

# Influence of the GDPR Around the World

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## Agenda

- **Global Data Protection Laws Influenced by GDPR**
  - Trends
  - Latin American
  - Asia
  - APEC
- **Impact and Considerations for ESPs**
- **What's on the Horizon?**



## GDPR Around the World - Trends

Even before the GDPR came into effect, jurisdictions around the world have been looking to the EU and its data protection laws as a model.

### Trends since passage of the GDPR

- Similar GDPR-like data transfer restrictions
- Extraterritoriality provisions like those in the GDPR
- Expansion of data subject rights
- Short breach notification time periods
- More significant penalties for violations



## Latin America

- Latin America has been slower to adopt data protection laws than other regions of the world, but they are catching up.
- The EU Directive and now GDPR has influenced the laws in the region, including:
  - Argentina, Brazil, Columbia, Costa Rica, Nicaragua, Peru, Uruguay
- In Latin America, unlike the European approach, there is a heavy reliance on consent to legitimize transfers to inadequate countries (and for collection generally).
  - As laws are updated and new laws passed, there has been some movement away from the heavy reliance on consent.





## Brazil



Brazil enacted a comprehensive data protection law in August 2018.

- The law will take effect in February 2020.
- Largely inspired by the GDPR

### Scope

- Applies to online and offline data.
- Extraterritorial reach – applies to any operation performed on personal data regardless of the means and of the place in which the processing takes place, as long as: (i) it is performed within the Brazilian territory; (ii) the processing activities are related to the offering of goods or services in Brazil or the processing of data subjects who are in Brazil; or (iii) personal data to be processed abroad is gathered within the Brazilian territory.

### Lawful Bases for Processing

- Expands bases for processing of personal data beyond current consent regime.



## Brazil, continued

### Data subject rights

### Data Protection Officer Requirements

### Transfers

- Authorizes international data transfers provided participating countries have “adequate protection” for personal data.
- In absence of adequacy – standard contractual clauses or binding corporate rules, or with a specific and highlighted data subject consent

### Penalties

- Include: warnings, fines, publication of the condemnatory decision in newspapers
- Fines may reach up to 2% of gross revenue, limited to BRL 50 Million (appx. \$13.5 million USD)
- **Enforcement in question:** The President vetoed a portion of the bill that would have created a body to regulate companies and verify compliance.



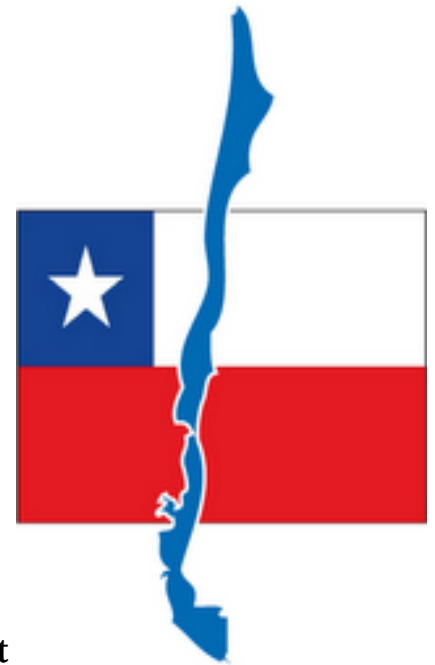
## Chile

### Law on Protection of Personal Data

- The law does not restrict cross-border transfers.
- The law not establish a DPA to oversee enforcement.
- A data subject's **written consent** required for processing.

### Draft Bill – April 2018

- **Changes the scope of personal data**
- **Consent and Other Lawful bases for processing beyond consent**
  - Consent remains the general rule for processing personal data, but the bill would establish new sources of lawfulness for processing data
- **Data subject rights:** access, correction, cancellation, opposition, portability, right to object to automatic decision-making
- **International data transfers:**
  - Permitted where there is adequate levels of protection, contractual clauses, binding and certified compliance or self-regulation model, or express consent.
- Creates a personal data protection agency to monitor and enforce compliance and which can issue fines up to 5000CLF (appx. \$20K USD)





## Argentina

### Personal Data Protection Act

- Based heavily on the EU Directive
- Transfers
  - Permitted whether there is adequate protection, express consent, or another exception.
  - Model Clauses



### Draft Data Protection Bill (proposed by the Argentina Data Protection Agency in February 2017).

- The bill is heavily based on the GDPR.
  - Would only apply to individuals.
  - Similar jurisdictional reach
  - Allows for other bases for processing personal data beyond consent (such as “legitimate interest”)





## **Influence on Other Latin American Countries**

### **Argentina & Uruguay – Adequacy**

- Argentina and Uruguay are the only two Latin American countries with regimes deemed adequate by the EU under the old Directive.
  - The proposed legislation in Argentina is meant to bring Argentina's law in line with the GDPR in part to maintain the country's adequacy status.
  - No proposals yet for Uruguay

### **Other countries of note**

- Costa Rica
- Peru
- Panama



## Emerging Laws in Asia

We are seeing a lot of new and revised laws in Asia adopting elements of the GDPR.

- There is a greater demand for data protection in the region.

### Data Transfer

- In July 2018 the EU and Japan entered a trade deal which also recognizes each other's data protection regimes as adequate.
- The EU and South Korea began talks at the end of October regarding a data transfer pact.
- EU- APEC data transfer pact discussions.





## China



### Information Security Technology – Personal Information Security Specification (PI-Specification)

- China's National Information Security Standardization Technical Committee (NISSTC)
- Implemented May 1, 2018
- Provides guidance on the collection, storage, use, transfer, and disclosure of personal information.
  - Similar to other jurisdictions, with elements of the EU model.
- **Voluntary, not legally binding** (but expected to be taken under consideration by regulators when enforcing cybersecurity obligations)

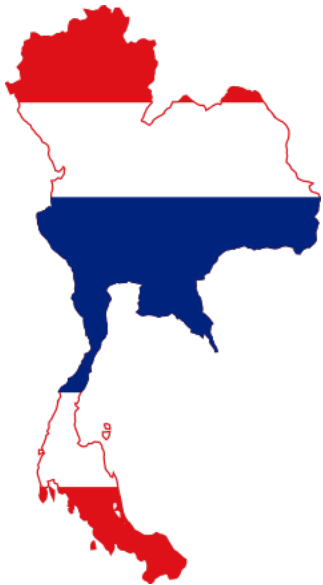


## Thailand

Currently Thailand has a consent-heavy data protection regime.

- Prior **written consent** is required for transfers to third parties.

### Draft Data Protection Bill



- Adopts some provisions from the GDPR, including extraterritorial applicability.
- Request for consent from a data subject must be made explicitly for the consent given to be valid.
- Other lawful bases are adopted to process personal data
  - Thailand is one of the few jurisdictions in the region to introduce the concept of a data controller's "legitimate interest" as a basis for processing beyond consent.
- Similar data subject rights as in the GDPR, including portability.



## India



The India Supreme Court declared privacy a fundamental right in August 2017.

### Personal Data Protection Bill, 2018

- Submitted to the Ministry of Electronics and Information Technology in July 2018, and may be introduced in Parliament.
- Data principals (subjects) are granted a number of rights, such as access, correction, data portability and the right to be forgotten
- Requires annual data audits by third parties
- GDPR-type extraterritoriality and penalties
- **Data Localization:** requires storage of a copy of personal data in India and “critical personal data” can *only* be stored in India.
- Data transfer restrictions



## Other Laws

- **Malaysia**

- Malaysian Personal Data Protection Commissioner is currently considering a data breach notification requirement (72 hours)
- Transfers permitted to countries with adequate data protection laws.

- **Hong Kong**

- One of the region's best developed data protection laws, with the Personal Data (Privacy) Ordinance dating back to 1995.
- The PCPD has stated that it is closely monitoring the implementation of the GDPR.

- **Philippines**

- Enacted in 2012, but the enforcement authority was not created until 2016
- Some GDPR elements in implementing rules and regulations, such as 72 hour data breach notification requirement, data portability.



## APEC Cross-Border Privacy Rules

**The APEC Cross-Border Privacy Rules (“APEC CBPR”) system was endorsed in 2011**

- A voluntary, principles based privacy code of conduct for data controllers in participating APEC member economies.
- Relates only to cross-border data flows.

Increasing participation

- Last year **Australia** announced its intention to become the sixth country to participate in the system (alongside Canada, Japan, Mexico, United States, and South Korea).
- **Philippines, Singapore, and Taiwan** have announced intention to participate.

The APEC Electronic Commerce Steering Group (the “ESGC”) met with the European Commission to begin discussions on recognizing the CBPR System as a certification under Article 42 of the GDPR.



## Impact & Considerations for ESPs

**Adoption of GDPR-like laws means compliance with those laws AND marketing laws.**

- Marketing has implications under data protection laws, but restrictions around marketing may also be supplemented by anti-spam laws, internet regulation, or consumer protection law.
  - UK – GDPR and Privacy and Electronic Communications Regulations (PECR)
  - Malaysia – PDPA and Communications and Multimedia Act
- Creates a patchwork with some jurisdictions requiring discrete or unbundled opt-in or opt-out consent sometimes with specific formalities that must be adhered to in direct marketing communications.

### **Extraterritoriality Implications**

- More entities including processors may become directly subject to these GDPR-like laws.





## What's Coming?

**More Laws**

**More Amendments**

**More Regulations**

**More Localization**

**More Compliance Concerns!**

### **U.S. Federal Privacy legislation**

- How much will it borrow from the GDPR?
- Unlikely to supplant marketing laws like CAN-SPAM



## Questions?

