



RightsCon 2017

Speech on “All we need is L....Privacy by design and by default”

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Thank you to Estelle and AccessNow for their invitation to introduce this impressive panel - impressive in terms of subject matter, and impressive in terms of personnel!

Our esteemed panel this morning is asked to address the question: What does privacy by design mean, in particular with the context of the e-Privacy reform.

To set the context for this question, let's think about how previous generations communicated.

In the old days, our grandparents and great-grandparents, in order to pass messages to distant friends and family, used to send letters.

Their letters were enclosed in a sealed envelope with an address written on the front.

Those generations had a reasonable expectation, assuming they were fortunate enough to live in a liberal democracy, that their letters would not be opened by anyone other than the addressee.

That expectation was generally met - unless, of course, exceptional circumstances such as war demanded a partial suspension of that expectation.

In other words, the humble envelope was, for many generations, privacy by design:

- It was opaque - you couldn't see its contents via the naked eye
- It was not 100% secure of course: anyone could easily force it open. But it was clear to see if somebody had tampered with or interfered with a sealed envelope.

However the design features of the envelope were not enough: conventions of society – and in some countries the law itself - dictated that it would not be opened except by the addressee.

This was, and remains, a very powerful convention.

It even applies to private households: for instance, heaven help me if I, sitting at the breakfast table, dared to open a private letter addressed to my wife or daughter!

The ePrivacy framework is complex and controversial, and has become ever more controversial as technology and the law has evolved – so rapidly in the last 20-25 years.

But, I would like to suggest that, for this conference, which is about human rights and freedoms, the crucial question is this:

In our online, digital, hyperconnected - but still democratic - society, does our generation, and the generation of our children and grandchildren, still believe that our messages should be confidential?

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Let's review for a moment the background to the Commission's proposal this year for a ePrivacy regulation.

I was the Italian government's representative during the negotiations on privacy protections applying as part of regulation of the telecommunications sector - what would become Directive 97/66/EC.

At the time, most of us who were involved in the discussions thought that this would be enough.

But within a few years, it became clear that these rules required updating for new internet-enabled technologies and communications services.

The 2002 ePrivacy Directive aimed to cover what it called the 'digital mobile networks'.

Another few years later, we realised that the directive needed to be updated again to address new communications phenomena: because everyone had started to use services like search engines and social media *et cetera* whose revenue streams depended on the ubiquity of browsing identifiers – cookies.

Hence the so called 'cookies directive' of 2009.

The current reform package reflects deep public disquiet about constant tracking of their behaviour line.

It also reflects the realisation that the old notion of 'publicly available' communications services is no longer helpful.

So here we are: 1997, 2002, 2009, 2017...

The legislator is constantly trying to keep pace with technological change.

We have seen this with data protection rules, although in this case the gap between reforms – 1995 and 2016 – is rather bigger.

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What is essential from the current reform package on the table?

I want to suggest three guiding principles.

First of all it must be **straightforward**:

We must have clarity on the relationship between a new ePrivacy regulation and the GDPR.

The GDPR took seven years to finalise – from the Commission’s initial consultation in 2009.

There are two years between adoption and full applicability in May 2018.

And after May 2018 we can expect a further two or three years for delegated and implementing acts and guidance from the European Data Protection Board.

That’s over 10 years in total.

We simply cannot, therefore, reopen discussions on the GDPR.

So the new rules must prevent, for example, confusion over the obligations of data controllers according to data protection rules, and the obligations of communications service providers.

Second, the new rules on ePrivacy must be forward-looking, **sustainable**. Now, of course, that is easy to say, hard to do. The 2002 directive, according to recital 46, aspired to be technologically neutral.

Therefore - and this is my third point – I will be urging lawmakers to keep these new rules as **simple** as possible.

We must preserve at all costs the integrity of the principle of confidentiality of communications.

But we should also avoid unnecessary details.

We should promote an ethical approach to providing communications services, just as we are doing with the processing of personal information.

We should promote accountability for decisions which are taken, not require bureaucratic exercises.

So those are my suggestions – straightforward, sustainable and simple.

I will expand on this in my opinion on the ePrivacy reform proposal in April.

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So to conclude.

This generation of lawmakers are not digital natives: we are *digital interlopers*, if you like. We have struggled to understand how principles and values apply in the age of hyperconnectivity.

Today’s teenagers have grown up with a new set of norms and conventions, shaped by the technology which they take for granted.

But as any parent entering their teenager's bedroom without permission knows – **privacy is just as important for them as it is for us.**

Privacy and freedom of expression are not conflicting rights – they are two sides of the same coin.

You must have a space which you know is intimate and inviolable - whether it is a bedroom or an encrypted messaging tool.

Because, without such a safe space, you cannot be free to choose what you say and what you listen to and read.

I predict that, in about a decade, today's 'Snapchat generation' will start to appear in the lobbies of the European Parliament.

They may look at the old-fashioned notion of 'privacy of electronic communications' and find it inadequate for protecting the privacy of human interactions. They will have to imagine new forms of privacy by design.

But our job now, as digital interlopers, is to preserve the confidentiality of communications for the next generation.

Thanks for listening and I look forward to our discussion.