



## **36<sup>th</sup> International Conference of Data Protection and Privacy Commissioners**

**"A World Order for Data Protection – Our Dream Coming True?"**

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### **Plenary II – Privacy with no Territorial Bounds**

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Dear colleagues,

The title of this plenary session seems to refer to a state of near paradise – privacy unlimited, no bounds, no territorial limits. This is very appropriate for a tropical island like Mauritius with almost unlimited space around in the seemingly endless ocean. Yes, indeed, one world, one privacy, a dream coming true!

At the same time, one should wonder: is it feasible, knowing on the one hand, how *borderless* Internet technology is developing nowadays, and on the other hand, how important national jurisdictions, and with that also *territorial borders* are in reality, certainly in law making and in law enforcement?

This is a real dilemma: our digital world is becoming more global and more local at the same time, as the Internet and related services are penetrating our daily lives. The global nature of the Internet and the global impact of digital services pose a real challenge for compliance with national laws in relevant jurisdictions. It is also a challenge for sovereign jurisdictions to rule effectively on what they consider as local matters.

The global impact of digital services inevitably also leads to importing or even imposing of foreign rules, customs, practices and assumptions in other jurisdictions, with the possibility of

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disconnects between accepted practices at the place of origin and rules and practices at the place of delivery. Let me just mention a few concrete examples of this phenomenon.

- Privacy policies: invented in the US in the 1990s, in the absence of privacy laws, and based on simple notions of 'notice and consent' that are now considered as outdated and ineffective, have nevertheless set a *de facto* standard, that is not really compatible with EU data protection rules, and in any case subject to quite different requirements.
- Right to be forgotten: the highly critical and sometimes aggressive reactions to the recent CJEU judgment in the Google Spain case show a *disconnect* between the assumption that available information can be re-used and the requirement that processing of personal information must always be legitimate and may be subject to rights of erasure or objection by the data subjects.
- Internet of things: we have heard at this conference that very few objects or devices for the future IoT are being devised with serious attention for privacy implications. Therefore, boxes with diverse gadgets, just being sent off to other parts of the world, without any thought given or information provided on privacy aspects, are simply a *disaster* happening in slow motion.

Again therefore the question: is it feasible, privacy with no territorial bounds? There is however an alternative strategy, namely *accepting* differences and *building bridges* across territorial diversities.

So where are we now, and what needs to be done in that perspective?

1. In terms of common standards, we have the Madrid Resolution adopted by this conference in 2009 which has influenced the revision of the OECD Guidelines, the Council of Europe Convention 108 and the current EU legal framework, as well as activities in the context of the UN. There are obvious differences in form and substance between these instruments, and also more subtle differences, such as relating to the role of risk as a threshold and the requirement of legitimacy or lawfulness for data processing. But all instruments have the Fair Information Practice Principles (FIPPs) as their common core.

2. We also agree on the need to make these principles more effective in practice, and this explains the strong emphasis in our discussions at this conference on accountability and privacy by design, and on risk assessment, not of risk as a threshold, but as a condition for greater effectiveness in practice.
3. Multi-stakeholder processes and other forms of self-regulation have their obvious limits in delivering acceptable outcomes. That means that we also need legal frameworks to drive the process and to ensure compliance, to deal with inevitable mavericks and outliers, and to allow persons concerned to exercise their rights. In the EU this also follows from the essential elements of data protection set out in the Charter of Fundamental Rights
4. It will then be necessary to carefully define the scope of the law, both its material and its territorial scope. In this respect, it will be most important to avoid lacunae and to deal with any possible overlap as a second step. As you know, the proposed General Data Protection Regulation in the EU will apply both to entities established in the EU and to all processing with a direct impact on persons in the EU.
5. It is also important to develop international cooperation in the enforcement of these laws. This conference has made a big step earlier this week in adopting a common arrangement for different phases of such cooperation. However, our cooperation should still be wider and also entail staff exchanges, as well as joint guidance on relevant subjects.
6. This international conference could also serve as a platform of cooperation in awareness raising and education. In fact, the conference is already developing such activities right now. Civil society would of course be a very good partner in this effort.
7. International business could develop tools for seamless compliance across jurisdictions, serving as 'travel plug' for interaction with different legal requirements. Binding corporate rules (BCR) and APEC's Cross Border Privacy Rules are good examples of this approach. Certificates and labels could also play an important role in this context.
8. In this context, we now see the very first companies stepping up as role model for privacy as a competitive advantage. However, we would need a far greater responsiveness on the part of industry in general to make a meaningful impact. Those companies who would still 'not get it', would have to face stronger enforcement as a backup.

9. At EDPS we have recently launched an activity to encourage more privacy by design. The Internet Privacy Engineering Network (IPEN) is aimed to speed up efforts in technical privacy solutions. Those interested will find more information on IPEN at the conference desk and on the EDPS website.

10. Finally, earlier this year, we have also issued a Preliminary Opinion on 'Privacy and competitiveness in the age of big data', and organized a workshop on privacy, consumers, competition and big data, which both looked at the interfaces of data protection, consumer protection and competition law. The 'big data economy' will also need big countervailing powers and close cooperation between all relevant regulators.

If we are successful in these ways, we will have accomplished 'interoperability' – whatever this might mean – between the relevant legal systems.

My vision is therefore not privacy with no territorial bounds, but privacy across territorial limits. At this conference we have made important steps, in providing key building blocks for this more sustainable approach across different jurisdictions.

In that sense, I am sure that Mauritius – this tropical paradise in the Indian Ocean – will leave a mark in the history of privacy, and most certainly in the history of this conference.

Thank you.