The changing landscape of Privacy laws

The reform of the European law on the processing of personal data: weighed and found wanting, compromising the future or a brilliant idea on short legs?

Willem Debeuckelaere[1]

When Commissioner Viviane Reding's proposal for a new European privacy law was announced on 25 January 2012, it was not exactly big news. Granted, the world of data protection was already buzzing in December over the leaking of version XXX[2]: it was already clear at that moment that it would concern a very ambitious and groundbreaking proposal, but that a number of problems would immediately be made apparent.

The European Commission's proposal

The choice of legal instrument, a Regulation, immediately applicable without the intervention of the Member States, was surprising at the very least. Certainly in regard to what falls outside of the hard core, the backbone of European privacy law. The power that the European Commission assigned itself also came as a surprise. It is by no means evident to provide that what is still an executive body is given the power to overrule the decisions of privacy commissions, which should have the power to take decisions independently. More importantly still was the fact that the selfsame commission was responsible for a large amount of implementing acts, the so-called delegated acts. It was immediately clear that the European Commission was not only faced with an enormous task in terms of implementation, but that it would also have to outline the right to privacy with great precision. The biggest surprise, however, at least for the proponents of a more EU-based approach, was that there was a major emphasis on a national approach and not on a common, EU-wide, policy. The successor of Working Party (WP) 29, named for Article 29 of the European Privacy Directive, the meeting of the assembled European national privacy commissions and the EDPS (the privacy commission for the European institutions), was a very meagre one. The "European Data Protection Committee" actually had no real decision-making powers. It was instead put under the tutelage of the European Commission and was mainly responsible for keeping the so-called coherence mechanism on the right track of fruitful cooperation.

These less attractive sides were not immediately apparent, as most attention was paid to the new elements: jurisdictional rules, the right to be forgotten, accountability, genetic data, data leaks and the data protection impact assessment, the abolition of the prior notification requirement, the prohibition of prior authorization of data processing and especially the one-stop shop, and the person responsible for data protection, the Data Protection Officer. It is worth noting, tellingly, that certain concepts are difficult to translate and are otherwise invariably and permanently referred to by their English names: privacy by design, privacy by default.

---

[1] William Debeuckelaere is the Chairman of the Belgian Commission for the protection of privacy.

[2] Version 56 of 29/11/2011 was made public by Statewatch, an NGO, after a "leak".

When the proposal was finally made public on 25 January 2012, it turned out that certain exceptions had been added as well as a number of strong protection measures and obligations toned down in respect of processors: small and medium-sized enterprises, especially, suddenly seemed to be able to operate under less severe restrictions than larger companies and organizations.

But the document existed: Proposal for a Regulation of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in short: the General Data Protection Regulation[3]. All in all, an impressive piece of work comprising 115 pages and 91 articles. Its smaller sibling, the police and justice Directive appeared on the same day under the title: Proposal for a Directive of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal penalties, and the free movement of such data[4]. The whole package was presented in the "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ensuring privacy in the online age. An European data protection framework for the 21st century"[5].

The beginning

The revision of Directive 95|46|EU of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data was announced regularly. However, the Commission, with the approval of the Parliament, concluded that there were no grounds for proceeding with a revision, which opinion was based on the Commission report of 15 May 2003[6]. This point of view was confirmed by the Commission on 7 March 2007[7]. Not that it was entirely perfect. It was more than clear to everyone that a constantly evolving society required modern legislation, which was in the eye of the storm of such changes, to also be adjusted. The comparison with other legislation whose effectiveness is constantly put to the test by technological developments is easily made. Think of the Belgian law on electronic communications which has had to undergo almost yearly alterations because of numerous pieces of European legislation. The Commission also indicated in its 2003 and 2007 assessment reports that the original Privacy Directive of 1995 was due a revision. It was assumed, however, that it was only to be a selective modification procedure based on the model of electronic communication and carried out through directives. This analysis did not prevent a number of players, including the British Information Commissioner's Office (the UK privacy and data regulator), from setting up a large-scale study on whether or not to reform the right to privacy, including the directive[8]. The ICO published a report entitled "Review of the European

[3] COM(2012)11.
[4] COM(2012)10.
[5] COM(2012)9.
[6] COM(2003)265.
[7] COM(2007)87.
[8] See: http://ico.org.uk/about_us/research/~/media/documents/library/Data_Protection/Detailed_specialist_guides/REVIEW_OF_EU_DP_DIRECTIVE.ashx

Data Protection Directive" which was prepared by RAND[9], a consulting firm which presents itself as an NGO, incidentally. It was necessary to once again carry out a comprehensive clean-out of Directive 95/46/EU. The report was presented at the spring conference, the traditional conference of the European privacy commissions, in Edinburgh, Scotland. The then president of WP29, Alex Türck, watched the whole takeover with dismay. He had warned us of just such an event in almost prophetic words.

In Brussels, Commissioner Bernier nevertheless deemed it necessary to task a group of knowledgeable people, four lawyers, and gave them free reign to fillet European privacy law. Türck was then given the opportunity to warn his compatriot, who was presented with an easy opportunity, by appointing four English-speaking experts, each associates of U.S. law firms. Fresh bait for a European counterstrike: the then already, in 2010, outgoing Commission held a two-day conference in Brussels to support the need for reform. Meanwhile, the four experts were relieved of their duties and the ball was put in the Commission's court. Viviane Reding got involved. Meanwhile, a broad coalition formed around EDPS president Peter Hustinx and Jacob Kohnstamm - successor of (burnt out?) A. Türck as chairman of the WP 29 - to implement a controversial reform of privacy law. What it should lead to, as well as the options and new concepts, was laid out in impressive papers. To me, personally, it appeared to be mostly a pep talk with no real legal substance, although not devoid of knowledge and background about the actual problems. But it was a "clean" document comprised of only the most worthy of objectives: strengthening the rights of the data subjects, enhancing internal market rules, revising rules for police and justice cooperation, globalization, strengthening the institutional framework, etc.

Need for reform: not quite...

For these three reasons

Lisbon abolished the EU's former remarkable Trinity, the three pillars, creating the need for a new institutional framework. But there were two more compelling reasons to rewrite Directive 95/46/EU.

1 The institutional framework needed to be strengthened

European privacy law needed a thorough facelift at the start of the 21st century. A major revision of a number of concepts and mechanisms was inevitable because at least two major developments in the past decade had thoroughly changed the information and communication landscape.

The placenta of privacy law remains Convention 108[10], the agreement concluded in the framework of the Council of Europe which first gave a fundamental text to privacy law. It is important to note that this text is also under review: technical discussions have been completed and discussions now revolve around a political conclusion in the broad spectrum of the Council of Europe. But also outside: Uruguay has already acceded, Morocco is completing the procedure, and Canada is in the queue. Anyway, this is another political matter.

---

[9] See: www.rand.org.

[10] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28/01/1981.

A large number of national laws were established throughout Europe on the basis of Convention 108. Particularly in Belgium which gave privacy laws substance with the Act of 8 December 1992. Meanwhile, ongoing discussions were held at the level of the European Union about the possibility, desirability and necessity for a European privacy law. The drive of distortions of competition gave privacy a European basis: we had to ensure that no improper unwanted competition arose between countries only for reasons relating to the various regulations concerning the processing of personal data. The European Court of Justice had problems with it - a few Community vagaries are typical of the Court - but eventually accepted it and adjudicated that privacy laws, being a fundamental human right, seemed to be perfectly compatible with European primary and institutional law.

2. The world of the mainframe which shaped Convention 108 has been undermined

In the late 80s, the model of large computer centres, large spools and files stored in a warehouse, accessible only to the initiated, had already been completely overtaken by a new concept: the network. However, transitioning from the pyramid to the network was made possible by the personal computer on the one hand, and, of course, through interconnection on the other. And before we knew it, there was the worldwide web. Remarkable means of communication, such as e-mail, suddenly became natural to us within just a short span of time. A whole new world suddenly opened up to us thanks to the emergence of search engines. The European directive on privacy protection entered into force in mid-1995. Was it already technologically obsolete by then? Not really. It has always been the intention of the legislation to be as technology neutral as possible. And it has been largely successful in that respect. Criticism levelled at the quality of the laws and regulations was mostly motivated by their not being adapted to new systems, but the basics were clear and unmistakable, at least for those who were prepared to read what was written. Anyway, it is clear to everyone that the world of the Cloud is not that of the mainframe. The idea of ownership of data has been completely undermined. Moreover, it is significant that such technological developments can no longer be regulated under traditional legal concepts.

3. International processing of personal data

The fact that the processing of personal data has become increasingly globalized was a second important driver for adjusting existing laws and regulations, and especially for developing new tools. This trend also started in the early days of the 21st century, but it seems it has become self-evident. The Internet is the main driving force behind this development too: it opened up the necessary communication channels. The Cloud will only serve to intensify this trend in the long run, although it is not yet clear whether it will happen as an arithmetical or exponential progression. The legal instruments that are traditionally provided by nation-state and international cooperation are not immediately successful in actually and effectively managing these phenomena. Let's face it. We now know that there are a lot of big players on the market who will do all that is in their power to thwart such cooperation and concordance. Only the bigger players are able to achieve the necessary financial and international connections and to position themselves adequately. Consumers, citizens, are left out in the cold. The traditional legal resources available are so cumbersome and unwieldy that they effectively render it impossible to obtain effective legal protection. Just try to initiate proceedings at the Mountain View Court of First Instance, the court

which normally has jurisdiction over disputes with Facebook, at least according to their terms and conditions. Other complicating factors such as language, access to legal counsel and the legal system and the fact that many laws do not provide that foreigners may rely on the rule of law only compound the problem. More specifically, Europeans are faced with a particular problem in the U.S.: it's like we do not exist. A large number of rights are not available and the judicial process is very expensive and complicated. There is no real hope of effecting real legal protection.

When the Belgian authority for the protection of privacy was confronted with the SWIFT case, one thing was clear: litigation in the U.S. was a surreal venture. It will be no different today. Real legal protection must come from our own laws and regulations.

The redemptive solution: from proposal to regulation

And finally, we come to the new large-scale European framework for privacy protection. First came the proposal of January 2012. Then began the political, commercial and legal negotiations.

In order to gain a proper understanding of the matter, we should note that there are three political forums in which debates are held concerning the draft. The first is of course the Commission. Official discussions took place in early 2012 and ended with the proposal of 25 January. It was then up to the Member States: they carried out discussions in the context of what are commonly called the DAPIX meetings. These were very intense and thorough discussions. Almost every week, thorough discussions were held on all of the articles, right down to the smallest details, under the chairmanship of the then current National Authority. Next up is Greece, now it’s up to Lithuania, and previously it was Ireland - each with its own qualities and disadvantages. But the Commission monitors proceedings. It is always present to defend the original position with verve and vigour. So be it, too. It is, however, extremely important to determine whether all of this is as wonderful as it seems, especially from a human rights perspective. Meanwhile, the European Parliament's LIBE Committee came up with a proposal for both a general regulation and a regulation on police and justice in late October. It was extremely significant in terms of policy. Especially when they voted: 50 to 2.

The procedure provides that the three actors, being the Commission, the Council and the Parliament, will engage in a trialogue, discussions at the end of which the three institutional players are expected to come to an agreement. That is what is going to happen in the coming months and years. In order to reach a settlement, many positions will have to be abandoned and compromises will have to be made. This has already happened in order to come to the common position in the European Parliament's LIBE committee: a curious mix of give and take between strongly divergent positions. It amounts to reconciling water and fire.

The bottlenecks

The problem of the one-stop shop is a terrible bottleneck. Actually, it's quite simple (though some claim it to be otherwise): Who decides what? Is it the authority responsible for the data subjects, the citizens, or is it the authority representing the main establishment of the processor or controller? It is a very important principle. Vivian Reding has repeatedly spoken out about it and clearly opts for the

establishment of companies, organizations and administrations. Not, therefore, for the place of residence of the consumer, the user or the person whose personal data are processed, the person concerned or the data subject. Politically, this concerns a fundamental choice between the citizen and the processor. Is it a matter of business or of protecting people and their rights? It's not meant to be a symbolic struggle. This discussion is incredibly fundamental. No less than Article 13 of the European Convention on Human Rights is tested to its limit.

The problem of the one-stop shop is also closely linked to the issue of how the administrative process in the respective privacy commissions is connected to further legal processing by traditional courts or administrative litigation. The one-stop shop assumes that only one of the 28 privacy committees decides and the resulting act applies to the entirety of the EU. But how can citizens challenge that decision in court? Everyone is agreed that any decision should be assessed by a court. Should that then be the court of the authority which took the decision or that of the litigant?

If I have a complaint about Facebook, shall I apply to the court that my Constitution and the ECHR allocates to me, or will it be the judge who oversees the privacy commission under the one-stop shop, in this case, Dublin, Ireland? The texts provide no answers, and neither do the discussions about them. This Gordian knot is also difficult to disentangle because the choice of instrument, a regulation, does not even permit legislation to be made in terms of justice. This has hugely important implications for law enforcement. Because of the proposal from the Commission and the Parliament, LIBE Committee, there is now a heavy emphasis on administrative settlement with heavy fines. But all that is administrative, outside of common law. In itself, this is already a monstrosity when considering the separation of powers. In our Belgian jargon, we refer to them as GAS fines*

*(Translator's note: these are fines for anti-social behaviour).

And that is closely related to the third bottleneck: the lack of subsidiarity, which is nevertheless a guiding concept for European regulations. It is a beautiful and useful principle: local issues are resolved locally, both in law and in terms of enforcement and handling. But it conflicts with the idea of the centralized regulation under discussion. And especially with the one-stop shop. It leaves no room for local processing. Needless to say that this will give rise to hilarious problems.

It does not have to be this way, however. The fourth bottleneck is that of the missed opportunity. The train of legislative change only comes round occasionally (fifteen years is estimated to be realistic for such an area of sensitive technology). And we remain focused on a nationalistic approach, while what we really need is a strong and robust European, Community-wide approach. A strong regulator is needed to go up against players such as Google, Microsoft, Cisco, Facebook and others: a privacy committee that can speak and act at the European level. And now such a committee will not be created. It is a missed opportunity for leveling the playing field. This is particularly true for the many, and especially the smaller privacy commissions, which cannot afford to hire an extensive staff equipped with the legal and technical know-how. Particularly given that the bottlenecks, especially in the field of technology, are the same for all 28 countries.

The finish line

No matter how brilliant a proposal may be ...If it runs on legs that are too short, it can't hope to win the race.