

OECD Conference
Current Developments in Privacy Frameworks: Towards Global Interoperability

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Vice Minister,

President Commissioner Peschard,

Ladies and Gentlemen, dear friends,

I would first like to thank the OECD for having made this event possible and having given me the chance to be part of such a distinguished panel.

In my intervention, I would like to focus on addressing the two questions raised by Commissioner Jennifer Stoddard in her introduction.

Data protection is a fundamental right, not only in Europe, but all over the world.

The starting point of Convention 108 was to secure for everybody, irrespective of nationality or residence, the right to privacy. The Convention remains the only legally-binding standard which has the potential to be applied worldwide. The Convention may be old, but it is still relevant. Interest is particularly strong in Latin America. Yesterday we had a very constructive meeting with the Iberoamerican Network on data protection and in July, Uruguay became the first non-European state to be invited to accede.

Soft-law instruments are not sufficient to ensure the degree of legal certainty and predictability which is required in an area directly affecting the exercise of human rights. Legally binding norms are thus a precondition for interoperability.

The general and technology-neutral standards of Convention 108 have been tested and applied over thirty years in more than forty countries. It is this experience which gives added value to our work or, as they say here in Mexico, "*más sabe el diablo por viejo que por diablo.*"

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However, thirty years have passed and time has come to revisit the convention's principles, to test their relevance against the new realities of the on-line world and, if necessary, to complement them with new principles and rights.

Modernisation process of Convention 108 - how to address transborder data flows in a globalised world?

The modernisation of Convention 108 pursues two main objectives:

- to deal with challenges for privacy resulting from the use of new ICTs;
- to strengthen the Convention's follow-up mechanism.

We are currently considering new principles, such as accountability, data minimisation or privacy by design.

But it is the issue of transborder data flows that will be key in the modernisation process. There is probably no other area where law and reality diverge so much. 30 years ago we lived in a different world, much less globalised and interconnected. Today, data instantaneously flows across borders, European or non-European.

The current patchwork of fragmented and unpredictable rules is no longer sustainable, neither from a purely economic nor from a human rights point of view. Existing regulatory frameworks are sometimes enforced unilaterally and sometimes simply ignored, leaving individuals without effective remedies to defend their right to privacy.

The current provisions on transborder data flow contained in the Convention and its 2001 Protocol will have to be revised. We are particularly grateful to Christopher Kuner, Richard Thomas and the ICC Task Force on Privacy and the Protection of Personal Data for having proposed a set of draft provisions intended to be "future proof". Taking into account the borderless nature of electronic communications and the evolving nature of the Internet, they propose to abandon the idea of data transfers from one jurisdiction to another and to focus instead on the obligations of data controllers and processors.

It is too early to go into details at this stage before representatives of all states parties and observers have had a first opportunity to discuss the new approach at the T-PD plenary at the end of November. We shall be honoured by the participation of President Commissioner Peschard, along with representatives from Canada and the United States of America.

Delegations will consider a new set of provisions on transborder data flows, still based on the well-known notion of an "adequate level of protection", while at the same time implementing elements of the concept of accountability. The use of standard contractual clauses and binding corporate rules (BCRs) is foreseen and even encouraged, provided that suitable and effective control measures by supervisory authorities are in place. The current prohibition to transfer data when there is no adequate protection will be maintained, recognising that this

prohibition has promoted the development of data protection laws around the world.

In keeping with the Convention's philosophy, any new provisions on transborder data flows or, indeed, other issues will consist of general principles only, albeit clear and concise, allowing states parties a certain measure of discretion when implementing them through their national legislation.

Co-operation with the OECD

Coming more concretely to co-operation with the OECD, I would like to mention a recently adopted resolution by the Parliamentary Assembly of the Council of Europe. For the purpose of debating the activities of the OECD, this Assembly meets annually in an enlarged forum including delegations from the non-European OECD member countries and the European Parliament. [Resolution 1833 \(2011\)](#) on the activities of the OECD in 2010-2011 invited the relevant bodies of both organisations to work together to ensure coherence in their approaches and to promote wide accession to Convention 108 by OECD countries. It also encouraged the further common development of the "global privacy enforcement network".

Indeed, the effective enforcement of data protection standards is crucial for their credibility. Spontaneous reactions by some data protection authorities only, as in the cases of Google buzz, are not sufficient. We need a truly global forum to exchange information and, where necessary, prepare a coordinated reaction by data protection authorities. The Council of Europe looks forward to actively contributing to the further development of GPEN. We could, for example, encourage all parties to Convention 108 to join the network.

Conclusions

The process to modernise and promote Convention 108 will be part of a comprehensive Council of Europe Internet Governance Strategy 2012-2015² and a priority area of the incoming UK Chairmanship of the Committee of Ministers. The strategy will be built around our two prominent instruments in this field, the Budapest Convention on Cybercrime and Convention 108.

We are convinced that there can be no security without respect for privacy. This applies not only to law enforcement, but also to the economy at large. Global online transactions currently total an estimated \$10 trillion annually. It will not pass to the predicted \$24 trillion by 2020 unless there is confidence not only in security but also privacy.

We are convinced that, with the active participation of countries and stakeholders from all over the world, Convention 108 will eventually fulfil the vision of its drafters and become a truly international standard for data protection.

² See http://www.coe.int/t/information/society/conf2011/IG_CoEStrategy_EN.pdf

If you are interested in the future of Convention 108, I invite you to consult our website.³ All our drafts and reports are publicly available. We value in particular input from NGOs and the private sector.

Thank you for your attention.

³ www.coe.int/dataprotection