

FCPA Update

A Global Anti-Corruption Newsletter



Also in this issue:

8 U.K. and U.S. Sign Landmark
Cross-Border Data Sharing
Agreement

[Click here for an index of
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Latin America's Evolving Anti-Corruption Landscape: Brazil in Flux and Regional Reverberations

With respect to anti-corruption enforcement in Latin America, change and uncertainty seem almost unavoidable. In Brazil, while political turbulence has persisted, the Offices of the Comptroller General (“CGU”) and the Attorney General (“AGU”) continue to play increasingly prominent roles in anti-corruption enforcement, adding complexity to the enforcement landscape for multinationals and Brazilian companies alike. Meanwhile, although anti-corruption enforcement has suffered setbacks in some parts of the region, there are glimmers of potential enforcement elsewhere.

According to Transparency International’s recent *Global Corruption Barometer – Latin America and the Caribbean 2019* report, 53% of those surveyed think corruption

[Continued on page 2](#)

**Latin America's Evolving
Anti-Corruption Landscape:
Brazil in Flux and Regional
Reverberations**

Continued from page 1

increased in their country in relation to the prior year.¹ Moreover, 57% think their respective governments are not doing a good job at addressing corruption.² This general disenchantment may have something to do with the thrust of recent developments across the region.

On October 17, 2019, as part of the seventh annual *Latin Lawyer – GIR Live Anti-Corruption & Investigations Conference* (the “Conference”), lawyers and compliance professionals gathered in São Paulo, Brazil to discuss the state of anti-corruption enforcement in the region. Below are some of the significant issues addressed.

I. Brazil in Focus

A. Background

In 2018, Brazil elected President Jair Bolsonaro, who ran a largely anti-establishment, anti-corruption campaign.³ He initiated his tenure earlier this year with former Judge Sergio Moro, who became widely known during *Lava Jato*, alongside him as Minister of Justice. As is often the case, execution of the various pledges has thus far proven more challenging than some may have expected.

Prosecutors in Curitiba and Judge Moro himself have come under intense scrutiny following stories published by *The Intercept* and other media outlets regarding private conversations about their targets and investigations in *Lava Jato*.⁴ Recent defeats related to *Lava Jato* in the Supreme Court have compounded these challenges, including the annulment on procedural grounds of the conviction of former Petrobras President Aldemir Bendine.⁵ It is unclear where these developments will lead or what effect they ultimately will have on Brazil's anti-corruption crusade.

B. Roles of CGU and AGU

Throughout *Lava Jato* and subsequent operations, much of the attention has focused on the role of prosecutors. However, administrative and civil bodies in Brazil recently have gained increasing prominence, expanding their role in cross-border enforcement matters. In particular, CGU and AGU have become more active in

Continued on page 3

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1. Transparency International, Video: *Global Corruption Barometer – Latin America and the Caribbean 2019* (Sept. 18, 2019), https://www.transparency.org/gcb10/latin-america-and-the-caribbean?/news/feature/global_corruption_barometer_gcb_latam_america_2019.
 2. *Id.*
 3. Bruce E. Yannett, David A. O’Neil, Andrew M. Levine, Kara Brockmeyer & Daniel Aun, *O futuro do combate à corrupção envolvendo Brasil e Estados Unidos*, ESTADÃO: POLÍTICA (Jan. 30, 2019), <https://politica.estadao.com.br/blogs/fausto-macedo/o-futuro-do-combate-a-corrupcao-envolvendo-brasil-e-estados-unidos>.
 4. See Glenn Greenwald, et al., *Secret Archive Brazil*, THE INTERCEPT (June 9, 2019 – Oct. 4, 2019), <https://theintercept.com/series/secret-brazil-archive>.
 5. Rafael Moraes Moura, *Segunda Turma do STF anula sentença de Moro que condenou Bendine na Lava Jato*, ESTADÃO: POLÍTICA (Aug. 27, 2019), <https://politica.estadao.com.br/blogs/fausto-macedo/segunda-turma-do-stf-anula-sentenca-de-moro-que-condenou-bendine-na-lava-jato>.

**Latin America's Evolving
Anti-Corruption Landscape:
Brazil in Flux and Regional
Reverberations**

Continued from page 2

investigating potential violations of Brazil's anti-corruption and administrative improbity laws, and also have coordinated increasingly with both Brazil's Public Prosecutor's Office ("MPF") and foreign authorities.

The best evidence of this may be the recent Technip resolution, the first global settlement to involve MPF, CGU, and AGU in Brazil and DOJ in the United States.⁶ On June 25, 2019, TechnipFMC entered into a three-year DPA with DOJ, agreeing to a fine of over \$296 million – all but \$81.9 million of which will be credited against the company's eventual settlement with Brazilian authorities – and a three-year compliance reporting obligation, but no compliance monitor.⁷ At the same time, TechnipFMC's U.S. subsidiary agreed to plead guilty to one count of conspiracy to violate the FCPA in connection with conduct in Brazil.⁸ Concurrently with the DOJ resolution, TechnipFMC and its Brazilian subsidiary entered into leniency agreements in Brazil with MPF, CGU, and AGU.⁹

“In Brazil, while political turbulence has persisted, the Offices of the Comptroller General ... and the Attorney General ... continue to play increasingly prominent roles in anti-corruption enforcement, adding complexity to the enforcement landscape for multinationals and Brazilian companies alike.”

At the Conference, delegates debated important questions that flow from these developments, including:

- which agencies in Brazil are competent to enter into leniency agreements;
- how CGU and AGU should treat leniency agreements previously executed by MPF; and

Continued on page 4

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6. Kara Brockmeyer, David A. O'Neil, Philip Rohlik & Jil Simon, "Skeletons in the Closet: TechnipFMC Settles FCPA Allegations Involving Both of its Predecessor Companies," FCPA Update, Vol. 10, No. 12 (July 2019), <https://www.debevoise.com/insights/publications/2019/07/fcpa-update-july-2019>.
 7. See *id.* at 2; U.S. Department of Justice, "Technipfmc PLC and U.S.-Based Subsidiary Agree to Pay Over \$296 Million in Global Criminal Fines to Resolve Foreign Bribery Case" (June 25, 2019), <https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve>.
 8. See Kara Brockmeyer, David A. O'Neil, Philip Rohlik & Jil Simon, "Skeletons in the Closet: TechnipFMC Settles FCPA Allegations Involving Both of its Predecessor Companies," *supra* n. 6 at 2; U.S. Department of Justice, "Technipfmc PLC and U.S.-Based Subsidiary Agree to Pay Over \$296 Million in Global Criminal Fines to Resolve Foreign Bribery Case," *supra* n. 7.
 9. See Kara Brockmeyer, David A. O'Neil, Philip Rohlik & Jil Simon, "Skeletons in the Closet: TechnipFMC Settles FCPA Allegations Involving Both of its Predecessor Companies" *supra* n. 6 at 2; Office of the Comptroller General ("CGU"), "CGU, AGU, MPF e DoJ firmam primeiro acordo de leniência global no âmbito da Lava Jato" (June 25, 2019), <http://www.cgu.gov.br/noticias/2019/06/cgu-agu-mpf-e-doj-firmam-primeiro-acordo-de-leniencia-global-no-ambito-da-lava-jato>.

Latin America's Evolving
Anti-Corruption Landscape:
Brazil in Flux and Regional
Reverberations

Continued from page 3

- in which order companies should approach Brazilian authorities when seeking negotiated resolutions.

At the Conference, Felipe Dantas, General Counsel of CGU, and Sara Martin Gomes Lopes, an attorney in the Public Property and Anti-Corruption Department of AGU, shared perspectives from the vantages of their respective agencies:

- Dantas pointed to difficulties in creating a model that satisfies what he characterized as the “micro legal systems” of all relevant players, including the concurrence of different laws and definitions of broad legal concepts such as damages.
- Lopes explained AGU's position that leniency agreements previously executed by MPF are valid, but do not bind the federal government. She added that CGU and AGU are seeking ways to avoid *bis in idem* and are open to crediting payments made under agreements with MPF, provided that the rationales of each category of payment (e.g., compensation of damages, undue advantage) are clearly described.
- Lopes also urged companies seeking to resolve potential allegations of wrongdoing to pursue coordinated settlements with all agencies, including because CGU and AGU are now more aligned with MPF and foreign authorities. Regardless of who is approached first, she recommended that companies seek to ensure that all relevant authorities are included in the negotiations before a settlement is executed.

While instructive to hear directly the views of these agencies, significant challenges remain. For example, at the Conference, members of the Brazilian bar challenged the positions of the government representatives on matters such as the treatment of prior MPF leniency agreements, which remains a complicated issue.

In any event, there appeared to be a consensus view expressed at the Conference that greater future coordination among Brazilian anti-corruption agencies would be a welcome development.

II. Broader Regional Context

Beyond Brazil, other countries in the region recently have faced serious anti-corruption challenges:

- Many previously speculated that the *Cuadernos* probe in **Argentina** might turn into a major investigation akin to *Lava Jato*, but that remains to be seen. While the government complemented the passing of the corporate liability law with the issuance of executive decrees regulating conflicts of interest and launching a five-year national anti-corruption plan, the advancement of the

Continued on page 5

Latin America's Evolving
Anti-Corruption Landscape:
Brazil in Flux and Regional
Reverberations

Continued from page 4

Cuadernos investigation appears to have taken a backseat, in part given political uncertainty created by the recent presidential election and economic difficulties.¹⁰ Laura Alonso, the head of Argentina's Anti-Corruption Office, expressed concern that a change in government not undo recent progress, noting her view that Argentina still has a "serious problem of corruption in the public and private sectors."¹¹

- **Peruvians** have witnessed somewhat traumatic corruption-related developments in recent months, with former President Alan Garcia committing suicide, former President Pedro Pablo Kuczynski resigning, and sitting President Martin Vizcarra facing a major standoff with Congress.¹²
- **Colombians** failed to show up to poll stations in sufficient numbers to approve a referendum on anti-corruption measures.¹³
- **Guatemalan** President Jimmy Morales essentially dismantled the International Commission Against Impunity.¹⁴

At the same, other developments reflect the potential for additional anti-corruption enforcement in the region:

- In **Mexico**, under the current administration, we have seen the appointment of the new anti-corruption prosecutor, as well as some developments on the enforcement front, including as to the former CEO of Pemex (Emilio Lozoya) and related individuals.¹⁵ Additionally, a Supreme Court justice recently resigned on account of alleged wrongdoing.¹⁶

Continued on page 6

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10. Brendan O'Boyle, *For Argentina's Polarizing Anti-Corruption Chief, Reform is "Life or Death"*, AMERICAS QUARTERLY (July 24, 2019), <https://www.americasquarterly.org/content/argentinas-polarizing-anti-corruption-chief-reform-life-or-death>; BBC News Latin America, *Argentina election: Centre-left Alberto Fernández wins presidency*, BBC NEWS (Oct. 28, 2019), <https://www.bbc.com/news/world-latin-america-50203727>.
 11. Maria Julieta Rumi, *Laura Alonso: "La Argentina tiene un serio problema de corrupción en el sector público y privado"*, LA NACION (Sept. 13, 2019), <https://www.lanacion.com.ar/economia/laura-alonso-la-argentina-tiene-serio-problema-nid2287226>.
 12. John Otis & Juan Montes, *'God and Money': Graft in Peru Sparks Political Reckoning*, THE WALL STREET JOURNAL (Oct. 9, 2019), <https://www.wsj.com/articles/god-and-money-graft-in-peru-sparks-political-reckoning-11570618801>.
 13. Julia Symmes Cobb, *Colombian anti-corruption referendum fails to meet quorum*, REUTERS (Aug. 26, 2018), <https://www.reuters.com/article/us-colombia-referendum/colombian-anti-corruption-referendum-fails-to-meet-quorum-idUSKCN1LB0GI>.
 14. Elisabeth Malkin, *Guatemala Expels U.N.-Backed Anti-Corruption Panel, Claiming Overreach*, N.Y. TIMES (Jan. 7, 2019), <https://www.nytimes.com/2019/01/07/world/americas/guatemala-corruption-commission-united-nations.html>.
 15. See Andrew M. Levine, Kara Brockmeyer & Marisa R. Taney, "Anti-Corruption Enforcement in Mexico: A Possible Turning Point?" FCPA Update, Vol. 10, No. 11 (June 2019), <https://www.debevoise.com/insights/publications/2019/06/fcpa-update-june-2019>; Lizbeth Diaz, et al., *Mexico issues arrest warrants for ex-Pemex CEO Lozoya, family members*, REUTERS (July 5, 2019), <https://www.reuters.com/article/us-mexico-pemex/mexico-issues-arrest-warrants-for-ex-pemex-ceo-lozoya-family-members-idUSKCN1U01N0>; Lizbeth Diaz, *Mother of senior aide to Mexico's ex-president arrested in Germany*, REUTERS (July 24, 2019), <https://www.reuters.com/article/us-mexico-corruption/mother-of-senior-aide-to-mexicos-ex-president-arrested-in-germany-idUSKCN1UJ245>.
 16. Diana Beth Solomon & Miguel Angel Gutierrez, *Mexican Supreme Court Justice resigns amid corruption questions*, REUTERS (Oct. 3, 2019), <https://www.reuters.com/article/us-mexico-politics/mexican-supreme-court-justice-resigns-amid-corruption-questions-idUSKBN1WJ08K>.

Latin America's Evolving
Anti-Corruption Landscape:
Brazil in Flux and Regional
Reverberations

Continued from page 5

- In **Ecuador**, former President Rafael Correa faces various corruption charges amidst political turmoil.¹⁷
- In **El Salvador**, a newly unveiled commission to fight corruption recently was established, and the United Nations has pledged to support these efforts.¹⁸

Latin America also continues to feature prominently in U.S. enforcement of the FCPA and related laws, as evidenced by three important sets of developments:

1. the Technip and Walmart settlements with DOJ over alleged wrongdoing involving Latin America and other locations;¹⁹
2. the PDVSA and Petroecuador cases led by U.S. authorities, which now include numerous charges and guilty pleas;²⁰ and
3. the creation of the new FBI International Corruption Squad in Miami focused on Latin America-related issues.²¹

* * *

Amidst the inevitable setbacks and progress, Latin America remains at the forefront of global anti-corruption enforcement, and there is no indication that this will change soon. Companies and executives based or otherwise active in the region therefore must remain attuned to these developments in order to anticipate and address issues that may arise. In the meantime, we will continue to monitor and comment on relevant developments.

Continued on page 7

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17. Kejal Vyas, *Ecuador's President Relocates Government Amid Protests*, THE WALL STREET JOURNAL (Oct. 8, 2019), <https://www.wsj.com/articles/ecuadors-president-leaves-capital-amid-antiausterity-protests-11570521548>.
 18. Nelson Renteria et. al, *United Nations to aid El Salvador anti-corruption body*, REUTERS (Sept. 12, 2019), <https://www.reuters.com/article/us-el-salvador-corruption/united-nations-to-aid-el-salvador-anti-corruption-body-idUSKCN1VY07K>.
 19. U.S. Department of Justice, "Technipfmc PLC and U.S.-Based Subsidiary Agree to Pay Over \$296 Million in Global Criminal Fines to Resolve Foreign Bribery Case," *supra* n. 7; see Kara Brockmeyer, David A. O'Neil, Philip Rohlik & Jil Simon, "Skeletons in the Closet: TechnipFMC Settles FCPA Allegations Involving Both of its Predecessor Companies," *supra* n. 6 at 2; U.S. Department of Justice, "Walmart Inc. and Brazil-Based Subsidiary Agree to Pay \$137 Million to Resolve Foreign Corrupt Practices Act Case" (June 20, 2019), <https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsidiary-agree-pay-137-million-resolve-foreign-corrupt>; see Andrew M. Levine, Kara Brockmeyer & Marisa R. Taney, "Walmart and U.S. Authorities Reach Long-Awaited FCPA Settlements" FCPA Update, Vol. 10, No. 11 (June 2019), <https://www.debevoise.com/insights/publications/2019/06/fcpa-update-june-2019>.
 20. See Andrew M. Levine, Kara Brockmeyer, Daniel Aun, et al., "The Year 2018 in Review: Continued Globalization of Anti-Corruption Enforcement," FCPA Update, Vol. 10, No. 6 (Jan. 2019), <https://www.debevoise.com/insights/publications/2019/01/fcpa-update-january-2019>; Clara Hudson, *PDVSA bribery probe leads to more arrests*, *supra* n. 19; Clara Hudson, *Without fanfare, DOJ continues to unravel bribery at Petroecuador*, GLOBAL INVESTIGATIONS REVIEW (July 2, 2019), <https://globalinvestigationsreview.com/article/jac/1194725/without-fanfare-doj-continues-to-unravel-bribery-at-petroecuador>; Clara Hudson, *PDVSA bribery probe leads to more arrests*, GLOBAL INVESTIGATIONS REVIEW (Feb. 26, 2019), <https://globalinvestigationsreview.com/article/jac/1180834/pdvsa-bribery-probe-leads-to-more-arrests>.
 21. Federal Bureau of Investigation, "FBI Announces New International Corruption Squad in Miami Field Office" (Mar. 5, 2019), <https://www.fbi.gov/news/pressrel/press-releases/fbi-announces-new-international-corruption-squad-in-miami-field-office>.

Latin America's Evolving
Anti-Corruption Landscape:
Brazil in Flux and Regional
Reverberations

Continued from page 6

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Continued on page 8

U.K. and U.S. Sign Landmark Cross-Border Data Sharing Agreement

On October 3, 2019, the United Kingdom and the United States signed a landmark data sharing agreement to give law enforcement agencies in one country faster access to digital evidence held by service providers, such as web hosts and social media companies, located in the other (the “Agreement”).¹ The material scope of the Agreement is wide, including fraud, cyberattacks, corruption, and other serious offences. The Agreement aims to provide an alternative, faster mechanism to the current system based on government-to-government requests pursuant to Mutual Legal Assistance Treaties (“MLATs”). Under the Agreement, law enforcement authorities will be able to compel production directly from service providers. The hope is that this will reduce waiting times to weeks or sometimes days. The Agreement is expected to enter into force following review by the U.K. Parliament and the U.S. Congress, in early April 2020.

Background

In response to what both governments view as unacceptable delays in obtaining digital evidence overseas under existing MLAT procedures, the United States introduced the CLOUD Act in March 2018, and the United Kingdom introduced the Crime (Overseas Production Orders) Act 2019 in February 2019. Under the CLOUD Act, instead of sending an MLAT request through central government, U.S. authorities can request digital evidence directly from an overseas service provider if the United States has an executive agreement with that service provider’s home country. Similarly, the U.K. Act allows designated authorities – including the police, the Serious Fraud Office, and the Financial Conduct Authority – to apply to the U.K. Crown Court for a binding “overseas production order” if a “designated international cooperation agreement” exists with the recipient’s home jurisdiction. The present Agreement will make both laws operational between the United States and the United Kingdom.

Continued on page 9

1. The text of the Agreement is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836969/CS_USA_6.2019_Agreement_between_the_United_Kingdom_and_the_USA_on_Access_to_Electronic_Data_for_the_Purpose_of_Countering_Serious_Crime.pdf. For the relevant press releases, see <https://www.gov.uk/government/news/uk-and-us-sign-landmark-data-access-agreement> (U.K.) and <https://www.justice.gov/opa/pr/us-and-uk-sign-landmark-cross-border-data-access-agreement-combat-criminals-and-terrorists> (U.S.).

U.K. and U.S. Sign Landmark
Cross-Border Data Sharing
Agreement

Continued from page 8

Safeguards

- **Written certification.** Authorities in each country seeking to issue a production order must obtain a written certification by the “designated authority” of that country – as designated by the U.K. Secretary of State for the Home Department and the U.S. Attorney General – that the proposed order is compliant with the Agreement and any applicable law. (Article 5(7))
- **Independent judicial oversight.** Any request for data will be subject to independent judicial oversight or review (usually by a judge or magistrate) of the requesting state, as provided for under national legislation. (Article 5(2)) Any order must be justified based on “articulable and credible facts, particularity, legality, and severity.” (Article 5(1))
- **No targeting of residents.** Both governments agreed that authorities in neither country can seek information on “residents” of the other. In respect of non-residents, U.K. authorities may not seek information on U.S. citizens (and lawful permanent resident holders) located abroad whereas U.S. authorities are permitted to target U.K. citizens once they have left the United Kingdom. Both governments can target individuals or corporates. (Articles 1(12) and 1(16))
- **Protection of “essential interest”.** The Agreement also bars the use of requested data in prosecutions relating to an “essential interest” of either the United Kingdom or the United States – specifically cases implicating freedom of speech if the evidence is requested by the United Kingdom and death penalty prosecutions if the evidence is requested by the United States. (Article 8(4))
- **Objection procedure.** The receiving government retains residual authority to refuse to give effect to the foreign order after the service provider has raised objections if the receiving government “concludes that the Agreement may not properly be invoked” with respect to any order. (Article 5(11))

If the request falls afoul of any of the above, the issuing country will have to resort to the traditional MLAT procedure.

Impact

The majority of businesses are unlikely to be on the receiving end of requests under the Agreement. But those that are – in particular, service providers – should prepare to comply with the new scheme. In most cases, this will mean updating internal subpoena and law enforcement request compliance programs to be able to comply with the shorter time frames for production under the new regime.

Continued on page 10

**U.K. and U.S. Sign Landmark
Cross-Border Data Sharing
Agreement**

Continued from page 9

For those subject to investigation by U.S. or U.K. authorities, the impact can be significant. Evidence against them could be gathered more quickly than before if held by a service provider in the other jurisdiction. The Agreement also has the potential to impact the manner in which the U.K. Serious Fraud Office conducts cross-border investigations by creating easier and faster access to e-mails and other electronic material, particularly in relation to an uncooperative target or witness.

For U.K.-based companies, the Agreement also goes some way to easing tensions between the CLOUD Act and the EU General Data Protection Regulation (“GDPR”). In July 2019, the European authorities opined that, without an international agreement making a CLOUD Act warrant enforceable, transfer of personal data from the European Union to the United States pursuant to such a warrant could breach the GDPR. The opinion expressly reserved the position on whether

“The Agreement aims to provide an alternative, faster mechanism to the current system based on government-to-government requests pursuant to Mutual Legal Assistance Treaties Under the Agreement, law enforcement authorities will be able to compel production directly from service providers.”

a bilateral agreement under the CLOUD Act, such as the present Agreement, would satisfy the cross-border transfer requirements of the GDPR, though the opinion’s language suggests that it would. Of course, companies producing documents would still need to abide by all other GDPR principles, including data minimisation.

Conclusion

The Agreement is important in a number of ways. *First*, as a first agreement under the U.S. CLOUD Act and the U.K. Crime (Overseas Production Orders) Act 2019, it has potential to provide a blueprint for future agreements. Negotiations between the United States and the European Union on a similar agreement commenced on September 25, 2019,² and negotiations between the United States and Australia were announced on October 7, 2019.³

Continued on page 11

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2. U.S. Department of Justice, “Joint US-EU Statement on Electronic Evidence Sharing Negotiations” (Sept. 26, 2019), <https://www.justice.gov/opa/pr/joint-us-eu-statement-electronic-evidence-sharing-negotiations>.
 3. U.S. Department of Justice, “Joint Statement Announcing United States and Australian Negotiation of a CLOUD Act Agreement,” <https://www.justice.gov/opa/pr/joint-statement-announcing-united-states-and-australian-negotiation-cloud-act-agreement-us>.

**U.K. and U.S. Sign Landmark
Cross-Border Data Sharing
Agreement**

Continued from page 10

Second, while the Agreement will enhance U.S. and U.K. authorities' data gathering arsenal, it does not address the challenges posed by increasingly prevalent use of encryption, leaving open the possibility of a data request returning encrypted data. In parallel with the signing of the Agreement, these challenges led the U.S., U.K. and Australian governments to publish an open letter to Facebook outlining their concerns with its plans to implement end-to-end encryption across its messaging services. They urged Facebook to halt those plans unless and until it enables law enforcement to access content with a warrant in "exceptional circumstances" and to tackle serious crimes. It remains to be seen how Facebook and other social media companies will respond to these recurring demands.

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