this decision has led to, SIC has prepared a regulatory model with a series of provisions to reinforce the obligations that derive for data controllers and processors from the transfer and transmission of personal data to third countries.

In this context, the Circular sets out the standards used to determine which countries provide a high or adequate level of personal data protection, in order to verify that a transfer or transmission can be carried out lawfully, without any additional burden or requirement beyond that of observing whether the country of destination of the personal data is contained in the list included in the Circular ('the Adequacy List').

Subsequently, the Circular states that when the transfer of personal data will be made to a country that is not in the Adequacy List, it will be the responsibility of the data controller to verify if the country to which the data is being transferred meets the established standards. If the recipient

country does not comply with the standards, the controller will have to request a declaration of conformity from SIC in order to transfer the data.

These standards, included in Section 3.1 of the Circular, are the following:

- the existence of rules applicable to personal data processing;
- normative recognition of principles applicable to data processing, such as legality, purpose, freedom, veracity or data quality, transparency, access and restricted circulation, security and confidentiality;
- regulation of data subject rights;
- regulation of the duties of data controllers and data processors;
- existence of judicial and/or administrative means and channels to guarantee the protection of the rights of data subjects and to demand compliance with the law; and
- existence of supervisory authority/ies for personal data processing, compliance with applicable legislation and the protection of the rights of data subjects.

International transmissions of personal data

At this point, it is pertinent to make a series of observations and comments on the position that Colombian legislation

has taken with regard to the concepts of 'transmission' and 'transfer,' in the face of the model the Circular creates.

Article 24(2) of Decree 1377 of 2013 (June 27) Which Partially Regulates Law 1581 of 2012 ('the Decree') provides that international transmissions of personal data between a data controller and a data processor to allow the processor to perform the processing on behalf of the data controller, shall not require the data subject to be informed or to give their consent when there is a contract under the terms of Article 25.

The abovementioned article mirrors Article 2.2.2.25.5.2 of Decree 1074 of 2015, mentioned in the Circular. According to this provision, the international transmission of data between a data controller and data processor may be of two types, contractual or extracontractual. Extracontractual transfers must be authorised by the data subject.

By virtue of the contractual relationship illustrated in Article 25 of the Decree, data controllers and data processors are responsible for, respectively, the following:

- indicating the scope of the processing, the activities the processor will perform on behalf of the controller



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for the processing of the personal data, and the obligations of the data processor with regard to the data subject and the data controller; and

- committing to complying with the controller's obligations under the data processing policy the controller has set out and performing the data processing in accordance with the purposes the data subjects have authorised and with applicable laws.

In addition, among other duties, the Decree specifies the following obligations for data processors:

- to process, on behalf of the data controller, personal data in compliance with the principles that safeguard them;
- to safeguard the security of the databases containing personal data; and
- to maintain confidentiality regarding the processing of personal data.

Having said that, it should be clarified that the exemption regarding the obligation to inform and obtain authorisation from data subjects referred to in Article 24(2) of the Decree, unlike the contractual requirements contained in Article 25, alludes not to the information on, and consent to, the processing itself, but specifically, to the sending of personal information that will be processed by a third party through the international transmission of data. Now, as indicated in the Circular,

regarding the instructions for the international transmission of personal information if there is no transmission contract, one of the following rules must be complied with:

- informing the data subject of the transmission of the data and obtaining their authorisation for it; or
- observing the provisions of Article 26 of Statutory Law 1581 of 2012 (October 17) Which Issues General Provisions for the Protection of Personal Data ('the Data Protection Law').

Article 26 of the Data Protection Law refers to the general prohibition not to transfer personal data of any kind to countries that do not provide adequate levels of data protection, subject to a list of exceptions.

Equally, it is pertinent to mention that, except for the special characteristics of the concepts of transfer and transmission which are ultimately a result of the qualities that distinguish the figures of controller and processor in terms of the power of decision-making, control and direction that the former has over the latter – the only difference present in the Data Protection Law and the Decree, is the transmission contract contained in Article 25 of the Decree.

Conclusions

The following conclusions can be put forward after analysing the Circular. Firstly, the reference made by the

Circular to Article 26 of the Data Protection Law, rather than revealing a protectionist character, since it equates the regulation of transmissions with that of transfers, may mean that SIC, to some extent, did not fully understand the will of the legislator. If the latter had wanted the provisions that are exclusive to one figure to apply to the other, it would not have bothered to make such a categorisation, nor assign specific articles to each.

Secondly, the concept of unauthorised international transfers, previously supported exclusively by the existence of a contract between the data controller and the data processor that is clearly intended to assign the competences, obligations and responsibilities of both parties, is now much broader. This is the case since such transmissions can be carried out on one of the grounds set forth in Article 26 of the Data Protection Law, on the basis of a declaration of conformity issued by SIC beforehand, or if the transmission is to one of the countries listed in Section 3.2 of the Circular.

Thus, although SIC sought to relax the issue of transmissions in favour of data controllers, this may lead to, correlatively, additional issues, by depriving personal data of a protection tool, which is the contract of transmission of personal data contained in Article 25 of the Decree.