

INTERNET & JURISDICTION
AND ECLAC

REGIONAL
STATUS REPORT
2020

EXECUTIVE
SUMMARY



UNITED NATIONS

ECLAC



INTERNET &
JURISDICTION
POLICY NETWORK



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DEUTSCHE ZUSAMMENARBEIT

A C K N O W L E D G E M E N T S

This is the Executive Summary of the Internet & Jurisdiction and ECLAC Regional Status Report 2020.

The full report is available at <https://internetjurisdiction.net/laregionalreport>

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EXECUTIVE SUMMARY

The *Internet & Jurisdiction and ECLAC Regional Status Report 2020* is the region's first comprehensive exercise in mapping the different policy trends relating to the transborder nature of the Internet and the way this affects different actors such as governments, companies and civil society.

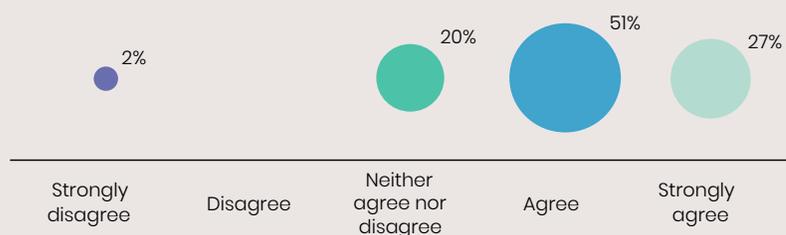
How might differing regional and national regulations create barriers to cross-border e-commerce and investment in digital markets? What economic and social benefits might be attained by harmonizing legal frameworks throughout the region? A better understanding of this situation is vital to efforts to foster investor confidence, promote innovation and economic diversification, create greater trust in e-commerce and boost a market of more than 600 million people, while opening up an array of opportunities for businesses, most particularly small and medium-sized enterprises.

At the same time, uncoordinated action by a wide range of actors and initiatives risks hampering the digitalization of economies, governments and societies. It is to help policymakers navigate the challenges ahead that the Internet & Jurisdiction Policy Network, in coordination with the Economic Commission for Latin America and the Caribbean (ECLAC), is presenting this report.

The report aims to: (i) map and consolidate information relevant to Latin America and the Caribbean and the regional digital market; (ii) create and strengthen regional contributor networks; and (iii) develop capacity-building for stakeholders on cross-border legal topics associated with the digital transformation.

In surveys and interviews conducted for the report with leading experts in the region, 78% of respondents agreed that Internet-related cross-border legal challenges would become increasingly acute in the next three years. At the same time, 73.17% of the stakeholders interviewed agreed or strongly agreed that coordination was required to address cross-border legal challenges, while 60.98% believed that the institutions needed to tackle those challenges were still not in place.

Will Internet-related cross-border legal challenges become increasingly acute in the next three years?



Source: Internet & Jurisdiction Policy Network and Economic Commission for Latin America and the Caribbean (ECLAC).

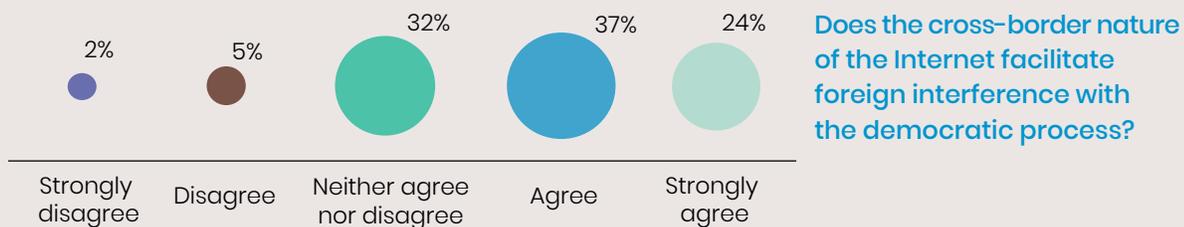
In an effort to analyse trends that are unique to the region, the report investigates how a changing technological landscape is empowering the idea of transnational activities as an emerging new dynamic that not only involves big multinational companies but is also setting the stage for regional start-ups to grow rapidly.

The report identifies how regional and national regulatory frameworks might be inspired by foreign initiatives, especially those arising in the United States and the European Union. This is the case with the European Union General Data Protection Regulation (GDPR), which has sparked a number of legislative changes in Latin America and the Caribbean. Is there room for cross-fertilization, or is this mere replication?

As major Internet companies try to adapt to the changing expectations of governments and the general public, involving increasing demands for greater responsibility, a plurality of norms is making the region ripe for jurisdictional conflicts, testing the limits of enforceability and the reach of national laws.

This report organizes the major topical trends in Latin America and the Caribbean into three groups: expression, security and the economy. There is no lack of trends that are unique to the region, although others are also present on a global scale.

One of the most pressing trends in the area of expression is the way the fight against disinformation and so-called fake news has been leading many countries to adopt new rules that might have impacts extending far beyond their borders. A substantial majority (60.98%) of the stakeholders interviewed agreed or strongly agreed that the cross-border nature of the Internet facilitated foreign interference with the democratic process. Cases in which automated social media accounts created abroad end up playing a role in a country's elections are not uncommon in the region.



Source: Internet & Jurisdiction Policy Network and Economic Commission for Latin America and the Caribbean (ECLAC).

The same demand for cooperation among countries to address jurisdictional challenges has surfaced in the region during investigations into corruption scandals. To secure evidence located in different countries, law enforcement agencies in Latin America and the Caribbean are pressing for more cooperation, which should create the conditions for standardization of cross-border data transfers in the region.

Coordination is crucial if a digital single market is to be created in Latin America and the Caribbean. A topic that came clearly to the fore in the interviews and surveys conducted for the report were the economic effects of a regional approach to issues such as the spread of financial technology (fintech) in the region. Stakeholders expressed considerable support for innovative regulatory solutions, with 82.92% agreeing or strongly agreeing that the deployment of innovative frameworks such as regulatory sandboxes helped foster economic growth.

The report also highlights the way significant approaches to cross-border Internet dilemmas in Latin America and the Caribbean might come from legislation or from the development of technological tools such as geo-blocking and content filtering, with all the controversies such resources might bring.

The *Internet & Jurisdiction and ECLAC Regional Status Report 2020* is intended to supply tools for evidence-based policy innovation and to provide all stakeholders with the information they need to develop frameworks and policy standards for the digital society in Latin America and the Caribbean. The report contains the following major observations:

Major transversal aspects of trends and solutions: overarching trends

- **Connectivity is on the rise.** A number of countries in the region are experiencing a significant increase in the numbers of the digitally included, but bridging the digital divide and tackling structural socioeconomic inequalities are still major challenges for development and innovation.
- **The landscape is changing.** The romanticized technological euphoria of the past has given way to a “techlash”, triggered by concerns about disinformation, hate speech and cybercrime (with a recent period of technology intensity in response to the COVID-19 pandemic and as part of the fight against it). Transnational interactions are an emerging new dynamic, the influence of multinational companies is strong and the entrepreneurial environment of regional start-ups is growing.
- **Foreign regulatory initiatives have influenced regional and national proposals.** There is an increasing appetite for regulating cyberspace, as the proliferation of initiatives attests; but are these legislative and judicial inspirations useful cross-fertilization or mere imitation?
- **Concerns about external influence and increasing normative plurality are appearing.** Rules are being set for –and by– large and well-established international actors, and the role of company norms is increasing as their terms of service attain “constitutional” status for the digital spaces they control.
- **The role of territoriality/sovereignty in a global network is increasingly being called into question.** National laws are increasingly extraterritorial in reach, but this is bringing challenges of enforceability.
- **Intermediaries are expected to play new roles.** Private operators are being asked to bear increasing responsibilities; intermediaries have been called upon to provide the main support in administrative and judicial investigations; transparency is vital to enhance trust, but implementation varies; there is a growing concern with due process in content moderation activities.

Major topical trends in Latin America and the Caribbean

Expression:

- Fake news and disinformation campaigns are triggering calls for regulatory action;
- Governments are imposing stricter rules for content moderation and removal on online platforms;
- The non-consensual distribution of sexually explicit media (“revenge porn”) knows no borders and can perpetuate harm;
- The Google Spain case at the European Court of Justice (ECJ) has sparked a regional debate about the “right to be forgotten”: while experts recognize this right as global in scope, the regional experience with amnesty laws and the notion of a “right to remember” have created a backlash against the enforcement of a general right to be forgotten;
- Defamation cases are triggering debates about the cross-border effects of protecting a person’s reputation. Moreover, defamation is both a civil and a criminal offence in many countries of the region, raising additional questions about how the protection of reputation might restrict freedom of expression (e.g., for journalists and bloggers).

Security:

- There is a growing need and aspiration for coordination in cybersecurity efforts to deal with widespread incidents in the region;
- Cross-border corruption cases in the Latin America and Caribbean region have prompted a sophisticated debate over multi-jurisdictional investigation practices;
- The challenges involved in accessing digital evidence across multiple jurisdictions mean there is a need to review current investigation practices in the region;
- Regional stakeholders do not advocate overhaul of the mutual legal assistance (MLA) system, but rather support its adaptation to the digital age; however, law enforcement agencies in the region are increasingly seeking access to user data outside the MLA treaty structure;
- Regional stakeholders agree that the Budapest Convention is a step in the right direction when it comes to facilitating cross-border investigations, but that it does not fully solve the problems of the MLA system;
- Stakeholders reaffirm that “back doors” would undermine trust in encrypted systems;
- Countries in the region have yet to fully adapt their legislation to the demands of fighting cybercrime;
- Mutual recognition of digital IDs would be a positive driver of regional and economic integration, not least for a digital single market.

The economy:

- Inspired by the GDPR, countries in Latin America and the Caribbean are creating or improving national data protection regulations;
- Half the countries in the region have a specific data protection regulation, but there is room for improvement and coordination to achieve a truly region-wide framework for data protection;
- Regional initiatives are fostering standardization of cross-border data transfers;
- There is demand for the creation of a digital single market in the region;
- Stakeholders indicated that areas such as consumer and data protection, digital payments and tax regimes were vital to the creation of a region-wide digital single market;
- The region has a strong consumer rights culture, providing a useful basis for the creation of a digital single market;
- Choice of law and choice of forum clauses tend to be frowned upon in e-commerce because of national consumer protection standards;
- The Internet of Things (IoT) knows no borders and requires standardization, but stakeholders are divided on the need for specific regulations for IoT;
- There are a number of challenges and opportunities for smart cities in the region;
- Smart farming enlarges the set of international players and is a natural move for the region;
- Digital payment developments in the region coexist with an unbanked population, low penetration of international credit cards, an enduring cash culture and foreign exchange volatility;
- Fintech is revolutionizing financial services in the region, but faces disparate regulatory treatment at the national level;
- Cross-border jurisdictional issues are increasingly impacting the activities of fintech companies in the region;
- Stakeholders have shown great enthusiasm for the adoption of innovative regulatory solutions, such as regulatory sandboxes;
- Blockchain and cryptocurrencies are viewed as enablers of cross-border trade (but also crime).

Major approaches to cross-border Internet dilemmas in Latin America and the Caribbean: legal trends

- States are increasingly resorting to an “effects doctrine” in asserting jurisdiction;
- The assertion of geographically far-reaching jurisdiction may not lead to actual enforcement;
- Higher courts in the region have so far refrained from decisions with a global reach;
- National courts are increasingly issuing platforms with take-down, stay-down and stay-up orders for content posted online;
- In addition to civil liability, countries are increasingly resorting to administrative sanctions to enforce compliance with sectoral norms;
- Companies’ terms of service interact with national laws, reinforcing or contradicting provisions regulating user behaviour;
- The impact of the controversial update to the European Copyright Directive is already being felt in the region;
- Online marketplaces are deploying dispute resolution systems as governments push for co-regulation of the sale of counterfeit goods;
- In the interests of consumer protection, courts in the region tend not to uphold choice of forum and choice of law clauses in international platforms’ terms of service.

Major approaches to cross-border Internet dilemmas in Latin America and the Caribbean: tools

- The use of personal data to map and control the COVID-19 pandemic will consolidate the discussion about geolocation technologies in the region;
- Geo-blocking and geo-pricing are raising antitrust and consumer and data protection concerns;
- Content filtering is on the rise as countries fight hate speech and disinformation;
- App blocking, once a last resort, is now common practice, with the potential for major impacts across borders;
- DNS blocking is being ordered by some governments, but is not a widespread practice;
- Internet shutdowns are not common, but can happen at times of social unrest;
- Mandatory data localization has been adopted in some countries for various reasons, but it raises serious concerns among stakeholders.

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