



## The influence of European Union personal data protection standards in Latin America from the perspective of social actors and Latin American authorities

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*ABSTRACT: This article seeks to delve into the perspectives of social actors across several Latin American nations regarding the impact of the European Union's (EU) personal data protection standards on their respective legal and administrative systems. The analysis is structured into three distinct sections, each contributing to a comprehensive understanding of this influence, culminating in a concise conclusion. The initial segment scrutinises excerpts from field interviews, shedding light on the influence of the EU and its legal provisions in shaping the national legal frameworks of researched countries, including Argentina, Brazil, Colombia, Chile, Costa Rica, Mexico, Panama, Peru, and Uruguay. The second part shifts the focus to a post-General Data Protection Regulation (GDPR) era, exploring the heightened awareness surrounding adequacy processes crucial for securing favourable decisions from the European Commission for international data transfers. Concluding the analysis, the third part examines selected excerpts from interviews about the relationship between the abovementioned*

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*countries and the Council of Europe's Convention 108+ and the Budapest Convention. Notably, these conventions serve as additional benchmarks in the data protection landscape. In summary, findings from the field research underscore that the influence of EU law significantly outweighs that derived from standards outlined in Council of Europe treaties. Additionally, interviews reveal a palpable recognition of the imperative to draw insights from diverse global regulatory examples, hinting at the potential for a unified global regulation.*

*KEYWORDS: European Union – personal data protection – Latin America – influence – social perceptions.*

## Introduction

This text seeks to explore the impact of the European Union (EU) model on data protection regulations and the establishment of personal data protection authorities in selected Latin American countries. The countries under investigation, chosen based on the presence of national data protection and privacy laws and established authorities, include Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, Panama, Peru, and Uruguay. Additionally, perspectives were gathered from Portugal and Spain through interviews to discern any Ibero-American viewpoint on personal data protection.

The research objective was to understand whether there is an Ibero-American perspective on personal data protection by eliciting perceptions through interviews. This text is a segment of the extensive interviews conducted in the project, “*Documentary and field research on data protection authorities in Latin America: the social and institutional concept of privacy and personal data protection*” under the FAPESP/MCTIC 2018 Call. The international influences on Latin America, particularly from the EU, were a part of the interviews.

Among several issues, the research sought to answer two questions this article addresses. The initial query sought to ascertain the presence of legal influence from the EU on the personal data protection statutes of the examined countries. It was essential to investigate the impact of specific directives, namely Directive 95/46/EC, the General Data Protection Regulation [GDPR, Regulation (EU) 2016/679], and Directive (EU) 2016/680. In instances where affirmative responses were received, the subsequent phase of the interview involved an in-depth discussion on the perceived mechanisms through which this influence unfolded, as articulated by the interviewees. Additionally, in the partially organised research protocol, there was a complementary question about Convention 108+ and the Budapest Convention, both from the Council of Europe, as relevant international agreements that would assist in parameterising the processing of personal data in Latin American countries.

Thus, the article addresses interviewees’ perceptions from various social sectors in the researched Latin American countries. Interviewees encompass individuals from governmental entities, data protection authorities, the private sector, the academic and scientific community, and organised civil society. This diverse range of perspectives proves valuable in comparing national viewpoints regarding the impact of EU law on Latin America. It serves as a foundation for shaping personal data protection laws in each country and delving into discussions about updating local norms to align with the provisions of the GDPR. In addition, this text analyses the role of the Council of Europe treaties in adapting the data protection authorities of the investigated Latin American countries. The research design was

intentional. The idea was to oppose diverse national actors to shield researchers from being confined to the perspective of a singular social segment – such as organised civil society – in their qualitative interpretation of the material.

The impact of the European continent on safeguarding personal data in Latin America hinges on two primary factors. First, Latin American countries are converged with the General Data Protection Regulation (GDPR) within the EU framework. Second, there is the integration of Convention 108 into the legal frameworks of Latin American nations, accompanied by the adaptation of this Council of Europe agreement into its updated form, Convention 108+.<sup>1</sup> It is important to emphasise that while these two rationales are complementary, they pertain to distinct systems. These two systems (GDPR and Convention 108) serve as standards for Latin America, established by the Ibero-American Network of Personal Data Protection (RED), as explained by a Spanish interviewee: “*The idea of these standards is that they serve as a reference for those countries that were beginning to legislate (...); having a country aligned with Europe in Ibero-America represents a significant advance from a commercial and economic perspective.*”<sup>2-3</sup>

Hence, the subsequent sections in this text investigate the impact of Directive 96/45/EC and the involvement of regulatory authorities in EU Member States, with a particular focus on Spain, in shaping data protection laws for Latin American nations. This exploration also encompasses the updates introduced by the General Data Protection Regulation (GDPR) and the adequacy decisions made by the European Commission. Furthermore, this discussion has an intricate link to the trajectory of Latin American countries aligning with Convention 108+. This Convention is the initial binding international instrument designed to safeguard individuals against potential abuses while collecting and processing personal data, simultaneously regulating the cross-border flow of such data. Conversely, adequacy decisions ascertain whether a third country outside the EU possesses adequate data protection for conducting international data transfers. The European Commission grants these decisions complying with Article 45 of the GDPR.<sup>4</sup>

The impact of adequacy decisions and Conventions 108 and 108+ becomes apparent upon recognising that these subjects are the focus of academic production in Latin America. All these topics originated from the semi-structured interview script, a research instrument designed to facilitate a discussion on these specific issues.

<sup>1</sup> ARG5ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas)* – volume 2, Alexandre Veronese *et al.* (Brasília: Fapesp, January 31, 2023), 1260.

<sup>2</sup> ESP1ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas)* – volume 2, Alexandre Veronese *et al.* (Brasília: Fapesp, January 31, 2023), 274.

<sup>3</sup> The interviews, initially conducted in Portuguese and Spanish, were translated by the authors themselves. The present English version is a result of their new translation.

<sup>4</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, concerning the protection of natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), accessed: 25 July 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN>.

## 2. The construction of laws in Latin America and their relationship with EU models

Even before the GDPR, Directive 96/45/EC was a significant element of EU influence in Latin America. It played a crucial role in providing general principles and inspiring the formulation of the “ARCO” rights (“*acceso, rectificación, cancelación y oposición*”),<sup>5</sup> which have become a common expression in the region. The Directive came about in a context of harmonisation and regulation in the face of the emerging electronic commerce of the information society, as explained by a Mexican interviewee:

*“I believe that, in the end, much of the context about personal data in Latin America comes from the EU. This fact stems from Directive 95/46/EC, which contains the principles of Data Protection. The Directive, at that time, was very noble in the sense that it left us with excellent precedents. So much so that, later on, the EU determined that the Directive was no longer sufficient and enacted the General Data Protection Regulation based on the principles derived from the Directive. When we look at many of the legislations in Latin America regarding personal data, they embody the principles of the Directive.”*<sup>6</sup>

In this process of diffusion of models, the Spanish influence in Latin America in the context of an EU Member State and the role of RED becomes clearer. Under the terms of the National Data Protection Commission of Portugal, RED:

*“[...] is an integrative forum of various actors, both from the public and private sectors, and develops initiatives and projects related to data protection in the Ibero-American space, to maintain and strengthen a constant exchange of information, experiences, and knowledge, as well as promoting the legislative developments necessary to guarantee an advanced regulation of the right to the protection of personal data in a democratic context, taking into account the continuous flow of data between countries that have common ties and a concern for this right.”*<sup>7</sup>

An interviewee from Peru indicates this: “I believe that RED was the main lobby or influence from the EU to implement personal data laws in the region.”<sup>8</sup> The influence was exerted through the dissemination of the former Spanish data protection law over Latin American legal frameworks, as indicated by the reports of interviewees from Costa Rica,<sup>9</sup> Peru<sup>10</sup> and Mexico.<sup>11</sup> That is why it is possible to speak of a European or EU standard when protecting personal data, even though the matter has particularities among its Member States.

<sup>5</sup> The literal meaning in English is: access, rectification, cancellation and objection.

<sup>6</sup> MEX8ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 611.

<sup>7</sup> Comissão Nacional de Proteção de Dados, “Rede Ibero-americana”, accessed October 23, 2023, <https://www.cnpd.pt/internacional/rede-ibero-americana/>.

<sup>8</sup> PER7EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 514.

<sup>9</sup> CRI5EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 883.

<sup>10</sup> PER9APD, PER5OSC and PER8OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 525, 465, 516.

<sup>11</sup> INAI-1, MEX3EMP in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 644, 721, 729.

Even when attempting to contrast the issue with the potential influence of the United States (US), the EU stood out as a model of inspiration. Consider the statement of another interviewee from Peru:

*“I have never seen much influence from the US. No one talks much about it. What goes is that the law, at least in the region, is a Roman law and, therefore, greatly influenced by what happens in Europe. It is more influenced by what happens in Spain. Sometimes, the old legal norms in Latin America are very similar to those of the EU. Especially the Spanish law. The Organic Data Protection Law No. 15/1999 and its amendments. In Peru, particularly regarding markets, competence, and commercial issues, there is an influence from legal or juridical aspects of the US. That is, the free-market vision is very close to that of the US. Here, the free market is an important issue. Economically speaking, Peru is a social market economy. So private initiative is privileged here and the state only acts as a subsidiary when the private sector is unable to be one. This fact gives much power to private companies to decide how they want things to be. The State has, at times, struggled a lot to have a more protectionist regulation. Those struggles include personal data. That is why, at this moment, it is challenging to update the law in Peru in line with the General Data Protection Regulation, which has many prescriptive protections. In our country, updating our law is considered quite complex. Also, there are many criticisms of the GDPR.”<sup>12</sup>*

The transcribed statement of an interviewee from Peruvian civil society is worth exploring in more detail. On the one hand, they indicate the influence of EU law and Spain, in particular, due to the Roman-Germanic legal tradition. On the other hand, however, they suggest there should be some criticism regarding the EU model, which would be more interventionist in the economy. Thus, they contrast EU law with the US legal context, which, in their view, is more aligned with free-market values – values they note are at the core of the Political Constitution of Peru. According to this same interviewee, foreign legislation was imported into the country without any social awareness of the issue of personal data protection. They believe that, in 2011, the population lacked culture and knowledge: *“A country imports a rule, and the people have no literacy about personal data. This rule is never applied. That is what happened in Peru.”<sup>13</sup>* The legal doctrine also highlights this process of importation when discussing the Peruvian law of 2011:

*“The Peruvian law on personal data protection, whose legal categories come from Spanish and EU regulations, is therefore not exempt from the indicated update, not only because it contains these references. But mainly due to the global nature of technological evolution. Likewise, as in other legal systems, exercising the fundamental right and protecting personal data must be guaranteed in the new technological and economic environment.”<sup>14</sup>*

In Uruguay, this inspiration relies on the Directive 95/46/EC. As it is a law from 2008, Uruguayan law also resorted to that EU Directive. In the eyes of other regional and international actors, this fact would position the country well in Latin

<sup>12</sup> PER3OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 431.

<sup>13</sup> PER3OSC in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 418.

<sup>14</sup> Diego Valdivia, “La normativa peruana de protección de datos personales frente al reto de pasar de un modelo de gestión de datos al uso responsable de la información”, in *La proyección del Derecho Administrativo Peruano: estudios por el Centenario de la Facultad de Derecho de la PUCP*, ed. Diego Zegarra Valdivia (Lima: Palestra Editores, 2019), 176.

America. However, one of the interviewees expressed concern that, in practice, the country might only be partially compatible with some aspects of the GDPR, like other countries, such as EU Member States. This issue would occur due to a need for more personnel, resources, or investment in training.<sup>15</sup> Uruguay's favourable positioning comes with the adequacy decision by the European Commission in 2012, which still stands today. This decision would allow Uruguay to gain some competitive advantages economically. An example would be more ease in receiving investments. Another example would be the possibility of hosting *data centers* and *call centers*. All these benefits would be related to the country's suitability for international data transfers with the EU.<sup>16</sup> The close relationship with Spain also extends to the managerial level of data protection or control authorities. This collaboration goes beyond the legal field: "*There is a great deal of interaction with the Spanish Data Protection Agency; in fact, there have been missions of experts from the Spanish Agency who have been here in Uruguay; and later, the initial law, so to speak, underwent several modifications.*"<sup>17</sup> The Uruguayan data protection authority, AGESIC, also had the challenge of helping to advance legislation to be at the same level of protection as the EU legal norm and practices, thus complying with the necessary standards to receive the adequacy decision of the European Commission.<sup>18</sup>

In Costa Rica, they also believe that the former Spanish data protection law significantly influences the country's legislation.<sup>19</sup> On the one hand, this influence of the old Spanish law is seen as beneficial, as it allows the existence of a normative parity. However, on the other hand, it is understood as problematic, given the existence of very different social and cultural contexts between the two countries.<sup>20</sup>

Colombia, in particular, is believed to have a more significant US influence. This influence would happen particularly in administrative terms, including personal data protection. One possible indication is that its authority structure is part of a larger body, the Superintendence of Industry and Commerce (SIC). That body encompasses various administrative powers. This structure could be a legacy from the US, where it is usual to create broader technical bodies to address multiple sectoral issues. Despite some differences, SIC is similar to the *Federal Trade Commission*, the FTC.<sup>21</sup> The SIC and the FTC have administrative powers to regulate competition,

<sup>15</sup> URU5ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 293.

<sup>16</sup> URU6ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 402.

<sup>17</sup> URU7ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 314.

<sup>18</sup> URU3APD and URU4APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 366.

<sup>19</sup> CRI5EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 886.

<sup>20</sup> CRI4APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 943.

<sup>21</sup> COL4APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre

consumer protection, and personal data protection. Furthermore, in Colombia, the influence of the US is not limited to the characteristics of its authority. An interviewee stated that there is “*commercial, political, as well as social dependence, i.e. in the sense of social mobility. This is made evident by the substantial percentage of Colombians living in the US.*”<sup>22</sup>

However, other interviewees emphasise that Colombia’s personal data protection system is highly centred on fundamental rights, recognised in its Political Constitution and applied by the Judiciary. According to one of them, this would make the Colombian system more robust than the US model, which lacks constitutional provisions for personal data protection, even by interpretation.<sup>23</sup> Therefore, the influence of the EU in this country occurs through legislation and the use of the GDPR as a standard in this global reach of EU law, as indicated by Elaine Fahey.<sup>24</sup> Notably, the explanatory statement of Law No. 1581 of 2012 in Colombia refers to the EU, not the US.<sup>25</sup> Spain is remarkably influential in stimulating the creation of laws and personal data protection systems in this country. According to an academic interviewee, creating the law in Colombia was a repercussion of the Spanish system.<sup>26</sup> Specifically, according to his description, the oldest Spanish data protection law from 1992,<sup>27</sup> known by the acronym LORTAD (pre-dating Directive 95/46/EC and updated in 1999 after the EU legal norm), was central to the construction of Colombian law.<sup>28</sup> According to interviewees from Argentina and Mexico, this normative movement in Spain also directly influenced the construction of laws before the GDPR in 2016.<sup>29</sup> In 2018, after the advent and enforcement of the GDPR, the Spanish law was replaced by the *Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales*.<sup>30</sup>

Returning to the case of Colombia, the SIC interviewees state that its actions and resolutions draw the attention of other data protection authorities, especially

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Veronese *et al.* (Brasília: Fapesp, January 31, 2023), 995.

<sup>22</sup> COLIACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese *et al.* (Brasília: Fapesp, January 31, 2023), 1035.

<sup>23</sup> COLIACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese *et al.* (Brasília: Fapesp, January 31, 2023), 1023.

<sup>24</sup> Elaine Fahey, *The Global Reach of EU Law: Studies in Modern Law and Policy*. (New York: Routledge, 2017).

<sup>25</sup> COLIAPD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese *et al.* (Brasília: Fapesp, January 31, 2023), 1004.

<sup>26</sup> COLIACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese *et al.* (Brasília: Fapesp, January 31, 2023), 1029.

<sup>27</sup> Spain. “Ley Orgánica 5/1992, de 29 de octubre, de regulación del tratamiento automatizado de los datos de carácter personal. (Madrid: BOE, October 31, 1992), accessed: 25 July 2023, <https://www.boe.es/buscar/doc.php?id=BOE-A-1992-24189>.

<sup>28</sup> Spain. “Ley Orgánica 15/1999, de 13 de diciembre, de protección de datos de carácter personal”. (Madrid: BOE, December 14, 1999), accessed: 25 July 2023, <https://www.boe.es/buscar/act.php?id=BOE-A-1999-23750>.

<sup>29</sup> MEX3EMP and ARG1ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volumes 1 e 2*, Alexandre Veronese *et al.* (Brasília: Fapesp, January 31, 2023), 729, 1343.

<sup>30</sup> Spain. “Ley Orgánica 3/2018, de 5 de diciembre, de protección de datos personales y garantía de los derechos digitales”. (Madrid: BOE, December 6, 2018), accessed: 25 July 2023, <https://www.boe.es/buscar/doc.php?id=BOE-A-2018-16673>.

those in the EU. Also, an interviewee from SIC explains how the country has collaborated with other neighbouring countries and the US on specific issues. A good example is when the same interviewee talks about the massive impact of large companies with a global presence and operating transnationally.<sup>31</sup> One interviewee representing academia associates this SIC model with the operation of the FTC due to its administrative action: *“It has independent administrative functions. In theory, then, it can initiate administrative investigations on its own, independently and autonomously; in addition, it has jurisdictional functions, so it acts like a judge; it sanctions individuals as a judge, that is, with stronger powers.”*<sup>32</sup>

On the other hand, Chile has an ancient law from 1999, also based on EU Directive 95/46/EC. Updating this law to an adequate level of protection is widely discussed and implies a potential change of perspective on the issue of personal data protection in the country.<sup>33</sup> Likewise, Mexico is a country whose 2010 private sector law took its basis from Directive 95/46/EC, according to an interviewee from INAI: *“The private sector (law) is outdated because it is from 2010. Then, it no longer corresponds to the EU standard. At that time, the big example was the EU Directive 95/46/EC, which is no longer in force because of the approval of the GDPR.”*<sup>34</sup>

Meanwhile, the data protection law applicable to the public sector in Mexico, as will be discussed further on, is more recent and is already in line with the GDPR. The RED and the Spanish Data Protection Agency were the first drivers of Mexico’s personal data protection topic. Their influence would have been significant in integrating personal data protection into the state entity dealing with information access. Until then, it was called IFAI. Later, it was expanded and became the current INAI, according to a business sector interviewee.<sup>35</sup>

In Argentina, the process of drafting the data protection law in 2000 took place due to the influx of foreign resources and the need to become a country suitable for international transfers. In the words of a representative of civil society:

*“Argentina has received much foreign investment, mainly from Europe. They say that one of the conditions for these investments to reach Argentina was that it had a personal data protection law. Especially by telecommunications companies. Several of the most important telecommunications companies in Argentina are European.”*<sup>36</sup>

<sup>31</sup> COL4APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 982.

<sup>32</sup> COL1ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1029.

<sup>33</sup> CHI5OSC and CHI6OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1187.

<sup>34</sup> MEX7APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 630.

<sup>35</sup> MEX4EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 651.

<sup>36</sup> ARG4OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1409.



The same account is given by a government interviewee in Argentina, for whom the creation of the law was especially inspired by the Spanish legislation of the time. Also, the government had a direct dialogue with the Spanish Data Protection Agency.<sup>37</sup>

*“In 2000, with the law, Argentina was one of the pioneers in sanctioning a statute in the region. Argentina was an international or regional example of an organisation. Argentina’s adherence to Convention 108 and the Budapest Convention provides a framework that fundamentally integrates Argentina into the rest of the world. However, this also commits Argentina to adapt its local regulations to standards and best practices.”*<sup>38</sup>

Latin America, facing the influence of models and the creation of data protection laws inspired by the EU, also departs, to a large extent, from the US legal approach. In the US, part of privacy protection is a consumer right. A Mexican interviewee affirms, *“we have it as a fundamental right, just like in the EU, not the US. There, the issue came as a consumer right, except for some bills under discussion.”*<sup>39</sup> The same response regarding the influence of the EU, compared to the US, is echoed in Peru by a civil society interviewee:

*“Peru generally looks at what the US does, but not specifically on personal data protection. The Peruvian tradition is to have many laws and regulations. The general conception is that. We look at this issue as follows. The US is flexible when it comes to personal data protection. They are not as demanding as the EU. Therefore, Peru looks more like continental Europe than the US on these issues.”*<sup>40</sup>

It is fascinating to see this dichotomy. On the one hand, the interviews indicate that the US has a remarkable influence in the fields of politics and economics in South America, Central America, and the Caribbean. However, it is a different story regarding the construction of legal infrastructure. This is particularly visible in the protection of personal data. The benchmark is continental European law. Consequently, EU law takes precedence, as explained by an interviewee from the business sector: *“The influence of EU personal data protection on Peru’s level is much stronger than that of the US, which is null; however, at the political, economic and general level, the influence of the US is 100 times greater than the European influence in Peru.”*<sup>41</sup>

There is a particular institutional contact between the US FTC and the Peruvian authority and, as mentioned above, with the Colombian authority, the SIC. However,

<sup>37</sup> ARG7GOV, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1314.

<sup>38</sup> ARG1ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1376.

<sup>39</sup> MEX8ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 622.

<sup>40</sup> PER2OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 459.

PER6EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 562.

<sup>41</sup> PER6EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 562.

when it comes to the protection of personal data protection, the primary relationship observed is with the EU in regulatory terms, as explained by a Peruvian authority interviewee.<sup>42</sup>

*“We are very close to this because the law also allows the Peruvian data authority to issue opinions on whether a country has adequate protection. We did that in the case of the US. We did it in the case of Chile. However, we are always looking at what is happening in Europe to have an opinion on the appropriate levels of protection. So we follow the international debate very closely.”*<sup>43</sup>

Hence, it is possible to understand that, regarding the US, the Latin American countries analysed take the positions of the EU as an example for their actions. That is, with some exceptions, they handle the issue of personal data protection with the US like that of the EU and its Member States. An example of this is explained by a Uruguayan academic, mentioning the decision of the Privacy Shield issued by the Court of Justice of the EU (CJEU). This ruling determined the invalidation of the European Commission’s decision that recognised the US as an adequate destination for the processing of personal data originating from the EU:

*“Uruguay, like almost all Latin American countries, has opted for the European model. In this sense, the European Commission also has a clear influence because of Uruguay’s adequacy. To such an extent that when the CJEU ruling came out, two decisions in our country followed a similar path. The EU declared the Privacy Shield agreement with the US invalid. In Uruguay, months later, it was also declared invalid. In other words, Uruguay “joined” the EU. So, I might add. It is not that the US has no influence. It is not that Uruguay ignores the US. Nevertheless, it follows the EU criteria. Clearly. What is the model that has prevailed globally? (...). So, I am not saying that Uruguay turns its back on the US because that is also there. Not at all. Not least, because there are critical US technology companies operating in Uruguay. The fact that they originate in the US and have headquarters there and in Uruguay does not mean we are turning our backs on them. Far from it! However, our personal data protection model is more European than American.”*<sup>44</sup>

In summary, one can see the creation and modification of national laws in response to the movements of the EU. The same is true for practices and symbols. For instance, many of the authorities’ opinions in interviews rely on cases from the EU, not those from the US.<sup>45</sup> Finally, it is possible to detail a movement to update the current laws of these Latin American countries before 2016, that is, before the GDPR. This process involves the creation of new legal and regulatory frameworks.

<sup>42</sup> PER9APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 527.

<sup>43</sup> PER9APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 540.

<sup>44</sup> URU6ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 412.

<sup>45</sup> PER10GOV, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 496.

### 3. The movement to update national laws following the advent of the GDPR and the dissemination of adequacy decisions

The extraterritoriality of the GDPR and its global reach makes it a standard used worldwide by large companies in terms of personal data protection regulations, as explained by a representative of a major technology company in Brazil.<sup>46</sup> The GDPR is an inspirational model. However, there are not entire importations. This inspiration – and not mere translation – is due to the existence of particularities in Latin American countries. A civil society interviewee from Peru explained this:

*“Well, we used the GDPR as an idea. That is, we did not copy it. We cannot do that because there are also aspects of the GDPR that we do not like. Therefore, we could not bring them to Latin America. Especially because Latin America has its particularities, and you must respect them. You must start from these particularities to create a specific personal data protection law consistent with the GDPR.”*<sup>47</sup>

The above statement demonstrates the complexity of incorporating something with diverse origins into a legal culture, such as protecting personal data. An interviewee from the Brazilian data protection authority acknowledges the importance of looking at models from other countries to integrate into a more extensive and older global context on the subject:

*“It is an essential process because we are not isolated from the world in terms of practice or culture. So, there is a culture. We have this as a normative example. We seek references in more mature cultures. Thus, we have this great reference of European culture regarding data protection. Nevertheless, we also seek inspiration from other sources. At times, we look at what the US or Canada have done. At other times, we even turned to Singapore.”*<sup>48</sup>

The country’s internal challenges and regional dilemmas have some association with this inspirational process. Global standards, particularly those of the EU, would provide answers because Member States have already experienced controversy over similar issues. Looking at other Latin American countries would be necessary for the same reason, according to this same interviewee from the Brazilian data protection authority:

*“Do we have our national perspectives? Yes, we do. That is because we have our local market. We have a consumer culture and data usage that is our own. We have our specific challenges to overcome. We have our own legal culture, law firms, and legal practitioners typical of here. Thus, the behaviours of other markets are exactly like here. However, at the same time, we have something that unites us with the other Latin American countries.”*<sup>49</sup>

In the Peruvian example, the GDPR is a reference for the legal interpretation of various controversial issues in applying the local law and the regulatory decree of personal data protection. The GDPR and EU decisions are also a source of regulatory

<sup>46</sup> BRA5EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 122.

<sup>47</sup> PER3OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 430.

<sup>48</sup> BRA8APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 71.

<sup>49</sup> BRA8APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 71.

interpretation for technical issues, such as “cookies” and artificial intelligence, which Peruvian law does not expressly address. The Peruvian solution involved applying an interpretation based on the principles established in the law. Article 12 specifies that the list of principles is open, meaning that it is only exemplary. This openness allows for the use of international references in conducting such interpretations. One example is the guidelines drawn up by the Spanish Data Protection Agency. According to an interviewee, they use them as decision parameters in the case of “cookies” processing in Peru.<sup>50</sup> The usage of external material does not imply exact replication. However, there is an influence of EU standards. Another interviewee mentions the case of the obligation to designate a data protection officer, as well as the recognition of the right to data portability:

*“I call this ‘GDPRisation.’ In other words, the aim is for the Personal Data Protection Law not to be a copy-and-paste of the GDPR. Instead, the current bill under discussion, which introduces the right to data portability, includes the obligation to designate a data protection officer. It is about trying to meet certain standards of the GDPR.”<sup>51</sup>*

Around 2010, several Latin American countries created data protection laws. At that time, these laws had a different approach compared to what is present today, with the maturation of the GDPR. Currently, there is a movement by several Latin American countries to update their personal data protection laws. In this sense, Argentina and Peru are countries that are undergoing political processes to update their laws, as explained by a representative of Peruvian civil society:

*“What happens is that Peruvian law is within the group of Latin American laws that have emerged since 2010. Today, when it comes to personal data protection laws, the models that are aspired to or sought after are mainly those of the General Data Protection Regulation. Because it is recent, it dates from 2016 and came into effect in 2018. For example, the problem with Peruvian law is that the regulatory focus is on the database rather than necessarily on the individuals. (...). On the other hand, the EU’s GDPR talks about the user, the person, and the personal data that concerns them. These are different approaches.”<sup>52</sup>*

Another representative of the Peruvian civil society reiterates this same perspective. They mention that the data protection authority tends to focus more on the EU than on other social, political, and institutional environments:

*“The personal data protection authority always looks much more at what happens in Europe. What goes on there? What can regulate the GDPR’s innovations? (...). Even in legal doctrine as well. Peruvian professors or authors who address these issues use EU law. (...). We always look more at the EU data protection scenario.”<sup>53</sup>*

A particularity of Peru and other countries in Latin America is the requirement to register databases with authorities. This practice dates to previous models of

<sup>50</sup> PER6EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 548.

<sup>51</sup> PER6EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 549.

<sup>52</sup> PER3OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 420.

<sup>53</sup> PER2OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese, Rebecca Igreja and Alessandra Silveira. (Brasília: Fapesp, January 31, 2023), 458.

personal data protection, as explained in another text by the authors.<sup>54</sup> The compiled reports consider this would have been an excellent way to create a protection culture through companies and other entities that handle personal data. In the past, it was also a means for the authorities to make an initial assessment of the adequacy of the processing proposed by those responsible. However, the shift in technological perspective has rendered this form of regulation a mere formality.

A challenge in the effort to standardise the EU model in Latin America is the context of significant market informality in the countries of the global south. This fact can create a particular mismatch and regulatory enforcement challenges. It reveals a certain dissonance between the importation of models and the social, political, and economic reality of the countries, as reported by a businessman from Peru:

*“I understand that it is an overprotective standard for personal data protection. Applying such high standards in informal economies like Latin America creates a huge compliance gap. Either you create a black market, and the law is not complied with, or you create standards so*

*high that they are blocked. This problem can happen when these standards are so unattainable that people can not comply. Alternatively, they even block some economic development.”<sup>55</sup>*

A Peruvian civil society interviewee believes focusing more on local problems than on importing models detached from the local reality is necessary. Alternatively, even to analyse existing solutions in other Latin American countries with similar realities. This local approach would be better for building a regulation consistent with practical possibilities:

*“Looking at personal data protection only through the regulations we have in Europe, especially in Spain, creates certain difficulties. This issue happens because we do not know our reality. We need to know more about our reality and, from there, generate laws and bills. It would be better if people knew more. It would be more feasible if they knew more about this law. Sometimes, we imitate models from abroad. We can imitate neighbouring countries such as Brazil, Colombia, Argentina, and Chile. After all, we are countries with similar realities. However, when do we go to another reality? When do we go to Europe and imitate it? We do not know how people’s conception of this law will differ from ours.”<sup>56</sup>*

There is also a movement to conform to the new EU standards, in the words of a Costa Rican interviewee, as they are considered the highest:

*“Here, since the creation of the agency, we have sought to follow the highest standards in terms of data protection, regardless of where they are. The point is that the highest standards came from the EU. Moreover, they are very different from the systems used in the US.”<sup>57</sup>*

Indeed, a bill is under debate, and the proposed changes would meet the

<sup>54</sup> Alexandre Veronese *et al.*, “Cultura, privacidade e proteção de dados pessoais na América Latina: bases teóricas para uma pesquisa de campo e de documentos de caráter internacional”, *Revista de Estudos Empíricos em Direito*, v. 10 (2023).

<sup>55</sup> PER7EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese *et al.* (Brasília: Fapesp, January 31, 2023), 510.

<sup>56</sup> PER4OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese *et al.* (Brasília: Fapesp, January 31, 2023), 443.

<sup>57</sup> CRI7EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese *et al.* (Brasília: Fapesp, January 31, 2023), 914.

requirements for Costa Rica to join Convention 108+. As an interviewee from civil society expressed, this aligns with the country's aspiration and has been actively engaging with the Council of Europe.<sup>58</sup> However, there is a notorious debate related to the necessity for local adaptation:

*“Nevertheless, the parameters move more or less similarly; that is, EU Directive 95/46/EC was the one that motivated the creation of Law 8.968/2001 in Costa Rica. Now, we want the EU's GDPR to be the source that feeds our broad reform of the personal data protection law. In both cases, EU standards must adapt to our national reality.”*<sup>59</sup>

Another civil society interviewee reinforces this idea of adapting EU standards to the reality of each country.<sup>60</sup> They present the scenario of countries with new laws created, such as Brazil and Panama, which would have already done so in light of the GDPR. Meanwhile, countries with previous regulations, such as Costa Rica, should update themselves to the new EU model. One advantage of having a more recent law would be to include more current regulatory issues, such as anonymisation rules, the data protection officer, and adequacy decisions, as seen in the case of Panama, whose personal data protection law dates to 2019:

*“In our law, we start from the highest standard if we compare ourselves with the other countries in the region. We are one of the countries with the highest standards because we adhere to European models. We have this advantage over our neighbours. So, it would be easy to comply with the GDPR. Our national law already incorporates the base of it.”*<sup>61</sup>

Uruguay has undergone the same “modernisation” process that is taking place globally and in Latin America. This modernisation, as presented by Uruguayan authorities, is related to compliance with the GDPR and adopting the updated Convention 108, the 108+.<sup>62</sup>

In this new movement to update laws and create new legislation following the advent of the GDPR, the role of RED stands out, acting as a forum of dialogue between Latin America and the EU.<sup>63</sup> An interviewee from the Colombian authority also emphasises the importance of RED. This importance would occur through strengthening regional integration on personal data protection. However, “we have Spain, which is part of the RED. It gives us that European influence.”<sup>64</sup> One of the two Mexican

<sup>58</sup> CRI3OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 823.

<sup>59</sup> CRI6EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 864.

<sup>60</sup> CRI3OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 835.

<sup>61</sup> PNM3APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1500.

<sup>62</sup> URU3APD and URU4APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 374.

<sup>63</sup> URU3APD, URU4APD and MEX3EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 390, 375, 714.

<sup>64</sup> COL4APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 992.

laws, the *Ley General en Posición de Sujetos Obligados*, from 2017, is also considered an “adapted version” of the GDPR, according to a civil society interviewee from that country.<sup>65</sup> On the one hand, this would place it as an advanced law compared to the EU standards. The Mexican authority, INAI, emphasises that the 2017 law follows the international standard of the GDPR. It adds that it takes into account the Ibero-American personal data protection standards,<sup>66</sup> that RED creates and approves.<sup>67</sup>

Colombia also has an appropriate international data transfer level with the United Kingdom after the evaluation of the British authority (Information Commissioner’s Office).<sup>68</sup> Chile still needs to have a specific data protection authority. However, its legislation follows the EU model for the protection of personal data, according to the interviewee from the *Consejo para la Transparencia*. It is noteworthy that this is the body that might eventually become the data protection authority:

*“The GDPR is the guiding principle. The focus of what is under debate now in Congress centres around respecting fundamental rights in personal data protection. Another debate revolves around enabling mechanisms, as occurs in the Asia-Pacific Agreement. The debate with the US is more about enabling data processing. Different from the EU, it is more of a trade-based discussion. It is a debate to facilitate trade relationships. It exists. However, our national focus is more oriented towards creating regulations that allow the processing of personal data, but under specific conditions and with a specific focus on the fundamental right to the protection of personal data.”*<sup>69</sup>

The agency, however, has also been checking the FTC’s experience as an alternative model. This approach comes from the diagnosis that Chile was already very focused on the GDPR, and there was a perceived need to engage with the US agency to gain another point of view. The interviewee from the *Consejo para la Transparencia* in Chile further emphasises that the convergence of personal data protection and the right to access public information is a Latin American trend. This trade-off debate would not occur in the EU. From this point of view, having a body guaranteeing transparency and access to information with a greater capacity for more excellent dialogue between both subjects would be positive. The topic of public information access is a debate regarding safeguarding human rights within a post-dictatorial setting:<sup>70</sup>

*“From Latin America. Because if we look at the European reality, I have yet to see any European country seriously discuss public access to information and personal data protection as*

<sup>65</sup> MEX5OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 755.

<sup>66</sup> Red Iberoamericana de Protección de Datos, “Personal data protection standards for Ibero-American countries.”, (Mexico City: INAI, 20 June 2017), accessed July 25, 2023, [https://www.redipd.org/sites/default/files/inline-files/Estandares\\_PORTUGUES.pdf](https://www.redipd.org/sites/default/files/inline-files/Estandares_PORTUGUES.pdf).

<sup>67</sup> MEX7APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 630.

<sup>68</sup> COL5ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1128.

<sup>69</sup> CHI2GOV, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1156-1157.

<sup>70</sup> CHI2GOV, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1171.

*we do. There is access to public information there because this right is recognised, but they do not engage in this discussion of personal data protection, except in the case of Spain. Even so, the Spanish have such a tremendous institutional force in data protection that issues of access to information are somewhat in the background. Yes, it becomes crucial to have a general regulation. However, they do not collide. Moreover, even if they do collide, the issues get resolved. Nevertheless, the focus in Europe has been different. Instead, we approach protecting personal data with solid legislation on access to public information. Yet this also stems from a specific institutional vision that concerns Latin America's reality. It is related to the Inter-American Court of Human Rights decisions, which have cast a specific light on this matter. Of course, there is a greater tension between these two rights here.”<sup>71</sup>*

An interviewee from Spain demonstrates this tendency of Latin American authorities to integrate the issues of data protection and transparency:

*“Here in Latin America, typically, the management of both rights has been handled by a single entity. The right to access public information and personal data protection fall under a single body. It also has a double treatment because, in Latin America, the right to data protection is a fundamental right with special protection. Eventually, in Europe, the right to access public information will not be a fundamental right; it will have a different degree of attention. In Spain, they address this by assigning responsibilities to two different state entities: the Spanish Data Protection Agency and the Transparency Council. In the beginning, this led to some friction. (...). Today, we have a link between the two organisations to solve dilemmas. Now, it works relatively well.”<sup>72</sup>*

The Spanish example could be an excellent regional practice as it facilitates greater dialogue between the two fundamental rights and a better understanding of the limits of access to public information imposed by privacy and the protection of personal data. It would be particularly relevant in the context of data treatment by the public authorities of Latin American countries. However, the issue must be carefully considered, as one theme may overshadow the other. This problem may be exemplified in Mexico, where the INAI regulates both issues. An interviewee from the country's business sector revealed that this configuration tends to make the INAI more popular, at least at the national level, due to the involvement of the authority's representatives in transparency matters:

*“Being an authority with powers on access to public information generates a lot in terms of political image because speaking about access to information is something nobody is opposed to. It would be politically incorrect to speak against access to information because it would be to speak against freedom of information. (...). So, when an INAI commissioner dedicates themselves to guaranteeing access to public information, they are an information hero Nobody could go against...At least not publicly. So, when someone thinks about becoming a commissioner of access to information, it generates much political prominence and positive publicity. (...). However, when you are a personal data protection authority, the same does not happen. You have no political popularity. Therefore, these issues do not encourage you to want to be a strong data protection authority. This social scenario means that not much time is devoted to this issue.”<sup>73</sup>*

<sup>71</sup> CHI2GOV, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1171.

<sup>72</sup> ESP1ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 283.

<sup>73</sup> MEX4EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito*



Nevertheless, what is most crucial for the enforcement of legislation is the independence of authorities. This trait is a fundamental characteristic of the authorities and is part of this adaptation movement:

*“In short, one of the important agendas for the region is how the new laws provide autonomy and independence from the government. Granting independence from private powers to authorities for the protection of personal data. This makes it easier to be effective. It is tough to provide adequate protection for personal data.”<sup>74</sup>*

A proactive alternative, suggested by a Mexican civil society interviewee, would be for Latin America to have an international regulatory body. It could help harmonise the interpretation and decision-making of national authorities, similar to how the European Data Protection Board operates:

*“I also think there should be an international regulatory body. Not the RED. We need an authority that governs the national bodies rather than a hierarchical superior. It could be a control body for accountability of what is happening at the national level regarding personal data protection. We will have to promote this through civil society. This proposal will not please the authorities. I wonder if something will have to be like what exists in Europe and is absent here. There must be something at the Latin American level that can later coordinate with Europe and Asia. From there, it would be possible to achieve convergence in protecting rights with their respective regulatory frameworks.”<sup>75</sup>*

It is important to note that, beyond its supranational structure, the EU has a regulation applicable to all Member States: the GDPR. The situation is different in Latin America. Therefore, another proposal is to “someday have an inter-American data protection convention,” as highlighted by an Argentine interviewee from the academic field:<sup>76</sup>

*“From an academic perspective, I see much attention being turned away from Latin America. There is much focus on Europe, generally and institutionally. Some people are aware of what is happening in Latin America, though. However, we can return to the root of the Brazilian effort to enact a data protection law. It was a demand made within the scope of Mercosur. There is no longer bridge for this. There has yet to be any further movement to establish a regional standard in Mercosur. My impression is that there is no such movement due to the disparities between the countries of Latin America today.”<sup>77</sup>*

If a path in Mercosur seems complicated, then one must consider the Organization of American States. It seems even more distant. What is the practical path for some normative integration? The following develops the last topic, which deals with the accession of Latin American countries to the Council of Europe’s Convention 108 and 108+. As indicated at the beginning of this text, this is one of the developments of Europe’s influence in Latin America. It is no longer just about

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*social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 741.*

<sup>74</sup> ARG5ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1161-1162.*

<sup>75</sup> MEX5OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 783.*

<sup>76</sup> ARG6ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1297.*

<sup>77</sup> BRA6OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 191.*

the EU. After all, the Council of Europe is its own international body and has a number of international cooperation instruments on personal data protection that are accessible to all countries willing to join its jurisdiction.

#### 4. The Council of Europe's Convention 108 and the accession of some Latin American countries

The Convention 108 is an international instrument of the Council of Europe. It is an organisation with a legal personality under international law dedicated to defending human rights in Europe. The Council of Europe operates independently of the EU institutions, such as the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors, which are supranational institutions of the EU. This list of institutions is exhaustive and can be found in Article 13 of the TEU.<sup>78</sup> The Council of Europe is an international and therefore, intergovernmental organisation. It is the oldest in Europe and aims to promote democratic values, human rights, and political and social stability in the region, assisting its Member States in these objectives. It has 46 Member States, 27 of which are also Members of the EU.

Convention 108 was made available for signatures on 28 January 1981. This day even became the International Day of Personal Data Protection. In 2013, Uruguay became the first non-EU Member State to sign the Convention 108. It remains open for other countries worldwide. In 2018, an amendment was made to the initial protocol to update it in response to new standards that emerged in the EU following the GDPR. This amendment became known as Convention 108+. Currently, 55 countries are part of the Convention.<sup>79</sup>

In some countries, being a member of the Organization for Economic Cooperation and Development (OECD) is also an international driving force for creating laws and compliance with personal data protection guidelines.<sup>80</sup> An interviewee, representative of the Brazilian academic sector, draws a temporal comparison between these two international catalysts for personal data protection in the region, namely, the OECD guidelines and Convention 108:

*“The OECD guidelines date back to 1980. The Convention 108 is from 1981. Interestingly, many people who helped draft one also helped draft the other. After all, both advance on many overlapping points. However, the approaches of the OECD and the Council of Europe differ. They have different views of the same problem. It is fascinating how the OECD foresaw the issue and, based on its mission of cooperation and economic development, understood that bringing about progress in personal data regulation would demand protecting rights and principles. This historical conclusion was exciting and is still there. Now, the Council of Europe, on the other hand, produced a normative document mainly based on the idea that the protection of personal data is a fundamental right.”<sup>81</sup>*

<sup>78</sup> Joana Covelo Abreu and Liliana Reis (eds.), *Instituições, órgãos e organismos da União Europeia* (Coimbra: Almedina, 2020), 7.

<sup>79</sup> Council of Europe, “Convention 108+: Convention for the protection of individuals with regard to the processing of personal data” (Strasbourg, June 2018), accessed July 25, 2023, <https://rm.coe.int/convention-108-convention-for-the-protection-of-individuals-with-regar/16808b36f1>.

<sup>80</sup> OECD, “Guidelines on the protection of privacy and transborder flows of personal data” (Paris, 2023), accessed July 25, 2023, [https://www.oecd.org/sti/ieconomy/oecd\\_privacy\\_framework.pdf](https://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf).

<sup>81</sup> BRA1ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito*

Currently, in the EU, the issue of Convention 108+ and OECD Guidelines is no longer relevant, unlike the situation in Latin America. This lack of relevance comes from the fact that the process is already advanced in Europe. In Latin America, the issue of complying with EU standards to be able to join Convention 108 continues to be a trending topic. The EU has advanced with its own set of norms on fundamental rights, and the protection of the Council of Europe happens in a convergent parallel. The convergence led to a broader protection system. A representative of the academic sector of Argentina outlines the scenario in some Latin American countries in their pursuit of joining Convention 108:

*“For example, there is an ongoing discussion in the Council of Europe with Costa Rica. Ecuador also wants to be part of Convention 108 and, in order to do so, has to adapt its laws accordingly. This desire to accede to the Convention generates a strong impulse in Latin America to modify regulations and practices. For example, Uruguay adopted the new version of the Convention last year. It is the first Latin American country to participate in Convention 108+. Colombia is also looking to move in the same direction. Without a doubt, so is Mexico. Peru has presented a more modernised project for the protection of personal data. In other words, a group of countries want to move in this direction. (...). For me, one of the exciting countries to observe in this regard is always Chile. Chile has a personal data protection law. However, it is constrained. Chile has been trying for many years to have a new law protecting personal data, and unfortunately, it has not succeeded yet.”<sup>82</sup>*

The Argentine data protection authority recognises the importance of joining Convention 108 for international cooperation on the subject of data:

*“Convention 108, in general, allows us to co-operate internationally. It is not just our deficit in Argentina. The deficit is the issue of jurisdiction, of extraterritoriality. The terms of Convention 108 have given us the possibility to seek assistance from other data protection authorities in different investigations. For example, through Convention 108, we have reached where we otherwise would not be able to.”<sup>83</sup>*

The Brazilian authority also acknowledges the need for future adherence to Convention 108 as a recognition of the level of adequacy through an international status on the issue of data protection:

*“Our prospect of adhering to the Convention 108 is great. We have our General Coordination of International Institutional Relations. It is making this effort to get us to accede to the group. We see that all those efforts of international initiatives on personal data protection are legitimate. Of course, this will benefit the authority in terms of recognition. This recognition is not a compliment. It is the recognition of a status.”<sup>84</sup>*

Peru needs to make legislative changes to seek accession to the Convention 108. The Peruvian data protection authority states that, “regarding Convention 108 and 108+, we also have a fluid relationship with the RED and some EU countries that promote it; we want Peru

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*social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 12.*

<sup>82</sup> ARG5ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1260-1261.*

<sup>83</sup> ARG3APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 1332.*

<sup>84</sup> BRA2APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 36.*

to adapt soon.”<sup>85</sup> A Peruvian interviewee from the business sector indicates the same viewpoint:

*“There is a whole issue regarding cross-border flow. Our national law states that cross-border flow can only happen between countries that meet certain security or even legality standards. However, a list of the countries that fulfil these criteria has never been released, as in the case of Europe. There, the countries are usually all members of the 108+ Convention.. Peru is not even part of this agreement.”*<sup>86</sup>

This process is widespread in the region, as demonstrated by a statement from a business sector interviewee in Costa Rica: *“Costa Rica is formally working to align with Convention 108. (...). However, if it happens, we would be the fourth country because Mexico, Argentina, and Uruguay are already in it.”*<sup>87</sup>

Uruguay was the first country in the region to adhere to Convention 108 and its update in the form of 108+, making it a pioneering nation in Latin America by joining the most up-to-date international regulation on the matter.<sup>88</sup> Currently, only Mexico,<sup>89</sup> Uruguay and Argentina are part of Convention 108.<sup>90</sup> Despite being a member of Convention 108, Mexico is not part of Convention 108+, and there seems to be no political interest in this movement to join the update.<sup>91</sup>

*“We did not manage to get any further than Convention 108 because, as you know, it is very complex to garner all the political will for something like this (...). However, we already knew there were compliance issues regarding Convention 108, which are easier. In comparison, Convention 108+ is more demanding in terms of changes. Therefore, this will take more time to happen. That is why there was no progress on the issue.”*<sup>92</sup>

Thus, at the time of writing (2023), of the nine countries investigated in Latin America that have both authorities and laws, only three have joined Convention 108. Among them, only Uruguay has joined Convention 108+.

<sup>85</sup> PER9APD, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 539.

<sup>86</sup> PER6EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 561.

<sup>87</sup> CRI4EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 2*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 944-945.

<sup>88</sup> URU6ACA, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 402.

<sup>89</sup> MEX6GOV, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 745.

<sup>90</sup> Council of Europe “Convention 108+: Convention for the protection of individuals with regard to the processing of personal data”. (Strasbourg, June 2018) 33, *Parties*, accessed July 25, 2023, <https://www.coe.int/en/web/data-protection/convention108/parties>.

<sup>91</sup> MEX8ACA and MEX2OSC, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 614, 692.

<sup>92</sup> MEX4EMP, in *Pesquisa documental e de campo sobre autoridades de proteção de dados na América Latina: o conceito social e institucional de privacidade e de dados pessoais – Anexo 2 (entrevistas não identificadas) – volume 1*, Alexandre Veronese et al. (Brasília: Fapesp, January 31, 2023), 665.

## Conclusion

Understanding the impact of EU law on personal data protection in Latin America involves recognising key intermediaries through which this influence is exerted. The Spanish Data Protection Agency stands out as a primary influencer, as does RED – the Ibero-American Network for the Protection of Personal Data, which notably mirrors the influence of the Spanish authority. Additionally, the Council of Europe plays an important role, and the direct impact of the EU legal framework is evident in Latin America, fuelled by factors like linguistic proximity and shared social and commercial interests. An exciting dynamic is emerging among Latin American countries themselves, where observing neighbours aligning with EU processes encourages others to follow suit, revealing that EU influence surpasses that of the Council of Europe.

Contrastingly, the influence of the US on personal data protection in Latin America is generally minimal, except for a few countries like Colombia and Chile. However, when influences can be observed, they often manifest in structural aspects, such as regulatory competencies akin to the Federal Trade Commission (FTC), rather than substantive aspects. This distinction arises because the Latin American model views personal data protection as an independent, often fundamental right, not merely derived from consumer protection.

In conclusion, personal data protection in Latin America exhibits distinct features shaped by the region's socio-economic, historical, and cultural characteristics. There are still many challenges, such as regulating the digital space in countries significantly influenced by informal markets. Additionally, the correlation between access to public information and personal data protection creates a unique scenario, leading to the establishment of authorities overseeing both themes. Sometimes, these authorities prioritise access to information over personal data protection for various reasons. It is crucial to acknowledge that, despite strong influence from the EU, Latin America is gradually forging its cultural identity regarding personal data protection. The groundwork is there, and significant developments will happen soon.