

4th Annual European data Protection and Privacy Conference
Shaping the Future Privacy Landscape
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Keynote presentation Jacob Kohnstamm
Chairman Article 29 Working Party

-CHECK AGAINST DELIVERY-

Ladies and gentlemen,

Unfortunately I will not be able to join you in this afternoon`s discussion as I have to travel to the United States to attend a meeting of the ad hoc US/EU working group that is investigating PRISM and other programs used by US intelligence services. A very intriguing and interesting topic that is high on the agenda worldwide these days.

Let me share with you a few thoughts about that other big issue that is on our agenda: the draft data protection Regulation.

I am sure that most of you are well aware of the ins and outs of the current data protection Directive and its intended successor. You might see the proposed Regulation as a threat. You may be searching ways to water down the proposal. Because you fear it means you need to make changes to your business practice. Or because you fear it might weaken the chances for the development of new technological toys that could be very useful or very profitable, or perhaps both.

It is said that Brussels has never before experienced such fierce lobbying. That tells us something about the interests at stake. And probably also about the amount of money that is attached to those interests.

Indeed, the initial proposal presented by the Commission may not have been picture perfect. But in

my view, in all, the proposed Regulation presents a huge step forwards. One of the most important factors is because of its form, a Regulation.

Business has always complained, and in my view rightly so, that having 28 different data protection laws in place in the EU is neither efficient nor effective. Companies doing business throughout the European Union want one single set of rules. And that is -hopefully- what we will be getting.

Unfortunately, the choice of instrument is not yet 100% sure. There are still quite a few Member States that oppose or at least express doubts about the instrument of a Regulation as such.

It is said that they oppose a Regulation because they feel that it does not leave sufficient room for Member States' cultural and constitutional differences. Or because they feel that the Regulation should allow for a more risk based approach, in any event more focussed on risk than

the current proposal. This opposition to the instrument of a Regulation has actually lead to an unholy alliance of those who strive for less privacy protection and those who strive for better protection.

I can however not stress the importance of the choice of a Regulation enough.

A Regulation will mean one basic set of rules for the European Union, directly applicable in each and every Member State. One basic set of rules for over 500 million citizens, which are -coincidentally- more than 500 million consumers in the European internal market.

No more 28 different national implementations of the same Directive. One basic set of rules will provide more legal certainty and will ensure a level playing field; a very big step forwards.

The draft Regulation also presents enormous opportunities for better and more consistent enforcement.

I would of course not go so far as to say that there is no effective enforcement of data protection rules in Europe today. But I must admit that I sometimes am jealous of Julie Brill in terms of her fining possibilities. The same goes for several of my European colleagues by the way. Which immediately puts the finger on the sore spot: at the moment, between DPAs there are large differences in enforcement powers.

The global and digital economy requires strong and consistent supervision. Supervision that is effective and consistent. I believe the draft Regulation provides a major improvement in this respect.

More uniform powers and stronger enforcement possibilities for European DPAs might seem scary to you. As indeed it should!

But more harmonisation in this field also means more predictability and possibly even more certainty as to what you will be facing.

Streetview brought about a cacophony of reactions and sometimes even conflicting enforcement actions from a large number of us, and therefore may not have been the EU regulators' finest hour, but I can assure you that for the company in question, it can hardly have been a walk in the park either.

On cooperation, I know the DPAs might not have an excellent track record. But the urgent need for stronger and more effective cooperation has already inspired us to start doing things better. An example is the way in which the French authority, the CNIL, is -at the request of the Article 29 Working Party- taking the lead in the investigation into Google's privacy policy change.

(As Julie mentioned earlier), regulatory cooperation is not only stepping up in Europe, but around the globe as well. The global data protection community is increasingly aware of the need to cooperate and join forces. Data protection authorities throughout the world are coming together, sharing experience and pooling expertise.

You may know that we will be meeting in Warsaw next week, at the International Conference of Privacy and Data Protection Commissioners. Not only will there be the usual open session to which all interested in privacy and data protection issues are invited. However, the main focus of the International Conference for DPAs is the closed part of the conference, where issues of common interest and concern are discussed, as well as strategies to cooperate with each other worldwide.

A recent example of cooperation is the joint (bilateral) investigation of Whatsapp by the Canadian Federal Privacy Commission and my own office, the Dutch

DPA. An even more global example is the initiative taken by Jennifer Stoddart, president of the Canadian Federal Privacy Commission, which resulted in 37 (!) data protection authorities signing a joint letter to Google regarding its Glass project.

But let me get back to better cooperation and consistency within the EU:

One of the top priorities for Commissioner Reding is the introduction of the so-called one stop shop. The idea is to have one DPA to whom a controller can turn. One DPA to – in principle – deal with.

Which DPA that will be, will depend upon the main establishment of the company concerned. Unfortunately, the draft Regulation itself is ambiguous about how the system would work exactly. The bottom line is however that when the main establishment is clear, the data protection authority of that Member State will act as the so-called lead authority.

Being lead authority means being the main contact point for a particular company. However, prior to taking actions or decisions towards that company, a strong system of cooperation is (or should be) put in place. The lead authority will –where necessary – need to consult with all involved authorities in an endeavour to reach consensus on the way forward. But in the end, the lead authority will be the one taking the decision. And the lead will (in principle) be the one that the company concerned will have to deal with.

In conclusion ladies and gentlemen, there's a lot to gain here for you.

The draft Regulation will give you one law for the entire EU, more consistent interpretation of that law through increased cooperation and in principle, one DPA to deal with. The benefits of this should not be underestimated.

But, you cannot have your cake and eat it too.

In other words, the basic data protection principles will remain the same. No erosion of well established principles, no widening of exemptions, in short: no trying to escape the rules by changing them along the way!

There are various attempts to limit the scope of the Regulation. Attempts to escape data protection rules. For example by trying to define pseudonymous data in such a way that these data fall outside the scope of the proposed Regulation and many companies would no longer need to bother with data protection. Or by trying to define the notion of profiling or scientific research in a way that would ensure a free pass for certain data processing activities. Or by allowing fundamental exceptions to the key principle of purpose limitation for the public sector.

From my experience, what I hear and see is that some companies make grand statements about privacy and

data protection, but in practice do not live up to their promises. Do not practice what they preach. Do not put their money where their mouth is.

Or change their minds. As the United States Digital Advertising Alliance did when they found out that the percentage of respondents actually enabling the Do Not Track option would far exceed the threshold the DAA would initially be willing to accept as an industry opt-out rate. After finding this out, the DAA – despite earlier grand statements about do not track- made every effort to kill the W3C's efforts to ensure a worldwide solution and continues to do so.

Companies treat individuals as consumers. And as consumers alone. But consumers are also citizens. And citizens have certain fundamental rights. Rights that cannot be waived because you forgot to untick a box.

There is no such thing as a free service. We just pay for this type of service with another currency, with our

personal data. And by doing that a tension arises: at that very moment, we are no longer merely consumers. We are citizens too. Citizens that have a right to privacy and data protection.

Because of that tension, the ground rules, the basic principles need to be clear. It cannot be left to consumer protection organisations to fight for more transparency and control for individuals. There needs to be a law- a Europe-wide Regulation- that ensures these basic elements of data protection for its citizens. And that law should, obviously at least provide for the same level of protection as the current Directive does.

Let me be clear: we are not here to spoil anyone's fun but to make sure no one gets hurt. Somewhat like a lifeguard on the beach, as Julie's colleague Edith Ramirez once put it. We need to make sure privacy and data protection are respected without getting in the way of innovation.

I know that later today you will be discussing important points of the draft Regulation. And I am sure that critical remarks will be made. Don't be mistaken. Also the data protection community sees room for improvement and fine-tuning.

But, as I said before, the draft Regulation is an enormous step forwards. Also for business.

As I mentioned before, let us not forget that we are dealing with a fundamental right here. A right that the European Union is actively, even pro-actively under the Treaty of Lisbon, obliged to guarantee. In all areas, for all sectors. The private sector, the public sector, and in the area of police and judicial cooperation.

The end result of the whole process should therefore be a comprehensive framework. That means that, as the European Parliament has often stressed, the key principles and basic system of the package, of both the

draft Regulation and the draft Directive, need to be the same. Aligned.

There is much speculation about whether the package will be adopted before the end of this parliamentary term.

I may not be an expert in predicting European negotiations, but if there ever was a time that proved the necessity of sound data protection rules, it's now.

I therefore urge all to stick to the plan and get the job done!