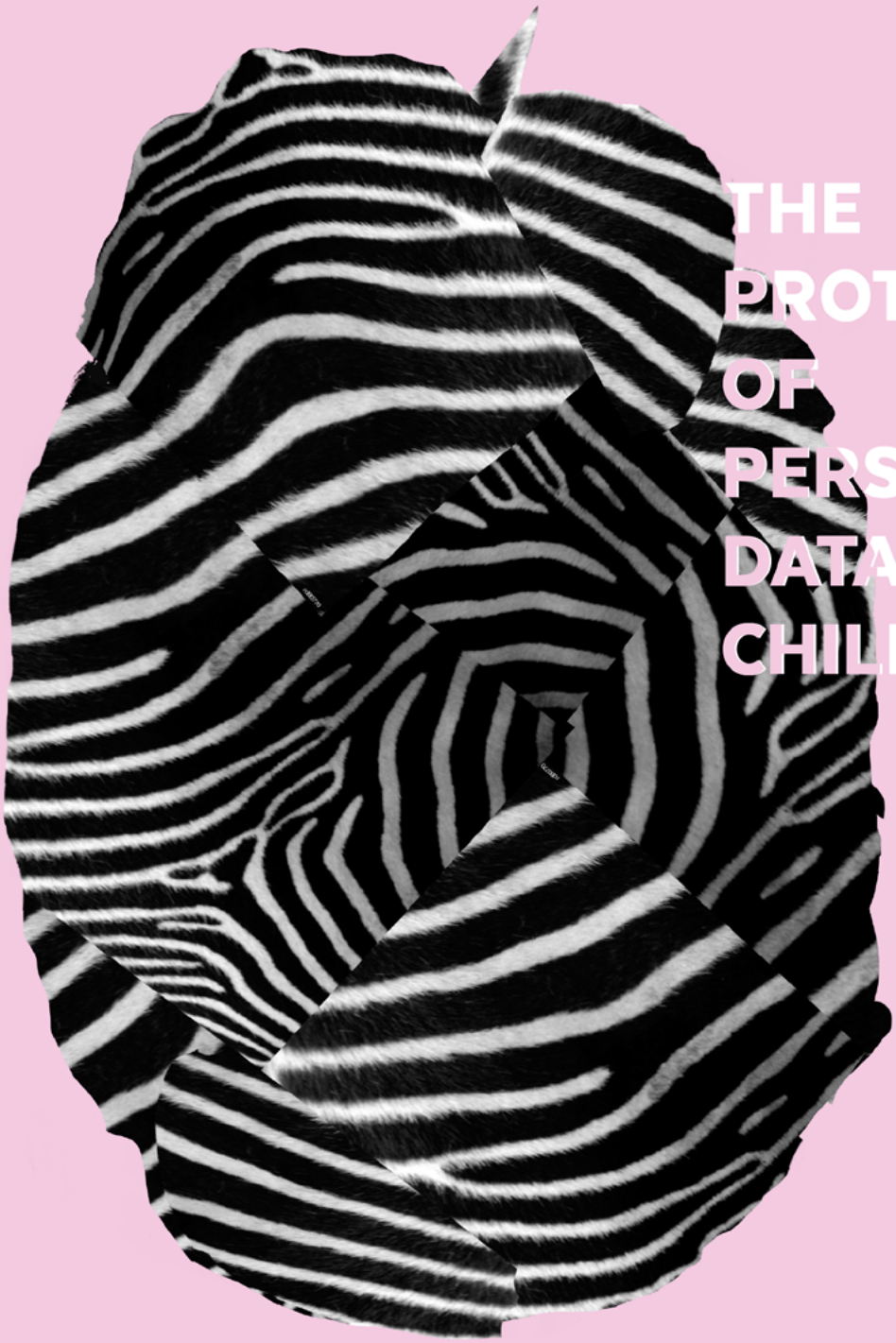

# THE PROTECTION OF PERSONAL DATA IN CHILE

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Derechos Digitales (Digital Rights) is an independent and non-profit organization founded in 2005, whose mission is the defense, promotion and development of fundamental rights in the digital environment, from a public interest perspective. The main areas of interest of this organization include the defense and promotion of freedom of expression, access to culture and privacy.Executive summary

This report portraits the current state of protection of personal data in Chile, from multiple perspectives: normative, institutional and political. With this purpose in mind, we briefly analyze the content of Law 19.628 on the protection of private life, the context of its enactment and the reforms to which it has been subject to. There have been several processes of reform to the law, including some that where frustrated and others that are still in progress. It can also be observed that several instances of participation related to these issues have taken place. Relevant actors are also participating in the current debate on a regulatory framework that allows updating the Chilean legislation in the matter.

There is consensus among the doctrine that Chilean legislation provides a weak scheme for the effective protection of personal data. This would be explained, among other reasons, to the fact that its content was constricted by private interests during the legislative discussion. This diagnosis is exemplified by the level of protection granted by the law, which is characterized for offering a regulatory framework for the market of personal data, rather than by guaranteeing protection to the right holders.

Among the main shortcomings of the current legislation that can be mentioned we find: the absence of effective sanctions, the lack of regulation of the cross-border flow of personal data, the authorization of the use of data for direct marketing without the holder's consent, the lack of registration of private data banks, the absence of a public control authority, broad exceptions to the required consent for the processing of data, and the lack of effective protection procedurals.

In most of the reform initiatives the law has sought to solve specific problems, but of general occurrence, where the rights of people are affected. This was the case with the prohibitions to hire people based on their credit history, and with the use of financial data for a purpose other than that for which it was collected. However, these reforms have not translated into an improvement in the standard for the protection of personal data.

The participation instances have helped the government consult the opinion of civil society on the criteria that a data protection law should comply with, but these instances have not been of a decisive nature. The actors invited to participate were academics specialized in the subject, representatives of the industry, members of different public departments and some civil society organizations. International organizations have also raised their voice on the matter, urging Chile to improve the standard for the protection of personal data.

Profound or structural reforms to the regulation of personal data have been announced by different governments. Each of the two previous administrations presented a project of reform to Law 19.628 that where finally not enacted and the current government is working on a new bill to present to Congress. The text has not been made public prior to its legislative discussion. In the context of the beginning of said legislative discussion, this document shows the current state of the subject matter in the country.

## 1. Introduction: the big picture

Informational self-determination, understood as the protection of personal data, does not enjoy express constitutional enshrinement in the Chilean legal system. In this vacuum, part of the doctrine and jurisprudence argues that such protection can be deduced from the interpretation of article 19 No. 4 of the Chilean Constitution (Cerda, 2012), which guarantees "the respect for and the protection of private life and the honor of the person and family."

The specific regulation of this matter has been relegated to the legal level. The Penal Code and other special normative bodies foresee some offences related to the infringement of the right to private life, but this legislation is fragmentary and insufficient when it comes to the protection of the rights of individuals (Cerda, 2012).

For a long time, the constitutional protection action contained in article 20 of the Constitution was the only procedure available to obtain protection in the courts of justice, when there was an improper treatment of personal data and only when, in some sense, the exercise of the right to private life or the honor of those affected was violated or disturbed.

As of 1999, with the enactment of Law 19.628 on the protection of privacy, the Chilean legal system has a regulatory body that specifically regulates the processing of personal data, the operation of databases, the rights and duties of those involved and a dispute resolution mechanism. Although this is one of the first personal data protection laws in Latin America, this legal body was considered inadequate to protect individuals from the treatment of their personal data by third parties, even in the legislative discussion prior to its enactment (Jijena, 2001).

## 2. Current legislation

### 2.1. History of the Law

Law 19.628 on the protection of private life was published on August 28, 1999 with the objective of "filling a manifest gap in our legal system, and with the purpose of giving an adequate protection to the right to privacy of individuals, in the field of Civil Law, in the face of possible illegitimate interferences." As a matter of fact, Chile was considerably behind in this matter in the global context, taking into account that other countries had special regulations several decades ago. Thus, for example, the Federal Republic of Germany enacted a law on the processing of personal data in 1970, France in 1978, England in 1984 and Spain in 1992.

Although the enactment of a special normative body was well received, criticisms regarding the shortcomings of the text promptly emerged. Shortly after the Law came into effect, Renato Jijena (2001) described a series of structural flaws of the Law that, despite being shared by a large part of the doctrine and having involved its modification on multiple occasions in recent years, have not been addressed and corrected satisfactorily.

This is partially explained by the way in which the legislative process was carried out, characterized by excessive work of advocacy on the part of the business world, and by a relative absence of voices from academia and civil society. According to Jijena (2010), Law 19.628 was drafted "with the direct advice of groups, unions and companies interested in ensuring the personal data processing business, which was added to the lack of knowledge of the parliamentarians that prompted the Law." According to the author, this statement is evident when comparing the regulation with the French law of 1978 and the Spanish law of 1992, which have substantive differences with the Law, despite the fact that the impellers expressed their inspiration in these normative bodies.

The bill was presented by motion of the then senator Eugenio Cantuarias Larrondo, on January 5, 1993. As reported by Vial (1997), the bill was based on comparative legislation, especially: the organic Law No. 1 , of May 5, 1982, of civil protection of the right to honor, to the personal and family intimacy and to the own image, of Spain; Law 78-17, of January 6, 1978, on computer science, files and liberties, of France; the Law of July 12, 1984, on data protection, of the United Kingdom; Law 48, of June 9, 1978, on registers of personal data, of Norway; Article 1071 bis of the Argentine Civil Code; and article 9 of the French Civil Code, among others. As the project was being discussed, the text of the Organic Law 5/1992 on regulation of the automated processing of personal data of Spain was taken up to the point that Law 19.628 can be considered as a tribute to it.The motion approved by the Senate established the protection of personal data to the detriment of its handling by third parties; in addition, it contained provisions regarding the extension of private life, sanctioned illegitimate interferences and granted procedural instruments to seek redress in the event that a person was unfairly affected. However, the Chamber of Deputies decided to limit the project to the protection of personal data, excluding the provisions related to the intrusion of private life, stating that said matter would be regulated by the bill on freedom of opinion and infor-

mation, which was currently in process (Cerda, 2012). This explains why Law 19.628 is entitled "on the protection of privacy", in circumstances where it only regulates the protection of personal data, and no other aspects related to the protection of privacy.

Table 1 summarizes the differences between the original project of January 5, 1993 and the current text of Law 19.628.Table 1: summary of differences between the bill for the protection of privacy and Law 19.628.

| | **Bill on civil protection of Private life (January 5, 1993)** | **Law 19.628: protection of personal data (August 28, 1999 and subsequent modifications)** |
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| *Object of protection.* | Rules concerning the protection of private life of people were repeatedly contemplated. In article 1º clause 1º stated that the private life of people is inviolable. In article 2, the concept of private life was defined, it included among other aspects: the right to one's own image, to personal and family intimacy, anonymity and reserve, the right to a quiet life without harassment or disturbance, and the inviolability of the home and of all forms of private communications.<br>Article 3 provided that no judicial decision could be founded in facts or background obtained through illegitimate interference to a person's private life – unless this Law authorized it-<br>Article 5 contemplated a presumption of illegitimacy of all intrusions into the private life of a person that did not comply with the terms of the Law.<br>Article 6 declared that private life is inalienable and imprescriptible, notwithstanding the cases of authorization contemplated in the Law or of the consent of the right holder.<br>Article 8 prescribed that technology must be at the service of the people and its development should always be adjusted respecting the right to privacy. | The law regulates the "treatment of data of a personal nature in registers or banks of data held by public or private entities". The law does not deal in depth with the protection of privacy; the only direct reference to the concept of private life can be found in article 2 letter g), where a definition of sensitive data is given. |

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| *Legitimate and illegitimate intrusions in private life.* | The following intromissions are considered illegitimate: Telephone tapping, filming or registers by other means suitable for the reproduction of intimate life or for its knowledge. The disclosure of information, use of the name, repeated and illegitimate harassment through calls, correspondence and stalking and, in general, any act or arbitrary omission that bothers, threatens or disturbs the right holder; the image of a person when it is manifestly accessory to information and cases in which the holder had granted consent. It deals with the dissemination of facts concerning private life, which does not remove this character, nor does it prevent the exercise of civil actions. | There is no detailed and ordered catalog regarding the legitimate and illegitimate intromissions to private life. |
| *Purpose in the use of the collected data.* | In article 4, the bill contemplated the following rule regarding the purposes that can be given to personal data collected for statistical purposes: "the information obtained for market studies or public opinion polls cannot be used for other purposes. Under no circumstances may the personal data provided by the people consulted in such studies or surveys be spread so they can be identifiable." | The law finally establishes a rule of a similar nature in article 9, paragraphs 1 and 2, which states: "the personal data must be used only for the purposes for which it was collected, unless it comes from sources accessible to the public.<br>In any case, the information must be accurate, updated and truthful to the real situation of the owner of the data "This principle was reinforced by the provisions contained in Law 20,575 of 2012." |

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| *ARCO Rights (access, rectification, cancellation and opposition).* | Article 12 of the original bill empowered the right holder to request to whom stored their personal data, to rectify, complete, clarify or update the data, when it was inaccurate, incomplete, equivocal or overdue. The right holder could also request that the data was removed in cases where it was outdated or had been collected, preserved, used, transmitted or disseminated, outside of cases authorized by the law or consented by the affected. | The final text of Law 19.628 in article 12 subsections 1st, 2nd and 3rd states: "Every person has the Right to require to whom is responsible of a data bank, that is dedicated in a public or private way to the processing of personal data, information relative to their person, their origin and recipient, the purpose of storage and the individualization of people or organisms to which your data are transmitted regularly.<br>In the event that personal data is erroneous, inaccurate, equivocal or incomplete, and this is proven they have the right to have it modified.<br>Without prejudice to legal exceptions, they may also require that the data is eliminated, in the case the storage is lacking a legal basis or it has expired. |
| *Legal actions and responsibility.* | The original bill, in article 20 and following, contemplated judicial actions that could be interposed by virtue of the law. The same article provided that any illegitimate interference in the private life of a person gives the right to exercise civil protection and compensation of damages actions before the competent courts.<br>Article 21 of the draft contemplated that any person that suffers deprivation, disturbance or threat to their right to private life because of arbitrary or illegal omissions, the possibility of recurring, by themselves or by any representative to the Court of Appeals, in the jurisdiction where the act was committed or where the arbitrary omission or illegal action occurred. The Court would immediately establish the measures deemed necessary to restore the rule of law and ensure the due protection of the affected rights, without the exclusion of other actions that the affected person could exercise before the corresponding courts for damage compensation. | According to article 23 of the final text of the law, the private or natural person or the public body responsible for the bank of personal data must compensate the patrimonial and moral damage caused by undue treatment of data, without prejudice of eliminating, modifying or blocking the data according to the requirement of the owner or, as the case may be, by order of the court. |

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| *Procedural aspects.* | The competent judge to answer to the infractions to this law must be the one of the domicile of the plaintiff. The actions to which we alluded are dealt with in a general way by the summary procedure and in a supplementary manner by the rules of the ordinary civil trial of a greater amount. The amount of compensation will be set prudentially by the Court, considering the circumstances of the case and the seriousness of the facts, for which it will take into account, among other antecedents, the conditions of the affected person and family group, such as dignity, prestige, honor, place in the community, functions performed or had performed, economic capacity and benefits that the infraction could have brought. | Following article 23 of the final text of the Law, the action for compensation of damages may be filed together with the claim intended to establish the violation, without prejudice to the provisions of article 173 of the Code of Civil Procedure. The applicable procedure is the summary procedure. The judge will take all the measures deemed appropriate to protect the rights that this law establishes effective. Regarding proof, the evidence will be appreciated in conscience by the judge.<br>The amount of compensation will be established prudentially by the judge, considering the circumstances of the case and the seriousness of the facts. |
| *Definitions of concepts for the application of the law.* | The draft law on the protection of private data does not contemplate concepts to be used. | In the final text of the law certain concepts are defined for its best understanding. Thus, article 2 defines concepts such as: data storage, data blocking, data transmission, expired data, statistical data, personal data, sensitive data, data deletion, publicly accessible sources, modification of data, public bodies, data dissociation procedure, registry or data bank, responsible for the registration or data bank, data holder and data processing. Such definitions are relevant and taken into account by the Law in the rest of the articles. Thus, for example, the treatment of sensitive data receives a special treatment in article 10 of the Law, in the following terms: “no sensitive data can be processed, except when the law authorizes it, there is consent of the owner, or it is necessary to grant health benefits to the holder”. |

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| *Distinction between data collection by a public body and by a private entity.* | The draft law on the protection of private data does not include this distinction. | This distinction is important in the final text of the Law. Title IV establishes a special treatment for the collection of data by public bodies, regulation stated from articles 20 to 22. In the first place, these rules provide that the processing of personal data by a public body can only be carried out in matters of its competence and subject to the rules established by law. Secondly, in general terms, it is established that public bodies that deal with data related to convictions for crimes, administrative infractions or disciplinary offenses may not communicate them once the criminal or administrative actions prescribed, or the sanction or penalty was served or prescribed. Finally, it is provided that the Civil Registry Service will keep a register of the personal data banks in charge of public bodies. In addition, the Law gives a public character to these registers, and must include the legal basis of their existence, their purpose, types of stored data and a description of the universe of people included. |
| *Automated data transmission between an authorized entity and another.* | The bill did not address the Automated transmission of data. | Article 5 of the final text of the Law deals with the subject. The first paragraph of that provision provides that the person responsible for the registration or personal data bank may establish an automated transmission procedure, always protecting the rights of the holders and only when the transmission is related to the tasks and purposes of the participating organizations. In the second paragraph, a list of requirements that must be met in the record of the requirement of personal data from one agency to another is established. |

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| *Duty of secrecy of people working in the processing of personal data.* | The bill does not establish a duty of secrecy or confidentiality on the part of these people. | The final text of the law recognizes a duty of secrecy or confidentiality for people who work in the processing of personal data, both in public and private organizations. These people are obliged to keep the data processed secret when they come from or have been collected from sources not accessible to the public, their obligation of secrecy does not cease because they have finished their activities in that field. |
| *Data processing by a trustee.* | The bill did not contemplate any rule regarding the processing of data by mandate. | Article 8 of the final text of the Law grants such possibility. The mandate must be written, recording the conditions of the use of the data. |
| *Systematic treatment of rights.* | The bill did not contemplate an orderly treatment of the rights of the holders. | The final text of the Law, in its title II, carries out a systematic treatment of the rights referred to in the Law. |
| *Right to access information about personal data by the right holder.* | Article 11 of the bill referred to the right to information of the right holder (the owner of the processed personal data).<br>The bill established a faculty for the holder that proved his/her identity, to require to the user of their personal data to provide through a computer copy the respective personal information that they have in their power, indicating the source, the use that is being given and the people receiving the information. The deadline to give this information is five working days, from the formulation of the request. If the information is expressed in terms that are only intelligible by means of an explanation, the user of the data should also provide the corresponding explanatory minutes. | The final text of the law gives the same faculty in article 16. However, it contemplates a more complex special procedure in case the request for information from the right holder is not duly answered. Such procedure is described between letters a) and h) of article 16. The amount of the fine established in this article was modified by Law 19.812, in 2002, to admit fines of up to fifty monthly tax units. |

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| *Use of personal data in relation to economic, financial, banking or commercial obligations.* | The project does not contemplate these aspects. | Articles 17 to 19 of the final text of the Law include a differentiated treatment of the subject. Thus, the first of these provisions begins rewriting that those responsible for the records or personal data bank may only communicate economic, financial, banking or commercial data, when these consist of bills of exchange and promissory notes, protested checks for lack of funds or for another reason, as well as for breach of obligations derived from mortgage loans or bank loans, and so on.<br>Article 18 prescribes that in no case can the data referred to in article 17, related to an identified or identifiable person, be communicated after five years have elapsed since the respective obligation became enforceable or after having been paid or extinguished by other legal means.<br>Article 17 was amended by Law 20.463 of 2010, to prevent the publication or communication of financial information when it originated during the period of unemployment affecting the debtor, and by Law 20.575 of 2012 to prevent the treatment of financial information that is pending. |

Due to discrepancies between the cameras of the Chilean Congress during the processing of the project, a mixed commission formed by members of both cameras was formed. This instance was the one that gave shape to the final text of Law 19.628, which was published in the Official Gazette on August 28, 1999 and became effective 60 days later. The law also had a transitory article that granted a year of grace to public bodies that processed personal data, to adapt to the obligations established by law.

It can be said that the legislator opted for an omnibus law, as opposed to a sectoral law. That is, that Law 19.628 constitutes a framework regulation, of a general nature, that is applicable to different circumstances related to the processing of personal data.

As for its structure, Law 19.628 is composed of 24 permanent articles and three transitory articles, contained in seven titles:

- Preliminary title: General provisions (articles 1-3).
- Title I: On the use of personal data (article 4-11).
- Title II: Of the rights of data owners (articles 12-16).
- Title III: On the use of personal data relating to economic, financial, banking or commercial

obligations (articles 17-19).

- Title IV: Of data processing by public organisms (articles 20 to 22).
- Title V: Of the responsibility for the infractions to this law (article 23).
- Final Title, which modifies the Sanitary Code (article 24).

## 2.2. Scope of the Law

The material scope of application of the law is the processing of personal data in general, whatever the form in which said process is carried out. In this matter, Law 19.628 follows the modern tendency to extend its scope of application not only to the processing of personal data carried out in an automated way, but also carried out manually.

Regarding the subjective scope of application, that is, the individuals with respect to whom the legislation and the fulfillment of the obligations contained therein is applicable; the law distinguishes between those who own the data and those who process it. In this last category we find the person or entity in charge of the registry or data bank, who has different rights and obligations.

**Holder of personal data**: the natural person to whom the personal data refers to. Therefore, legal persons are excluded from this category.

**Responsible for registration or data bank:** the private individual or legal entity, or the respective public body, which is responsible for decisions related to the processing of personal data. Therefore, this category is applicable to both natural persons, as legal entities, as well as public organisms.

The law does not explicitly include the person in charge of personal data, as foreign legislations do. The person in charge is the one who performs the processing of personal data on behalf of the responsible for the data, and, therefore, responds to the latter. However, the law does consider the figure of the "agent", to whom the general rules of the mandate contained in civil legislation apply (Lara, Pincheira and Vera, 2014).

## 2.3. Subsequent modifications to Law 19.628

Law 19.628 has been the object of a series of modifications. Most of these have aimed at remedying certain situations of discrimination or violation suffered by people due to the traffic of their personal data by companies. However, none of these modifications signified an integral reform of the law, nor aimed at remedying some of its structural flaws in a general way. That is why they can be cataloged as "patch laws".

- **Law 19.812:** Published on June 13, 2002, it modified Law 19.628 and the Labor Code, so that personal data of an economic, financial, banking and commercial nature would no longer be used to discriminate against those who apply for a job. Due to the fact that the conduct considered illegal (conditioning the contracting to the absence of obligations of an economic nature) was specified in a pre-contractual stage, this was outside the scope of application of the Labor Guardianship Procedure, the main procedural that allows workers to request for judicial intervention when their fundamental rights are affected. Indeed, the second subparagraph of article 485 states that "the same procedure shall also be applied to determine the discriminatory

acts referred to in article 2 of this Code, with the exception of those contemplated in its sixth subparagraph", which refers to job offers. Although the objective sought by the law was worthy of consideration, in practice it has seen little application, due to the lack of a procedure that makes it effective. Consequently, this reform did not end with the pernicious practice of requesting applicants to a job to present their financial history and in this way discriminate against those who have outstanding debts.

- **Law 20.463:** Published on October 25, 2010, it prohibits administrators of personal data bases of a financial nature to processes data relating to debts of natural persons, when these occurred during the period in which the person was unemployed. Like the previous reform, this also did not have a substantive impact, since it only prevented the publication and exchange of financial information related to the delinquency due to debts incurred in the period of unemployment, and not to those previously contracted which's delinquency is a product of unemployment. On the other hand, if the individual is not assigned to unemployment insurance, it is the debtor's responsibility to certify their dismissal in the Commercial Bulletin.

- **Law 20.521:** published on July 23, 2011, it prohibits any type of commercial risk assessment that is not based on "objective information" related to the financial situation of individuals. An infraction of this law allows those affected to demand compensation for the damages suffered and to request the immediate removal of the non-objective data from the databases. In our opinion, the main weakness of this regulation is that it is too short and does not suffice itself, since its brief text does not define what should be understood by "objective information", notably reducing its legal effectiveness. In fact, the text is so succinct that it is necessary to resort to the history of the law to understand it.

- **Law 20.575:** promulgated on February 14, 2012, this is perhaps the most important modification that Law 19.628 has suffered. The Law has two parts: articles 1 to 6 constitute an independent regulatory body, while articles 7 and 8 modify Law 19.628. The main merit of this law was to enshrine the principle of finality, analyzed below. It is worth mentioning that this legislation had the express purpose of avoiding abuse in the treatment of personal data by different entities, to the extent that the press called it "DICOM Law" (El Mostrador, 2012), in reference to the practices of those who used the data recorded in Equifax, the continuation of the old company dedicated to the processing of data and information of a commercial nature.

## 2.4. Categories of data and definition of data bank in Law 19.628

In a similar way to comparative legislation on personal data, Law 19.628 contemplates the definition of certain concepts, including the different meanings of "data".

Following Cerda (2012), "data" can be understood as a "basic unit of information (...) when the information that carries the data is relative to a specific person or susceptible of being so, it is called personal data or nominative data, that is, a unit of information that is predicated on a determinate or determinable person."

The Law defines four categories of data:

**Personal data**: "those related to any information concerning natural persons, identified or identifiable."

**Sensitive data**: "personal data that refer to the physical or moral characteristics of a persons or facts or circumstances of their private life or privacy, such as personal habits, racial origin, ideologies and political opinions, beliefs or convictions religious, physical or mental health conditions and sexual life."

**Expired data**: "the one that has lost relevance by provision of the law, by fulfillment of the determined condition or the expiration of the term indicated for its validity or, if there was no express norm, by the change of the facts or circumstances that it consigns."

**Statistical data**: "the data that, in its origin, or as a consequence of its treatment, cannot be associated with an identified or identifiable owner. The latter is, therefore, outside the scope of application of the law."

Regarding the registry or functional data banks, the law has defined them as "the organized set of personal data, whether automated or not and whatever the form or modality of its creation or organization may be, which allows to relate the data, as well as perform all kinds of data processing ".Therefore, it should be noted that an organized set of personal data cannot be considered, for legal purposes, as a data bank if it cannot be related to each other or does not allow to carry out processing operations. The factor that distinguishes, therefore, a database from a simple set of organized data is that the database is potentially subject to processing, either by automated or non-automated means.

## 2.5. Principles in the Law

Following the categorization made by Cerda (2002), Law 19.628 includes the following principles:

### 2.5.1. Freedom in the processing of personal data

Far from prohibiting, as a general rule, the processing of personal data, the legislator chose to consecrate the right to perform this process. Article 1 of Law 19.628 establishes that "every person can carry out the processing of personal data". Then, and considering the interests of those involved, the law conditions the processing to the fulfillment of three elements: 1) the handling must be carried out in accordance with the law, 2) the purposes of use must be permitted by law, and 3) it should always respect the full exercise of the fundamental rights of the owners of the data and the faculties that the law recognizes them.

### 2.5.2. Information and consent of the owner

In order to safeguard the right of individuals to control the information that concerns them, the law establishes that the processing of personal data can only be done through an express authorization by the law - Law 19.628 itself, or any another - or by the owner of the data. In the latter case, said person must be informed about the purpose of the storage of their data and its possible publication, and the authorization must be made expressly and in writing. Such authorization may be revoked without the need of a justified reason, without a retroactive effect.

Although the expressed and informed consent constitutes, in principle, the general rule for the treatment of personal data, the law contemplates three exceptions to this principle. Some authors consider that this exceptions are of such an amplitude that the general rule is, for all practical purposes, the exception to the rule (Ciclo de Riesgo, 2014; Jijena, 2010).

The exceptions are:

1. Data obtained from public access sources: these sources are defined, ambiguously, as "the records or compilations of personal, public or private data, of unrestricted access or reserved for applicants" . Such data may be subject to processing , without the authorization of the owner, to the extent that any of the following (non-copulative) conditions established by the legislator are present: (i) that the data is of an economic, financial, banking or commercial nature, (ii) that it is contained in certain categories of persons that are limited to indicate antecedents such as the belonging of the individual to that group, their profession or activity, their educational titles, address or date of birth, or (iii) that are necessary for commercial communications of direct response or commercialization or direct sales of goods or services.

The definition of "public access sources" is unclear. The fact that only one of the three conditions must be met makes this exception extremely broad. This has given rise to a large number of abuses on the part of those who process personal data, and to the fact that due to this exception the right holders are deprived of the protection that the law should provide. Countries with a higher standard of protection of personal data, such as Spain, have opted to define more narrowly what should be understood by a public source, and have even established a closed catalog of the sources that can be considered within that category (Alvarado, 2014).

2. Handling by private legal entities: another exception is related to the processing of personal data by private legal entities for the exclusive use by these, their associates and the entities to which they are affiliated, for statistical, tariff or other purposes of general benefit.

3. Handling by public bodies: public bodies will not require the express authorization of the owner of the data for processing, but such handeling can only refer to matters of their competence, subject to the provisions of Law 19.628.

### 2.5.3. Principle of finality

While it is possible to argue that the principle of finality was present in Law 19.628 since its publication in 1999, it was Law 20.575 that reinforced its consecration.

In particular, the finality principle states that personal data can only be used and treated for the purposes for which it was collected. This principle is closely related to the principle of information and consent of the owner, since it would be illegitimate that the data were used for purposes other than those consented.

Because different commercial risk entities used to grant, in exchange for a tariff, certificates of financial history of natural persons to any person who requested them, Law 20.575 opted to establish that the communication of personal data of an economic, financial, banking or commercial nature "may only be made to the established business, for the credit process, and to the entities that participate in the commercial risk assessment and for that sole purpose". It added that "in no case may this information be required in the processes of personal selection, pre-school, school or higher education admission, urgent medical care or application for public office."

It is worth emphasizing that the principle of finality is also diminished with the exception regarding sources accessible to the public. In fact, Article 9 of Law 19.628 establishes that "the personal data must be used only for the purposes for which it was collected, unless it comes from or has been collected from sources accessible to the public."

### 2.5.4. Quality of the data

This principle is included in the second paragraph of article 9 of Law 19.628, which establishes that the information - personal data - must be accurate, up to date and truthfully answer to the real situation of its owner. The contravention of this obligation results in the faculty of the latter to request that the data is modified, blocked or eliminated.

### 2.5.5. Special protection of sensitive data

The legislator has chosen to provide a special level of protection to certain personal data that, given their nature, is considered sensitive. This include data that refers to the physical or moral characteristics of a persons, or facts or circumstances of their private life or intimacy, such as personal habits, racial origin, ideologies and political opinions, beliefs or religious convictions, states of physical or mental health and sexual life. For this reason, the definition of personal data is broad and the definition of sensitive data refers to facts or circumstances related to intimacy or privacy. The treatment of sensitive data is particularly prone to damage the fundamental rights of the affected person, situation for which the legislator has chosen to grant a higher level of protection.

Given these circumstances, the legislator decided to reverse the rule applicable to personal data and establish that the processing of data of a sensitive nature is, in principle, prohibited. Only three exceptions expressly established by law allow the treatment of this type of data, namely: (i) that the law authorizes it, (ii) that there is consent of the owner, or (iii) that said data is necessary for the determination or granting of health benefits of the holders.

### 2.5.6. Data security

This principle is contained in article 11 of Law 19.628, which establishes the obligation of the person responsible for the registers or data banks, to take care of them with due diligence, taking responsibility for the damages caused. However, the law does not establish standards of care or specific measures that those responsible must take in order to ensure the security of the data or prevent damages. Therefore, the courts are called upon to define, case by case, if sufficient measures have been taken to comply with this principle.

### 2.5.7. Secrecy duty

The law establishes the obligation for those in charge of the registries or data banks to keep secret the personal data consigned in them, if it comes from, or has been collected, from non-public access sources. Said obligation is not extinguished when the person is no longer in that position, which means that the obligation is extended over time.

### 2.5.8. Guarantees in case of cession and the communication of data to third parties

Unlike other countries, Chilean legislation does not include provisions regarding the cross-border transfer of data. The foregoing may reduce the effectiveness of Chilean regulation to protect personal data. Therefore, it would be possible to transmit personal data to countries that have a lower standard of protection that those established by Law 19.628, or at least those adequate according to general parameters.

The legislation does not offer more guarantees than those contained in its general rules regarding the transmission of data. Namely, the possibility of an automated data transmission is admitted, insofar as the rights of the holders are preserved and the transmission is related to the purposes of the participating organizations. The admissibility of the request will be evaluated by the person in

charge of the data bank that receives it, but the responsibility will fall upon the requester. The person in charge of the data bank must record: a) the individualization of the requesting party; b) the purpose and motive of the request, and c) the type of data that is transmitted.

Again, these obligations are not required in cases where the data was obtained through public access sources. The provisions of article 5 are not applicable when it comes to the transmission of personal data to international organizations in compliance with the provisions of international treaties and conventions. The foregoing reinforces the need for such treaties and agreements to establish their own standards that give an adequate level of protection to people when dealing with their personal information.

## 2.6. Rights of data owners

The rights established in Title II act as a counterweight to the legal authorization for the processing of personal data, contained in Article 1 of Law 19.628. On the one hand, the Law allows anyone that satisfies certain requirements to process personal data, and, at the same time, it gives the tools that assure that the data is real and that the handling is done legally.

Therefore, in the event of failure to comply with any of these two conditions, the Law guarantees data owners the right to request the modification, cancellation or blocking of the data in question.

According to the provisions of article 13, the rights of information, modification, cancellation and blocking are unavailable and cannot be limited by means of any act or convention.

### 2.6.1. Right to information or access

The Law gives the data owner the right to make to require the person responsible for the data bank for them to provide information about the data concerning their person, their origin and recipient, the purpose or motive of the storage and the identification of the people or bodies to which data is transmitted regularly.

As a way of making this right enforceable, the law establishes the obligation for public bodies to register databases in a public registry, in charge of the Civil Status and Identification Service. This public record must contain information about the legal basis of its existence, its purpose, type of data stored and a description of the universe of people it comprises. Unfortunately, this obligation has not been extended to private entities, the latter being exempt from the obligation to register their databases, and thereby reducing the ability of natural persons to exercise their right to information and access in those cases.

### 2.6.2. Right to modification or rectification

The modification or rectification is defined in article 2, letter j) of Law 19.628 as “any change in the content of the data stored in registers or data banks”. What is sought is to obtain the correction or integration of the data that is inaccurate or incomplete in the database.

Therefore, the law empowers the owner of the data to request its modification, and the correlative obligation of the responsible of the data bank to make such modification, when the data is erroneous, inaccurate, misleading or incomplete, and so it is accredited.

### 2.6.3. Right of cancellation or elimination

Article 2 h) defines the deletion or cancellation of data as “the destruction of data stored in registers

or data banks, regardless of the procedure used."

The cancellation will take place, and may be requested by the owner, when its storage lacks legal basis or when it has expired , then it must be deleted or destroyed from the database. According to Paula Jervis (2013), the treatment of a piece of information loses its legal basis when it is done in contravention to what is established by the law or, for example, if the authorizing law is repealed.

### 2.6.4. Right to blockage

The blockage consists of the temporary suspension of any operation for the processing of stored data. According to the third paragraph of article 6, those responsible for personal data banks must block personal data if its accuracy cannot be established or validity is doubtful and are not subject to cancellation.

Data blockage is subsidiary to elimination, when the owner revokes their consent to the processing of data, or when the owner does not want to appear in a database of a commercial nature temporarily.

### 2.6.5. Other rights

Although the rights of access, modification, cancellation and blocking are the four main rights established by the Chilean legislation, it is also worth mentioning two more rights, contained in Law 19.628.

As a counterweight to the right to information and access by the data owners, the Law establishes an obligation of communication to third parties by the person responsible for personal data. This means that, if personal data that has been previously communicated to other people are modified or canceled, the person in charge of the data bank must notify them about the operation carried out. However, it is important to note that the Law gives this right to the owner, without expressly qualifying it as such.

Finally, the last clause of article 3 establishes the right to opposition: "the owner may object to the use of their personal data for purposes of publicity, market research or opinion polls". According to Jervis (2013) this right can be exercised at any stage of the data processing.

## 2.7. Observance of the provisions of the law

### 2.7.1. Administrative control authority

One of the main criticisms regarding the ability of holders to enforce the observance of the precepts contained in Law 19.628 is the absence of a public control authority, compared to what happens in other legislations. The absence of said control authority implies that the affected individuals must appeal to the ordinary courts of justice, either through a constitutional protection action, or through the ways established in the Law to enforce their rights and protect themselves from the treatment of data by third parties. The costs associated with judicial trails, and considering the relative lack of knowledge that individuals have on personal data processing by third parties, evidences that the lack of a control authority directly affects the applicability of Law 19.628 for ordinary citizens.

Law 20.285 granted the Council for Transparency the authority to ensure proper compliance with Law 19.628, on the protection of personal data by the organs of the State Administration. Unfortunately, it was not granted the ability to sanction the breach of these obligations, so the lack of compliance with the provisions of the law by public bodies has not been mitigated. On the other hand, the Council has no attributions to make provisions of Law 19.628 effective regarding private organizations.

### 2.7.2. Jurisdictional control

Like most legislations, the Chilean statute gives the possibility to those affected to go to court in order to safeguard their rights regarding the processing of their personal data. The affected person can opt for the special procedure contained in Law 19.628, which has been called *habeas data*.

The *habeas data* action proceeds in the cases where the person in charge of the data bank does not respond to the request for information, modification, cancellation or blocking within a period of two working days or, when it is denied. By meeting these requirements, the affected person can appeal to the court within the domicile of the person responsible for the registration or data bank. The court must proceed through a brief and summary procedure. If the claim is upheld, the sentence will set a prudential period to comply with it and may apply a fine of one to ten monthly tax units ($ 686 US dollars, approximately), or from ten to fifty monthly tax units (between US $ 686 and US $ 10,299, approximately) if the data is related to economic, financial, or other banking or commercial obligations.

### 2.7.3. Constitutional judicial control

Eventually, those who are victims of an illegitimate treatment of their personal data may choose to file a constitutional protection action to the Court of Appeals of their domicile, a procedure that is characterized by its celerity and low cost for the appellant. Through it, any person can request the Court to take measures conducive to end an arbitrary or illegal act or omission, which implies a deprivation, disturbance or threat to their rights and constitutional guarantees. For this reason, the appellant must justify that the illegitimate treatment of personal data affects some of the constitutional rights mentioned in article 20 of the Constitution, such as the protection of private life or the honor of the person and family, and not in the infraction of the provisions of Law 19.628.

## 3. Legislative reform processes

### 3.1. Bulletin N 6.120-07

Proposed by the President to Congress in 2008, the bill is based on the diagnosis that the current legislation is insufficient, and proposes to incorporate a series of profound modifications to Law 19.628. Key modifications include: the explicit recognition that any handling of personal information must respect the rights of the owner; the extension of the protection of personal data to legal persons; the establishment of an autonomous control entity, with the power to enforce the provisions established in Law 19.628; and the application of administrative sanctions.

The fact that third parties, under current legislation, do not require the consent of the owner to collect, process and exchange personal data when these are obtained from public access sources is unchanged, and a more detailed definition of the concept is not provided, as some authors have recommended. However, we propose the incorporation of a new paragraph to article 4 of Law 19.628, which states: "those who process personal data without the authorization of the owner in accordance with the provisions of this article, must inform the data owner of the handling, in the terms of article 3 bis ".

The obligation to inform the right holder of the treatment of their personal data, even when their consent is not required, as well as the creation of an autonomous authority in charge of ensuring these guarantees, would considerably improve the legal framework's capacity to address the limitations surrounding the protection of personal data. The last milestone of this project took place on January 13, 2010, when it stopped advancing with the arrival of the previous government.

### 3.2. Bulletin No. 8.143-03

It was proposed by the Executive to Congress in 2012, with the specific objective of adapting Chile to the data protection obligations required by the OECD. The project reconsiders the way in which the prior consent for the use of personal information was given, stating that it must be explicit, free and unambiguous. It still recognizes that data obtained from public access sources is an exception to the requirement of explicit consent, but provides a narrower definition of what is meant by such sources.

It also introduces the principles of data protection recognized by the OECD, namely the principle of proportionality, data quality, specification of the purpose or motive, limitation of use, data security, access and opposition of the data owner and transparency.

The project also regulates the claim procedure in case of infractions, without creating a new control authority. In the case of infractions committed by public bodies, the affected party can complain to the Council for Transparency. When the infraction is committed by a private organization, the data owner has the possibility of promoting a voluntary understanding through the National Consumer Service (Chamber of Deputies of Chile, 2012), which does not have sanctioning or inspection powers (and the project does not create these either). After this stage, the affected party may bring sanction and compensation actions before a civil judge. This bill stopped being processed in the previous government.

### 3.3. Bulletin No. 10.133-03

This proposal was initiated in 2015 by a parliamentary motion in the Senate. It seeks to modify the regulation of targeted advertising or spam through the reform of Law 19.496 of Protection of Consumer Rights, creating an opt-in mechanism where only direct mail can be sent to those who have consented to previously in and expressly. It also modifies Law 19.628 by eliminating the

requirement of authorization of the data owner for commercial communications of direct response or commercialization or direct sale of goods or services. The project is currently being processed by the Senate Economy Committee and its last legislative milestone was held on July 6, 2016.

### 3.4. Bulletin No. 9.917-03

It modifies Law 19.628 so that in no case can personal data related to economic, financial, banking or commercial obligations be used, processed or communicated after five years have elapsed since the respective obligation became enforceable, thus establishing a "right to be forgotten" restricted to commercial obligations.

In this way financial institutions must proceed as if these people had never existed. The objective of this legislation is that these institutions cannot resort to the practice of "scoring" with respect to obligations that have already completed more than five years since they were due, allowing the affected person to reconstruct their economic situation. The project, initiated by a parliamentary motion in 2015, is currently being processed by the Senate Economy Committee and its last milestone was on January 18, 2016.

### 3.5. Bulletin No. 10.512-07

The project was admitted by a motion in the Chamber of Deputies at the beginning of 2016. It proposes to add the identity card number known as the Unique National Rol number (RUN) and Unique Tax Identification Number (RUT) to the list of data that article 2 of the Law 19.628 mentioned as personal data. In this way, it seeks to avoid different forms of violation of privacy and information self-determination of individuals, such as that produced by the existence of sites such as 24x7datos.

This modification seems to be rather symbolic, because the RUT and the RUN have always been susceptible of being considered personal data, since they identify or make a person identifiable. On the other hand, the project seeks to correct the exception of data obtained in a public access source, modifying article 4 and establishing that "the processing of personal data that come from or that is collected from public access sources also requires authorization, whatever its nature and support is, including economic, financial, banking or commercial data." The project is being processed in the Constitution, Legislation, Justice and Regulation Commission and its last legislative milestone took place on January 13, 2016.

### 3.6. Bulletin No. 9.839-03

The project, introduced at the beginning of 2015 through a parliamentary motion before the Chamber of Deputies, modifies Law 19.628 with the purpose of prohibiting the use of delinquency or bill protest information from natural or legal persons to perform a commercial risk assessment if it originated within 180 days prior to the entry date of an application of an economic, financial, banking or commercial nature. The last milestone in the processing of this project took place on January 7, 2015.

### 3.7. Bulletin No. 9.388-03

It seeks to modify Law 19.628 so that any person can request search engines and websites the elimination of their personal data. The project establishes, in this way, a right to be forgotten that can be requested to the search engines, but also to content websites. On the other hand, the project does not establish any type of requirement for the application to be processed, such as that the data no longer fulfills its purpose, is out of date, or is not a matter of public interest. This exaggerated amplitude, and lack of counterweights, makes this project extremely dangerous for journalism, freedom of expression

and historical memory. The last milestone in the processing of this project, entered by parliamentary motion in the Senate in mid-2014, took place on September 2 of the same year.

### 3.8. Bulletin No. 7.886-03

The project started by a parliamentary motion in the Chamber of Deputies in mid-2011, which includes an expansion in the notion of data holders, an extension of the concept of commercial information, the creation of a System of Economic Obligations (SOE). It also proposes the strengthening of the rights of data owners, the regulation of the entry and exit requirements of the information distributors, the regulation of the obligations of all holders of economic obligation data, among other modifications. The last milestone in the processing of the project took place on June 17, 2014.

### 3.9. Bulletin No. 9.384-07

Its objective is to modify the Constitution in order to enshrine the protection of personal data in article 19 No. 4, which currently guarantees the respect and protection of privacy and the honor of the person and family.

This modification may be relevant, since if it was materialized, people could use the constitutional protection action to safeguard their fundamental right to the protection of personal data. Currently, this route is possible only if the affected party is able to demonstrate that the improper treatment of their data violated in some way their right to privacy or their personal honor or that of their family. The last milestone in the processing of this bill draft initiated by motion in the Senate in mid-2014, took place on March 4, 2015.

### 3.10. Bulletin No. 8.559-03

It incorporates the obligation to create an instant data elimination system, in the case of debtors who have paid their obligations. This in order to correct the system that is currently used, which is qualified as slow in the bill draft. This project, initiated in 2012 through a parliamentary motion submitted to the Senate, and has not made any progress since the previous government.

### 3.11. Bulletin No. 8.589-07

It modifies Law 19.628 in order to oblige those who are in the telemarketing business to inform the original source that collected the data to the receiver of the call. In the same way, it establishes the obligation to offer the recipient the possibility of requesting the deletion of the database. This project, initiated through a parliamentary motion presented in the Senate in mid-2012, has not progressed since the previous government.

### 3.12. Bulletin No. 8.175-03

It expressly prohibits the existence and use of historical records of debtors, sanctioning the dissemination and use of such information. This project has not progressed since its presentation in January 2012, during the previous government.

### 3.13. Bulletin No. 7.732-07

It prohibits the sending of commercial communications through text messages to cellphones (SMS) that have not been previously authorized by the recipient. The last milestone in the processing of this draft took place on June 16, 2011, the same day it was admitted by a motion in the Chamber of Deputies.

## 4. Participation instances

### 4.1. Panels and technical meetings by the Executive Power

#### 4.1.1. First public consultation of the Ministry of Economy (2011)

On August 30, 2011, the former Minister of Economy, Pablo Longueira, launched a public consultation on the personal data bill that the government proposed to present to the National Congress. However, the comments submitted by each of the actors were not made public. Derechos Digitales (Digital Rights) requested the transparency of the content of the comments made by the industry, which was rejected by the Ministry of Economy, arguing that it was not public information (Derechos Digitales, 2012).

Finally, in January 2012, the bill was submitted (Bulletin No. 8.143-03) which was abandoned after about two years of discussion in the Chamber of Deputies.

#### 4.1.2. Second public consultation of the Ministry of Economy (2014)

In July 2014 the Ministry of Economy opened a virtual public consultation so that that business owners, academics and civil society organizations could comment on the draft of the "Law for the Protection of Individuals in the Processing of Personal Data" drafted by the government. This process was led by the Undersecretary of Economy.

Although the comments submitted by the different actors were published, the modifications made to the preliminary draft concerning these comments were not available to those involved.

#### 4.1.3. Technical data protection panel (2014)

In mid-2014, during the public consultation, the Ministry of Economy convened the private sector, academia and civil society to a series of meetings for the review of the draft of the "Law on the Protection of Personal Data". This panel discussed the articles of the preliminary draft that where subject to public consultation. The purpose of this technical panel was to generate as many agreements as possible between the actors, before being submitted to Congress. The process lasted several months and was led by the Undersecretary of Economy.

In a similar way to the case of the public consultation process, the modifications made to the preliminary draft were discussed, but were not available to those involved in the technical panel or to the public.

#### 4.1.4. Civil Society Council for the Protection of Personal Data

Inaugurated in October 2015 and under the Undersecretariat of Economy, this council has as its mission "to manifest the voice of citizens throughout the cycle of public policies related to the development of the Protection of Personal Data in Chile".

The Council is made up of non-profit non-governmental organizations, think tanks representatives and experts from the private sector with national and international experience, many of whom had previously been part of the technical panel. When the Council was created, the draft law on the protection of personal data resided on the Ministry of Finance, which was studying the budgetary viability of the creation of a data protection authority. However, this preliminary version of the draft sent to the Ministry of Finance, with the modifications made after the work of the technical panel and

the results obtained in the public consultation, remained unknown to the members of the Council, despite the efforts made in that sense.

This Council has not been convened for new sessions since the end of January 2016, without any further notice.

On May 21, 2016, and as part of the annual public account, President Michelle Bachelet announced that she would send a bill during the next few weeks that creates an efficient institutional framework to guarantee the adequate protection of personal and public data. However, there is no certainty that the content of said bill has any relation to the preliminary draft submitted to public consultation and discussed by the technical panel, and that was subsequently requested by the Civil Society Council for the Protection of Personal Data.

## 4.2. Legislative impact

Aside from the instances of participation convened by the Executive Power, the Chilean legislative process admits the participation of actors interested in the discussion of the different draft bills. This participation translates into the opportunity, upon written request, to participate in the various committees of the Chamber of Deputies or the Senate, where bills are specifically discussed. At the same time, parliamentarians often invite experts or civil society organizations to present different perspective on the issue addressed by the bill.

## 5. Interested actors

An essential characteristic of the regulation that protects personal data in Chile is that it generally affects individuals and companies, but there is no specific autonomous or dependent administrative body in charge of the protection of personal data. Those interested in the regulation and enforcement of personal data protection include various administrative organs, members of civil society organizations and academics.

In many of these cases, relevant actors emerge from the creation of organizations and groups, not by virtue of their specific mission but because of the members that compose or integrate them, where often outstanding people -especially, those linked to the academia- work in.

### 5.1. Official bodies

**National Congress**: The National Congress is composed of two branches: the Chamber of Deputies and the Senate. Both concur to the formation of laws according to the procedure established in the Constitution.

One of the members of congress that has shown the most interest in the regulation on the protection of personal data is Senator Felipe Harboe. Among the projects that he has presented and sponsored there is Law 20.575, which establishes the principle of purpose in the processing of personal data (also known as "DICOM Law"), bill Bulletin No. 9.384-07 that constitutionally enshrines the protection of personal data, bill Bulletin No. 9.917-03 that modifies various legal bodies to prohibit the use of historical records of expired commercial data, among others. Publicly, he has been in favor of the enactment of a new law on the protection of personal data, amending the current weaknesses of our legal framework, and the creation of an independent data protection authority with sanctioning faculties (Alonso, 2015).

The processing of laws is done through committees devoted to specific subjects. This means that some commissions have a more preponderant role in bills related to the protection of personal data. Among those commissions with a negative record in the processing of personal data bills, the following stand out:

**Constitution, Legislation, Justice and Regulation Senate Commission**, for its role in the approval of Law 20886 on Digital Processing of Judicial Proceedings, which does not protect people from the unnecessary exposure of personal data made by the Judicial Power.

**Transportation and Telecommunications Senate Commission**, which is currently processing Bulletin No. 10,125-15, which seeks to create a public registry of public transport fees evaders.

**Constitutional Commission of the Chamber of Deputies**, in this commission the modifications to the original project of Law 19.628 where made, that eliminated the provisions that sought to reach its initial objective: to regulate different aspects of private life.

**Ministry of Economy, Development and Tourism**: Its mission is to promote the modernization and competitiveness of the productive structure, private initiative and efficient market action of the country.Its current Minister is Luis Felipe Céspedes Cifuentes, a commercial engineer at the Pontifical University Catholic of Chile and Ph.D in Economy of the University of New York.

Within this Ministry, the Undersecretariat of Economy and Small Businesses has a special relevance.

Since 2014, this body was in charge of the preparation of the new personal data law project, which would repeal the current Law 19.628 and modernize the regulatory framework on the subject in Chile, making it compatible with current international standards (Andrade, 2014). With this in mind the Ministry coordinated different organisms such as the Civil Society Council for the Protection of Personal Data, the Technical Committee for the protection of personal data and has done two public consultation processes. The Undersecretariat was also a key organism in the process of preparing the Digital Agenda 2020, which includes the enactment of a new personal data law.

The former Undersecretary of Economy and Small Businesses, Katia Trusich Ortiz, was one of the main promoters of a new personal data protection law (Ministry of Economy, 2015). The former undersecretary resigned on January 4, 2016, supposedly due to differences with the Minister of Economy (Alonso and Leiva, 2016) after the Finance Ministry stopped the processing of the personal data bill to analyze whether the Treasury had the resources to finance a personal data authority (Reusser, 2015). Attorney Raúl Arrieta served as an advisor to the Ministry of Economy during the preparation period for the draft of the new personal data law, heading the process of public consultation and subsequent technical committee, until his resignation in 2015. Through her employees and ex-employees, the Undersecretariat has been in favor of updating the national regulations on the subject, and of creating a public control entity (Aravena, 2016). In the same way, she has published in various academic journals and participated in the public debate about the protection of personal data through the press.

**Ministry of Finance**: its function is to efficiently manage the public resources of the State. In accordance with article 65 of the Political Constitution, the laws that are related to the financial or budgetary administration of the State are of exclusive initiative of the President of the Republic. For this reason, any legal initiative that includes a personal data control authority with some expenditure, must be promoted by the Executive Power, and not through the parliamentarians' motion. Its current minister is Rodrigo Osvaldo Valdés Pulido, a commercial engineer from the University of Chile and Ph.D. from the Massachusetts Institute of Technology (MIT).

On June 1, 2016, the government announced that the data control authority will be dependent of the Finance Ministry, the so called National Data Protection Bureau, which will be "light-weighted" since, in the minister's words, "these are not the times to make big expenditures", referring to the deteriorated economic situation of the country in 2016. Although the announced bill has not yet been submitted to Congress, it has been announced by the press that this new independent service of a technical nature will be in charge of ensuring the compliance with the law, promoting the protection of personal data and will be empowered to dictate instructions to adapt the regulatory framework to the development of new technologies (Alonso, 2016).

**Ministry of Transport and Telecommunications**: Among its main functions is to propose national policies on transport and telecommunications. Although this ministry does not directly regulate issues related to personal data, it has recently pushed a bill that seeks to create a public registry of evaders of public transport fees, using the exposure of the personal data of offenders as an incentive for the payment of the fees (Senate, 2016).

Under this ministry, the Undersecretariat of Telecommunications (SUBTEL), has the responsibility of delivering personal data in compliance with article 222 of the Code of Criminal Procedure, and the administration of the lists of users specified in the number portability law.

**General Directorate of International Economic Relations (DIRECON)**: a public division, under

the Ministry of Foreign Affairs, whose purpose is to execute and coordinate the Government's policy on International Economic Relations. Its current director is Andrés Rebolledo.

In compliance with its functions, DIRECON carries out the negotiation of various international commercial treaties that have an impact on the national regulation of personal data. In this way, DIRECON was the authority in charge of the negotiation of the Trans-Pacific Agreement (TPP), which deals with the regulation of personal data in its chapter on electronic commerce. Similar issues are discussed in the negotiation of the Trade in Services Agreement (TiSA).

**Council for Transparency**: an autonomous corporation of public law, with legal personality and its own assets, created by the Law on Transparency of Public Function and Access to Information of the State Administration.

The Council has the power to ensure compliance with Law 19.628 by the organs of the State Administration. However, it is not endowed specific mechanisms to compel other State agencies to comply with provisions of Law 19.628. In spite of the above, the Council has launched a series of initiatives that reflect its interest in the protection of personal data. On January 28, 2016, it launched a social media campaign called "#cuidatusdatos" (Take Care of your Data) that focuses on publicizing the importance of controlling the data that citizens provide daily (InfoJuris, 2016). This Council has been considered as a potential candidate to act as a data authority to private and public organisms, as explored in detail by Álvarez (2016).

Likewise, and in connection with the controversy over the installation of three televigilance balloons in two communes of Santiago, the Council compelled the municipalities that implemented these surveillance systems to provide information related to "the faculties that these municipalities have to use hot air balloons that capture images of public and private spaces of their commune", "the type of data or information is collected by this system" and "the treatment they are giving to the collected personal data" (Council for Transparency, 2015).

**National Consumer Service**: SERNAC is a public service under the Ministry of Economy, Development and Tourism. It is responsible for protecting and promoting the rights of consumers, as well as educating the population about their rights and duties in this matter.

In 2013 SERNAC launched a platform called "Do Not Disturb", which allows anyone to express their willingness to be erased from the lists of massive advertising and/or promotional mailings of companies. This seeks to prevent people from receiving emails, calls, text messages or print advertising without due consent.

**Superintendency of Banks and Financial Institutions (SBIF)**: this is a public and autonomous institution, created in 1925 with its own legal personality, independent of the central government and related to the Ministry of Finance. Its function is to supervise banking companies and ensure the proper functioning of the financial system, including the processing of personal data by financial institutions.

## 5.2. International bodies

**Organization for Economic Cooperation and Development (OECD)**: an international cooperation agency. Its objective is the coordination and analysis of public and social policies among its 34 country members. Chile has been a member of this organization since 2010. Its entry implied the obligation to implement the Guidelines regarding the protection of privacy and the cross-border flow of personal data (OECD, 2002), an obligation that even after repeated requests, has not been fulfilled, which has given Chile the right to be warned by the organism.

**Asia-Pacific Economic Cooperation Forum (APEC):** a cooperation forum where many countries of the Pacific basin participate. Its objective is to promote and facilitate trade and economic development in the region. In the same way as the OECD, APEC has commitments regarding the right to privacy (APEC, 2005) and cross-border trafficking (APEC, 2009) of personal information, although it establishes a lower protection standard than that enshrined in the documents of the OECD.

## 5.3. Academic institutions

**University of Chile**: the oldest public university in Chile. It is positioned as the best university in the country according to the América Economía ranking of 2015 (América Economía, 2015).

**The Center for Computer Law Studies (CEDI)**: part of the Faculty of Law of the University of Chile, this research center is a pioneer in Latin America regarding issues of law and technology. The research center mission is to analyze the implications of the technological phenomenon in the national and comparative legal system.

The CEDI is in charge of the postgraduate program "Master in Law and New Technologies", which has organized two versions of the International Seminar "Regulatory Trends on Protection of Personal Data" in 2014 and 2015, events that brought together national and international experts in the matter. In addition, it publishes the Chilean Journal of Law and Technology, with semi-annual edition, which is one of the main media where articles related to topics of protection of personal data are published in Chile.

Some of the Academics of the Center include:

**Alberto Cerda Silva**, founder of Derechos Digitales (Digital Rights). Lawyer and Master in Public Law from the University of Chile and LL.M. in International Legal Studies by Georgetown University Law Center, where he is currently pursuing doctoral studies. He has taught numerous courses related to computer law, intellectual property and new technologies. Among his extensive bibliography, there are multiple articles where he explores different aspects of the protection of personal data, such as the processing of personal data by employers, unwanted emails, the need for a control authority, online services, and so on.

**Daniel Álvarez Valenzuela**, Lawyer of the University of Chile, founder of NGO Derechos Digitales (Digital Rights), graduated in Computer Law and is currently doing a Masters on Public Law, in the same house of studies. He specialized in matters of copyright, private life and cultural legislation. He teaches undergraduate courses on Copyright and New Technologies; and, Privacy and Technologies, and postgraduate studies in the Master of Law and Technology, both at the Faculty of Law of the University of Chile.

**Claudio Magliona Marcovicth**, lawyer from the University of Chile, LL.M in Law, Science & Technology from Stanford University, Academic Coordinator and Professor of the Master of Law and New Technologies of the Faculty of Law of the University of Chile.

**Salvador Millaleo Hernández**, lawyer from the University of Chile and Ph.D in Sociology from the University of Bielefeld (Germany). He has been a Research Fellow at the University of Bielefeld and the Max Planck Institute for Foreign and International Law in Freiburg. He has also participated in the Hub Digital project with the Humbold Institut fur Internet und Gesellschaft in Berlin. He specialized in Sociology of Technology, Sociology of Law, Identity Policies and Cyberpolitics. He is currently the deputy coordinator of CEDI.

**Rodrigo Moya García**, lawyer of the University of Chile, he graduated in Computer Law and has a Master in Public Law from the same University. His work focuses on the interaction between

Law and Information and Communication Technologies. In the same area, he has participated as a teacher assistant both on undergraduate and postgraduate programs of the Faculty of Law of the University of Chile.

**Alex Pessó Stoulman**, lawyer of the University of Chile and Master in Constitutional Law by the Pontifical Catholic University of Chile. He is a specialist in matters of electronic government, legal regulation of software, intellectual property and public procurement.

**Pontifical Catholic University of Valparaíso**: a traditional private university of confessional and regional character. It is positioned as the fourth best university in the country according to the América Economía ranking of 2015 (América Economía, 2015).

Some outstanding scholars include Renato Jijena, one of the most prolific specialists on topics such as New Technologies, Computer Law, Electronic Commerce and Electoral Government. His career includes the publication of the book "Chile, the criminal protection of privacy and cybercrime", of the Editorial Andrés Bello, in 1992, seven years before the publication of Law 19.628, being the first text in the national doctrine related to this theme. He has served as legal advisor to different institutions, both public and private, such as the sub-directorate of informatics of the Internal Revenue Service, E-Sign S.A, the National Chamber of Commerce, Customs Chamber of Chile A.G, among others. He is the coordinator in Chile of the network of experts in protection of personal data habeasdata.org and of the Latin American Journal of Protection of Personal Data.

**Universidad Alberto Hurtado**: founded in 1982, it is a non-traditional private university. It occupies the fifteenth place in the América Economía ranking of the year 2015 (América Economía, 2015).

Academics specialized in the subject include:

**Jessica Matus**, professor of the Legal Clinic on access to public information. Lawyer of the University of Chile, Master (c) in New Technologies Law and diploma in the same house of studies. She is a member of the Ibero-American Network for Data Protection and adviser to the Chilean Institute of Law and Technologies. Co-author of the book "The transfer of personal data". She has worked in the public sphere in various government agencies since 2006.

**Pedro Anguita**, lawyer of the University Diego Portales and Ph.D in Law and Informatics by the Complutense University of Madrid. He is a professor of the course "Right to information" of the School of Journalism and author of the books "The Right to Information in Chile", "the protection of personal data" and" the right to privacy and Actions of protection against Google".

**Lorena Donoso Abarca**, lawyer from the University of Chile, master's degree in Information Technology and Law (LL.M.) from the Complutense University of Madrid and Ph.D (c) in Law from the same house of Studies. Lorena is an academic at the Alberto Hurtado University and since 2014 serves as president of the Chilean Institute of Law and Technology.

**Universidad Diego Portales**: founded in 1982, it is a non-traditional private university focused especially on humanistic careers. It occupies the ninth place in the América Economía ranking of 2015 (América Economía, 2015).

Some academics specialized in the subject include Rodolfo Figueroa, UDP Attorney, Master and Ph.D of Law from the University of Wisconsin. Professor of constitutional law UDP. In 2014 he

published the book “Privacy”, edited by the same house of studies, which constitutes one of the most complete legal investigations related to the right to privacy and intimate life.

**Universidad Mayor**: founded in 1988, it is a non-traditional private university. It occupies the twentieth place in the América Economía ranking of 2015 (América Economía, 2015).

Some outstanding academics include Carlos Reusser Monsálvez, lawyer and graduate in Juridical and Social Sciences from the University of Chile and master’s degree in Computing and Law from the Complutense University of Madrid. Carlos was the academic coordinator of the Center for Computer Law Studies at the University of Chile (2005-2009), president of the Chilean Institute of Law and Technologies (2011 - 2014) and today teaches Procedural Law at the Universidad Mayor. Today he works as an advisory lawyer to the Legal Division of the Undersecretary of Telecommunications.

**Chilean Institute of Law and Technology**: it is a Private Law Corporation that is dedicated to researching and disseminating topics related to technologies and law since 2009. This center generates academic publications, organizes events and dictates lectures and math classes on topics related to the subject. At the same time, they perform consultancies to both public and private entities.

The President of the organization is Lorena Donoso Abarca (who’s academic career was already mentioned), the Interim President and First Vice President is Patricia Reyes Olmedo, lawyer of the University of Chile, Ph.D in Law from the Complutense University of Madrid, Master of Business Administration Companies, mention Human Resources, by the University of Valparaíso. She is one of the forerunners of Computer Law in Chile and, for many years, was the Head of Legal Resources of the Library of the National Congress. She is an academic from the University of Valparaíso and has been a graduate professor at the University of Chile and Former President of the Chilean Institute of Law and Technologies.Jannet Lara Ceijas, Second Vice President, Lawyer from the University of Havana, Master in Law from the University of Havana, Diploma in Advanced Studies (DEA) from the University of Valencia. She has been Deputy General Director of the National Copyright Center of Cuba and is a member of the Cuban Commission on Information and Law of the National Union of Jurists of Cuba and Professor of Intellectual Property of the Faculty of Law of the University of Havana. Her secretary, Fernando Fernández Acevedo, lawyer of the University Diego portals, Master in Law from the University of Chicago and Master’s degree in Innovation, Technology and Law from the University of Edinburgh, Professor of Contract Law at the Diego Portales University and Postgraduate at the University of Chile, has been a legal advisor to the State Modernization and Government Digital Unit.

## 5.4. Civil society

**Derechos Digitales (Digital Rights)**: is a non-governmental organization dedicated to the defense, promotion and development of fundamental rights in the digital environment. Its main focuses are privacy, freedom of expression and access to culture related to new technologies in Latin America.

Derechos Digitales has pointed out the need of a reform to Law 19.628 and to strengthen the regime for the protection of personal data through different research projects, advocating for the implementation of an administrative control authority, endowed with sanctioning powers.

In the legislative follow-up work done in Chile, the ONG has participated in the discussion of different bills related to the protection of personal data, including the two projects that were proposed to reform Law 19.628, and has participated in different participation instances for civil society

promoted by the government, including the instances of participation promoted by the Ministry of Economy as of 2014. Currently, Derechos Digitales participates in the Civil Society Council for the Protection of Personal Data.

**Fundación Datos Protegidos (Protected Data Foundation)**: this organization was formally founded in 2015, having as background the website Personal data protection, functioning since 2008. This organization was founded by expert lawyers in the area of personal data protection, Romina Garrido and Jessica Matus. She has been part of different instances of civil society and has participated in the processing of different bills related to the protection of personal data.

Fundación Datos Protegidos has participated in the discussion of multiple bills and instances of civil society participation, related to the protection of personal data, as well as in the public debate through the press. It is also characterized by having litigated on these issues from a public interest perspective. In 2015, they filed a constitutional protection action against the site http://datos.24x7.cl/ for publishing the Identity Card Number of people in Chile (Matus, 2015); a constitutional protection action in conjunction with Derechos Digitales and Corporación Fundamental, against telemonitoring balloons of the communities of Lo Barnechea and Las Condes, and a lawsuit against Banco Santander for infractions of Law 19.628 (Protected Data, 2015).

**Fundación Pro Acceso (Pro Access Foundation)**: a non-profit foundation that operates since 2004. Its main function is to monitor progress and difficulties in the implementation of the Law of Transparency, as well as the realization of citizen's advice and relative public interest litigation around transparency, access to information and personal data.

**Observatorio Iberoamericano de Protección de Datos (Iberoamerican Data Protection Observatory)**: a personal initiative of the Spanish lawyer Daniel López Carballo. This platform operates as a blog where different actors of Latin America publish on topics related to the protection of personal data in order to extend the culture of privacy in different countries.

**Ciudadano Inteligente (Intelligent Citizen)**: It is a non-profit social organization with a base in Santiago de Chile. It seek to promote transparency through three areas of work: Lab, which is responsible for the development of technology to meet these goals; Advocacy, which seeks to promote and influence transparency policies; and Community and Networks, which seeks to connect people in the digital environment to carry out a joint development of its objectives. Its advocacy work has led Ciudadano Inteligente to participate in the legislative process of certain projects re-linked with personal data, although from a perspective more inclined to the access of personal data than to its protection.

## 5.5. Representatives of the industry:

**Association of Direct and Digital Marketing of Chile (AMDD):** it is a trade association that brings together the different companies that carry out direct and digital marketing. It advocates self-regulation of the sector and has represented the industry before the different projects to reform Law 19.628, in order to preserve the possibility of sending direct email messages. The AMDD also had an important role in the legislative process of Law 19.628 and many of the exceptions to the consent of the owner of personal data were established in their favor.

**Chamber of Commerce of Santiago**: It is a trade association that brings together more than 2,000 companies of all categories. It is in charge of the edition and distribution of the Commercial Information Bulletin. This bulletin contains information about unpaid debts and checks and protested financial instruments.

The Chamber has also represented the industry in the legislative process of Law 19.628 and the successive projects that have been proposed to reform it.

**Equifax Chile S.A**: Chilean branch of Equifax Inc., it is the continuation of the Directory of Commercial Information (DICOM), whose mission was to administer the Commercial Bulletin and was controlled by the Santiago Chamber of Commerce.

Today Equifax Chile S.A buys information from the Commercial Bulletin and offers its commercial information services to businesses. Due to its commercial interest, Equifax has also opposed to the strengthening of the personal data protection legislation.

## 6. Pending issues for a new personal data law in Chile

Throughout this report it has been shown that the Chilean legislation is deficient in terms of the protection of personal data. Legislation that respects the interests involved and that cares about the real protection of individuals must go deeper into a series of matters that are absent or deficient in Law 19.628, its subsequent amendments and even in the numerous bills that failed to be promulgated within the National Congress.

In the first place, the current law seems to correctly define basic concepts regarding the processing of personal data. It defines what should be understood by personal data, sensitive data, expired data and what is a data bank, however, it fails to give a precise definition of public access sources, which in practice leaves personal data in the country unprotected.

The structuring of the principles enshrined in Law 19.628 is also deficient. Regarding the principle of freedom to process personal data, the legislation does not provide sufficient guarantees to establish a balance with the right to privacy and intimacy of individuals. In relation to the second principle recognized by law, and under the same prism, the scope of the exceptions that can be invoked to fulfil the requirement of consent are excessive. Again, following the authors cited above, it would seem that the exceptions in these cases prevail over the general rule. With respect to the third principle of those enumerated by the doctrine and by Law 19.628 itself, by virtue of which the data can only be used for the objectives for which it was collected, a revision also seems necessary, since this principle is a corollary and a logical consequence of the one outlined above, so if that one deserves a new regulation, it is equally necessary to modify this one. Regarding other two principles contemplated by the law, we consider a necessary revision with a new legislation in the matter in mind. This is the case of the principles of security and secrecy, since currently there are no clear and effective sanctions for the infraction derived from these rules. A new regulation is needed to address this point, taking into account that not all the collected data has the same value and that its dissemination does not harm the guarantees involved in the same way.

From a procedural point of view, it is urgent that in Chile there is a comptroller entity endowed with the necessary powers to ensure compliance with the obligations contained in the law. As we have pointed out, due to Law 19.628, direct (*habeas data*) and indirect (constitutional protection action) methods do not seem sufficient to guarantee the interests of the owners of personal data in relation to their rights. Therefore, we believe that a new personal data law should, among other things, create an organ endowed with these powers, which operates *ex ante* to a breach of the current norms, considering the eventual passivity of the holders of personal data, avoiding with greater efficiency the possible violations of rights.

We must also take into account that, when it comes to sensitive data, the damage caused by a contravention would not always be repairable through the established jurisdictional path, or through pecuniary compensation, since it could injure the honor of a person, the State must take charge, through a comptroller entity, both of the prevention of eventual infractions and of the reduction of the subsequent damages already produced.

## 7. Final considerations

The main problem of Law 19.628 is that it does not seek to protect individuals from the processing of their data by third parties, but to regulate the market of the processing of personal data. This translates into: lack of effective sanctions in case rules are violated, lack of regulation of the cross-border flow of personal data, use of data for direct marketing without authorization of the owner, lack of registration of private databases, absence of a public control authority, broad exceptions to the consent for data processing and lack of effective safeguard procedural mechanisms.

Added to this is the lack of adaptation of the legislation to the international OECD standards. Because of this, it is necessary to adapt the internal legislation, rethinking the way in which the prior consent of the use of personal information is given, which must be explicit, free and unambiguous, establishing, as it has been explained, a restriction to data obtained from public access sources. It is necessary, on the other hand, to introduce the principles recognized by the OECD, such as proportionality, data quality, specification of the purpose or purpose, limitation of use, data security, access and opposition of its owner, and transparency, among others.

The enactment of a new law on the matter is an excellent opportunity to overcome the deficiencies of the current legislation, taking into account each and every one of the factors analyzed throughout this report. A new law should incorporate opinions of all civil society and not only protect the interests of the government and companies. For this reason, ensuring an effective participation of all the actors involved in the drafting of a new personal data law will be a necessary condition for Chile to have legislation focused on the protection of the rights of individuals. Unfortunately, and as noted in this report, this has not been the case of the different instances of participation that have been convened so far, where the participants where denied the access to the results of their own joint work.

After seventeen years of Law 19.628, there is consensus in academia and civil society regarding the weaknesses in the regulation of personal data and which are the elements to be corrected. Added to this are the outdates of a legislation that arose at a time when access to technologies and networks was notoriously inferior to the one that currently exists, which is manifested in the extended automated processing of data and in the facilities for the cross-border flow of information, both procedure that today can be realized at a very low costs for high volumes of data, which is possible to store almost without limitations, and that has originated phenomena of complex approach like Big Data.

Under this scenario, the only thing that is missing so that Chile can have a legislation that leaves private interest and protects the personal data of individuals from a humans rights perspective is the political will of the government.

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