

35th International Conference of Data Protection and Privacy Commissioners

The 35th International Conference of Data Protection and Privacy Commissioners concluded last Thursday, following a week of official sessions (and numerous parallel events), dominated by four issues: (1) the challenges presented by technologies such as mobile apps and online profiling, (2) multinational interoperability and enforcement, (3) the pending EU data protection regulation and alternatives, and (4) surveillance by the NSA and its repercussions.

For the first time, the closed sessions of the conference preceded the public ones, so discussions in the latter were both aware of, and influenced by, the former. Meeting in closed session, the commissioners adopted one declaration and eight resolutions. It is not always clear what the difference is between declarations and resolutions, but Jacob Kohnstamm, chair of the Article 29 Working Party, when reporting on the work of the closed session (another first), paid special attention to the declaration, and its text (unlike that of the resolutions) was distributed to all participants in the open sessions, so it may warrant special attention.

1. Technology Challenges

The declaration—the [Warsaw Declaration on the “Appification” of Society](#)—addressed the challenges posed by the increased use of mobile applications and expressed the clear commitment of data protection commissioners to ensure that app users are offered a better privacy experience. In particular, the declaration emphasizes that “apps should be developed on the basis of surprise minimisation: no hidden features, nor unverifiable background data collection.”

In addition, the declaration made clear that app developers are not the only parties responsible for privacy; providers of operating systems also bear responsibility for their platforms. The declaration indicated that the data protection commissioners intend to focus on improving privacy and data protection in this area and that they will revisit the subject during the 36th International Conference next year.

A number of the resolutions also reflected this focus on technology and its impact on personal privacy. The [Resolution on Profiling](#), for example, made six recommendations for everyone who engages in profiling:

- Clearly determine the need and the practical use of a specific profiling operation, and ensure appropriate safeguards before beginning.
- Limit assumptions and data collection to that which is necessary for the intended lawful purpose, and ensure that the data is sufficiently up-to-date and accurate, where appropriate.
- Ensure that the profiles and the underlying algorithms are subject to continuous validation.
- Inform individuals about profiling operations to the maximum extent possible.
- Ensure that individuals are informed about their data protection rights, and that human intervention is provided where appropriate (particularly with respect to decisions that have significant legal effects on individuals or that affect benefits or status).
- Ensure that all profiling operations are subject to appropriate oversight.

Similarly, the [Resolution on Web Tracking and Privacy](#) urged all stakeholders to follow 10 recommendations, including:

- Observe the principle of purpose limitation.
- Refrain from the use of invisible tracking elements for purposes other than security or fraud detection or network management.
- Ensure adequate transparency about all types of web tracking practices to enable informed consumer choices.
- Conduct a privacy impact assessment at the start of new projects.
- Use techniques that reduce the privacy impact, such as anonymisation and pseudonymisation.
- Promote technical standards for better user control (e.g., an effective Do-Not-Track standard).

The third plenary session of the open portion of the conference addressed “privacy and technology” explicitly. During that session, FTC Commissioner Julie Brill discussed data privacy challenges of big data and data aggregation, and identified four steps that she believes are necessary to help resolve the challenges presented by these developments:

- Robust de-identification technology coupled with the public commitment by the organisation not to re-identify information, and the existence of downstream contractual commitments with third-party vendors to oblige them to keep data de-identified.
- Enhanced enforcement (Commissioner Brill mentioned the first FTC enforcement action against TRENDnet regarding connected devices).
- Law reform, especially in the areas of notice and choice and FIPs in general, as their application can be problematic in the world of big data and the internet of things.
- Better industry practices, especially to ensure fair information and transparency, access to one’s personal data, one-stop opt-out from sales/marketing purposes, and increased regard for context.

2. Multinational Interoperability and Enforcement

The second consistent theme was the focus on interoperability and enforcement across national and regional boundaries. During the closed sessions, data protection authorities adopted the [Resolution on International Enforcement Coordination](#), calling on more nations to join the [Global Privacy Enforcement Network](#) and to work to make it more effective. The aim of the resolution is to build on previous efforts, including the work of GPEN and the work of the International Enforcement Coordination Working Group, which was created at the 33rd International Conference of Data Protection and Privacy Commissioners. To this end, the resolution called on the International Enforcement Coordination Working Group to:

- Work with other networks to develop a common approach to cross-border case handling and enforcement coordination.
- Set forth the approach in a multilateral framework document to be adopted at next year’s conference.

During the public portion of the conference, Centre Senior Policy Advisor Fred Cate moderated a session on the Nexus for Compliance and Enforcement, during which UK Information Commissioner Christopher Graham stressed the importance of regulatory flexibility to allow regulators to target the most egregious and harmful behavior. The pending draft regulation, Graham commented, was “too *dirigiste*.” “If you

have inflexible regulation, you over claim and lose authority. Less is more,” he concluded. Instead, he said, enforcement must be “proportionate, consistent, and risk-based.”

During the conference, Deputy European Data Protection Supervisor Giovanni Buttarelli also stressed the importance of interoperability and mutual recognition. He stated that the goal should be to look for more convergence between different legal regimes. Five developments present opportunities for such convergence: (1) modernization of the Council of Europe Convention; (2) the recent review of the OECD guidelines; (3) the growing focus on strengthening organisations’ accountability; (4) better cooperation by data protection authorities in respect of global data transfers; and (5) cooperation between data protection authorities in enforcement.

3. Pending EU Data Protection Regulation and Alternatives

The pending EU data protection regulation was on everyone’s lips, and while most data protection commissioners expressed hope that it would still pass, the widely shared sentiment in the halls seemed to be that there was too much work—both substantive and procedural—still to be done for the regulation to pass in the current Parliament. Whilst the Parliament is ready with the compromise amendments and will vote in October or early November, the discussions in the Council appear far behind and likely will delay the process further.

Whether or not the draft regulation is adopted, there was considerable discussion of additional tools for shoring up data protection. During the closed sessions, the commissioners adopted a [Resolution on Anchoring Data Protection and the Protection of Privacy in International Law](#) that called “upon governments to advocate the adoption of an additional protocol to Article 17 of the International Covenant on Civil and Political Rights (ICCPR) . . . to create globally applicable standards for data protection and the protection of privacy in accordance with the rule of law.”

Article 17, it will be remembered, already provides that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

The US FTC abstained from this resolution.

Centre Senior Policy Advisor Richard Thomas was a panelist during the open sessions on a framework for assessing privacy risks to individuals. He stressed the importance under existing laws, and proposed reforms for institutions and data protection authorities to rationally assess the risks posed by proposed uses of data and to respond accordingly. Using a phrase that was frequently repeated during the conference, he noted “you have to be selective to be effective.”

4. NSA Surveillance

Without question, the most widely discussed subject was the surveillance activities of the NSA revealed since May by Edward Snowden. Government surveillance was not the subject of any declaration or resolution (although it was addressed in the commissioners’ [Resolution on Anchoring Data Protection and the Protection of Privacy in International Law](#) and mentioned obliquely in the [Resolution on Openness of Personal Data Practices](#), however, Chairman Jacob Kohnstamm, reporting the results of the closed

sessions, stressed that “we need a better balance between security and surveillance, and privacy.” Chairman Kohnstamm characterized the NSA’s activities as “building haystacks in order to find the needle,” and he stressed the concern that “non-Americans do not like to be discriminated against.”

Chairman Kohnstamm noted that the closed sessions had included a discussion with David Medine, chair of the US Privacy and Civil Liberties Oversight Board, and he seemed to be reflecting the sentiments of many conference participants when he warned, “the whole world is protesting about what is happening.” Michał Boni, Polish Minister of Administration and Digitization, offered an even more stark assessment: “on behalf of security we are destroying freedom.”

In the absence of some significant gesture from the US government, it seems likely that data protection officials will continue to press for reform or even rescission of the Safe Harbor agreement, delays in trade talks, or other steps designed to reflect their displeasure with US surveillance and US law. European Data Protection Supervisor Peter Hustinx expressed an apparently common sentiment when he said that the NSA’s PRISM surveillance program “shows that we need to be stronger.”

On the day the Warsaw conference opened, Brazilian President Dilma Rousseff, attacked US surveillance of herself and other Brazilians during an address at the UN General Assembly: “the right to safety of citizens of one country can never be guaranteed by violating fundamental human rights of citizens of another country.” From the prevalence of this topic in Warsaw, it seems clear that many of the participants would agree.

Conclusion

The 35th Conference admitted three new members to the group of data protection and privacy commissioners:

- Data Protection Office of Mauritius
- Kosovo National Agency for Personal Data Protection
- Buenos Aires Ombudsman’s Office

In keeping with what is rapidly becoming a tradition, it was announced that one of the three—the Mauritius Data Protection Authority—would host the next international conference beginning September 22, 2014.

Two key data protection officials who will not be in Mauritius—at least not in their current official capacities—are European Data Protection Supervisor Peter Hustinx and Canadian Privacy Commissioner Jennifer Stoddart, whose terms end this year. One official who is likely to be there and undoubtedly breathing a little easier is the Polish Inspector General for Personal Data Protection Wojciech Rafał Wiewiórowski, who together with his staff, organized an apparently flawless conference and executed it with characteristic warmth and hospitality.