Opinion of the EU's Article 29 Data Protection Working Party *vis-à-vis* the Level of Protection of Personal Data in Argentina.

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After a request presented through a letter by the Ambassador of the Republic of Argentina before the European Union, the Article 29 Data Protection Working Party has issued a favourable Opinion[1] assuming that this country ensures an adequate level of protection within the meaning of Article 25(6) of Directive 95/46/EC.

The document makes, first, a general overview of the Argentinean law on data protection, focussing on its scope, and then, an assessment of the content and procedural/enforcement principles, following the methodology designed in the Working Party's Opinion on "Transfers of personal data to third countries; Applying Articles 25 and 26 of the EU data protection Directive"[2].

The Working Party has taken into account the explanations and assurances given by the Argentinean authorities as to how the provisions of the Law are to be interpreted and as to what situations fall within its scope.

General Norms

Argentinean Law on personal data protection is conformed by a national Constitution[3] norm, the Personal Data Protection Act No. 25.326[4] and the Regulation approved by Decree No. 1558/2001[5].

[1] Article 29 Data Protection Working Party, Opinion 4/2002 on the level of protection of personal data in Argentina. Adopted on 3 October 2002. WP 63. Available at: http://www.europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wp63_en.pdf

[2] Article 29 Data Protection Working Party, Working Document no. 12 *"Transfers of Personal Data to Third Countries: Applying Articles 25 and 26 of the EU Data Protection Directive"* Adopted on 24 July 1998. Available at: http://www.europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wp12en.htm

[3] Constitución de la Nación Argentina. Available at : http://infoleg.mecon.gov.ar/txtnorma/ConstitucionNacional.htm

The constitutional reform of 1994 has incorporated a special judicial remedy called "habeas data" for the protection of personal data, which is a subspecies of the procedure enshrined in the Constitution for the protection of constitutional rights (*Amparo*). That makes of the protection of personal data a fundamental right.

The Personal Data Protection Act has developed and broadened the "habeas data", including general principles of data protection, the rights of data subjects, the obligations of data controllers, supervisory authority, sanctions and rules of procedure. The Regulation is a secondary legislation and complements and clarifies some aspects of the Act.

Scope of the Law

The Opinion makes an analysis of the substantive scope with regard to the data controller, the data subject, the means of processing and the purposes of processing.

When the data controller is a private entity (natural or legal person) the protection covers personal data recorded in data files, registers, databanks or other technical means in so far as the personal data files, registers or databanks go beyond exclusively personal use or even when they do not go beyond exclusively personal use, if they are intended for the assignment or transfer of personal data, irrespective of whether the circulation of the data or information produced is performed for payment or free of charge. This interpretation results from a number of arguments brought forward by Argentinean authorities.

The "data subject" is defined as "any physical person or legal entity having a legal domicile or local offices or branches in the country, whose data are subject to the processing referred to in this Act". The Argentinean authorities explained that the requirement of having a legal domicile or local offices of branches in Argentina only applies for legal persons to be considered as data subjects. It does not apply to natural persons, and therefore all natural persons are considered as data subjects and are protected by the Argentinean Law.

In what concerns the territorial scope, the Opinion points out which are the provisions of the Act that uniformly apply throughout the whole of the Nation (federal level) and which are those that are applied at provincial level. Being Argentina a federal country, the provinces have delegated powers to the nation (which are established in the national constitution), and they have kept certain powers like, for example, what concerns the legislation over and application of procedural law for provincial matters.

Assessment of the Argentinean Law as providing adequate protection of personal data

The Working Party has understood that the Argentinean Law complies with the Basic Content Principles indicated in the Working Document n. 12: purpose limitation; data quality and proportionality; transparency; security; rights of access, rectification and opposition; and, restrictions on onwards transfers. Additional principles such as those regulating sensitive data, direct marketing and automated individual decisions, are also covered in an adequate manner.

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[4] Ley 25.326 de Protección de Datos Personales. Available at : http://www.jus.gov.ar/minjus/DPDP/Ley25326.htm

[5] Decreto 1558/2001. Available at: http://www.jus.gov.ar/minjus/DPDP/Dec15582001.htm

Concerning Procedural and Enforcement mechanisms, the Law has been analysed *vis-à-vis* three objectives that have to be properly addressed: (1) to deliver a good level of compliance with the rules; (2) to provide support and help to the individual data subjects in the exercise of their rights; (3) to provide appropriate redress to the injured party where rules are not complied with.

The first objective is put in place through different elements, for instance, effective dissuasive sanctions. Those sanctions can be administrative (warning, suspension, fine ranging, closure or cancellation of the file, register or data base), or criminal. The Criminal Code considers as a criminal offence knowlingly to process false personal data and the breach of confidentiality or data security. This crime is penalized with imprisonment from 3 to 6 years (or from 4 years and a half to 9 years in case of harm to any person) and disqualification to hold public office for civil servants. Another element is the Data Protection authority, who is endowed with a number of powers in order to take the necessary actions for compliance with the Law.

The second objective is covered by the "habeas data", which is a simplified and quick judicial remedy. The burden of proof is laid upon the data controller or user in case an exception to the right of access, rectification or deletion is alleged. Data subjects can also use the general rules of procedure in a civil jurisdiction for compensation of damages or for enactment of any of the rights recognised by the Act or Regulation, and in a criminal jurisdiction for offences determined in the Criminal Code.

The third objective is not addressed specifically by the Law but by general rules of Argentinean legal system on liability (contractual or extra-contractual), which are in line with the European tradition in Civil Law.

Results of the Assessment

The Working Party assumes therefore that Argentina ensures an adequate level of protection within the meaning of Article 25(6) of Directive 95/46/EC. The Working Party has based its analysis on the information and assurances provided by the Argentinean Government, in particular in what concerns the scope of the Law.

Further, Argentinean authorities are encouraged to take into consideration the reservations expressed as regards certain weaknesses of the law, for example, in relation with the independence of the supervisory authority, and his territorial jurisdiction.

Argentinean case-law interprets the scope of the Law broadly.

There have been some recent Court of Appeal decisions that, apart from other issues, made an interpretation on the scope of application of the Argentinean Law on personal data protection. Indeed, Article 43.3 of the national Constitution and Article 1 of the Act make reference to

"private data files, registers, databanks or other technical means for data processing, *whose purpose is to provide reports*". This distinction is not made for public ones.

In the case "Halabi v. Citibank"[6], the plaintiff had asked for the deletion of certain data recorded on the data base of the Central Bank and a credit information company, data that had been provided by the defendant without an accurate base. The Citibank oppose the action alleging that "it is not an entity *whose purpose is to provide reports*". The First Instance judge rejected the remedy, which was appealed. The Second Instance Tribunal considered that the guarantee provided by the "habeas data" can take place even in those cases where the controller is an entity whose purpose is *not* to provide reports.

The arguments used were based on Article 2 of the Act, which gives broad definitions, among others, of "personal data", "data files, registers, databanks", "processing", and "data controller". Indeed, the data controller is defined as "Physical or legal person, either public or private, owing data files, registers, base or databanks"[7]. Apart from this, the Tribunal took into account Article 33.1.b) of the Act, which says: "The action for the protection of personal data or of *habeas data* shall be applicable: (…) b. to those cases in which the falsehood, inaccuracy or outdating of the relevant information is presumed, and the treatment of such data whose registration is prohibited by this Act, in order to demand their suppression, rectification, confidentiality or updating."[8]

Further, the generic protection given by Article 43.1 of the Constitution is available, considering that the guarantee assured by Article 42 "the right of consumers to an adequate and truthful information" is endangered.

The Tribunal expressed that when constitutional rights are at stake, the criteria for appreciation should be wide and flexible, and not tied to formalistic objections, in order to give proper defence to them. It is important also to point out that reference was made to the leading case "Siri"[9], where a substantive interpretation of constitutional rights was developed by the National Supreme Court, stating that judges should apply constitutional rights in the plenitude of their sense.

In the case "Becker v. Banco de la Provincia de Buenos Aires"[10] the object of the "habeas data" was to demand the bank to provide certain information about operations done by it on the plaintiff's accounts, information that was refused to be given. The *Ministerio Público*[11] (Public Prosecutor) understood that the denegation of the remedy by the First Instance judge did not correspond. The information under question frames within the wide definition of "personal data" established in Article 2 of the Act, and exceeds domestic or "personal use", in the terminology of Article 24 of the Act and Article 1 of the Decree.

An analysis was made of the risks to personal data protection constituted by private data files, registers, databanks or other technical means for personal data processing, whose purpose is

[6] C. Nac. Comercial, sala C, 26/03/2002 – Halabi, Ernesto v. Citibank n.a.. Jurisprudencia Argentina, 21/08/2002, p. 28.
[7] Unofficial translation.
[8] Unofficial translation.
[9] Fallos 239:459(8)
[10] C. Nac. Comercial, sala E, 15/05/2002 – Becker, José v. Banco de la Provincia de Buenos Aires. Jurisprudencia Argentina, 21/08/2002, p. 33.
[11] The "*Ministerio Público*" intervenes in cases of "habeas data" since it is a matter of Public Order.

not to provide reports, but since they exceed the domestic use they can be dangerous for the rights of the data subjects. Due and legal protection should be guaranteed in those cases, not only the ones related to financial institutions, but also for cases like employers registers on employees, medical records, etc. The Second Instance Tribunal adhered to the argumentation of the *Ministerio Público* and revoked the appealed decision.