

The role of Convention 108 in the international cooperation

J.-Ph. Walter

Chair of the T-PD

Deputy Commissioner, Federal Data Protection and Information
Commissioner, Switzerland

As we all know, the globalisation resulting from the increasing development and use of information and communication Technologies in all our activities stimulate the cross-border personal data processing and intensify the risk of privacy and data protection infringements. Such developments are to be tackled by Data protection authorities and justify, where necessary, the need for an effective and strong cooperation between DPAs to deal with cross border data protection breaches and to ensure consistent enforcement of the data protection regulations.

The Council of Europe has a long tradition in international cooperation and initiated over 40 decades ago, in parallel to the OECD's work, the first regulation concerning data protection. The Convention for the Protection of individuals with regard to automatic processing of personal data and its additional Protocol have since been, and are still, the only legally binding international instruments in the field of data protection. The convention which now gathers 46 countries has been ratified by 45 out of the 47 members of the Council of Europe. This instrument is opened for accession by third countries which are not members of the Council of Europe and Uruguay was the first non-European country acceding to the convention in

August this year. We hope that Morocco will shortly follow and finalise the accession procedure before the end of the year. The Convention and its protocol are currently being modernised with notably the intention to improve the international cooperation, and in particular the cooperation between DPAs.

The existing Convention and its additional protocol contain provisions dealing with Mutual assistance in Chapter IV. Article 13 foresees that the Parties render each other mutual assistance in order to implement the convention and shall designate one or more authorities in charge of this task. The great majorities of the Parties which have fulfilled their obligation to designate an authority in charge of mutual assistance have designated (or held accountable for this issue) their Data protection authorities. The designated authority is requested to furnish information on its law and administrative practice in the field of data protection. It shall take, in conformity with its domestic law and for the sole purpose of protection of privacy, all appropriate measures for furnishing factual information relating to specific data processing carried out in its territory, with the exception however of the personal data being processed.

The additional protocol regarding supervisory authorities and transborder data flows acknowledges the central role of the Data Protection authorities in ensuring the international cooperation: In accordance with the provisions of mutual assistance (chapter IV of the Convention), the supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information.

Article 14 of the Convention regulates the assistance that each Party shall give to any person resident abroad to exercise their rights, in particular the right of access or the right of rectification. A person residing in the territory of another Party can submit his or her request through the intermediary of the authority designated by that Party.

Article 15 foresees safeguards concerning the obligation of mutual assistance. The authority shall not use the information received for the purposes of assistance for other purposes than those specified in the request of assistance. The persons in charge of the handling of the request shall be bound by appropriate obligations of secrecy or confidentiality. An authority can only ask for assistance on behalf of a data subject with the express consent of the person concerned.

In accordance with article 16, a designated authority to which a request of assistance is addressed may in principle not refuse to comply with it. There are some exceptions:

- the request is not compatible with the powers in the field of data protection of the authorities responsible for replying;
- the request does not comply with the provisions of the convention;
- Complying with the request would be incompatible with the sovereignty, security or public order (ordre public) or with the rights and fundamental freedoms of persons.

Another important aspect of the international cooperation in Convention 108 is the existence of the consultative committee (T-PD). This committee which is composed of representatives of each of the parties to the Convention exercise a central role for the application and

interpretation of the Convention. In particular, the T-PD can make proposals to facilitate or improve the application of the convention. It can make proposals for amendment of the convention or formulate an opinion on any proposal for amendment. It can also express an opinion at the request of a Party concerning the application of this convention. This Committee has been instrumental in the development of the Council of Europe's data protection standards and has offered since its creation a unique forum of discussion for its members. It currently enables over 60 specialists (members and observers participating to the discussions in a spirit of equality) from over the world to meet on a regular basis to address common data protection challenges, provide regulatory guidance as well as technical expertise on some particular aspects of a domestic system and discuss means to tackle the difficulties faced in countries X, Y and Z.

The Committee furthermore contributed to a concrete action aimed at enabling easier communication between enforcement authorities around the world : it proposed to its delegations to join a combined list of contact points of enforcement authorities shared between members of the APEC, the OECD and the Council of Europe. This list which is updated on a regular basis is hosted and kept up to date by the GPEN and currently holds the contact details of over 35 contact points across the globe.

As already said, the Convention is currently being modernised. The Consultative committee has adopted a draft during its last plenary meeting in November 2012. This draft will be finalised by an ad hoc committee which will hold its first meeting in November of this year. This Committee

will be composed of governmental representatives from the 47 member states of the Council of Europe as well as of over 36 countries from all over the world invited to contribute to the discussions. The modernised convention should be adopted by the Committee of Ministers next year.

This draft strengthens the international cooperation. The competences and the position of the supervisory authorities have been improved. In the future the mutual assistance as regulated in Chapter IV will exclusively be the task of the supervisory authorities. They shall cooperate with one another to the extent necessary for the performance of their duties. In particular, they shall

- exchange all useful information, in particular factual information relating to specific processing, with the exception of personal data undergoing this processing, unless such data are essential for co-operation or with the consent of the data subject;
- coordinate their investigations or interventions;
- conduct joint actions;
- provide information on their law and administrative practice

To be effective, it is definitively necessary that the co-operation be based on a certain structure. Therefore the draft proposes that the supervisory authorities shall form a conference or a network to organise their co-operation and to perform their duties.

The draft improves also the competences of the convention committee (currently referred to as the “T-PD”) to allow a stronger follow-up and evaluation of the implementation of the Convention. The T-PD will prepare, before any new accession to the Convention, an opinion for the Committee of Ministers relating to the level of data protection of the candidate for

accession. It will periodically review the implementation by the Parties and decide upon measures to take where a Party is not in compliance with the Convention. It shall also facilitate, where necessary, the friendly settlement of all difficulties related to the application of the Convention.

To conclude I fully agree with and support initiatives to strengthen the international cooperation in the field of data protection and in particular between Data Protection Authorities as a necessary means to guarantee the effectiveness of the respect of fundamental rights and freedoms with regard to processing of personal data. We must be aware that they are many obstacles to an effective and full collaboration between DPAs. One of them is the existence of different architectures of legislations with different approaches or different definitions. Therefore it is also important to have common standards of data protection which are based on international recognized basic principles. Convention 108 offers such a common basis to cooperate for its 46 parties and for all countries – members or not members of the Council of Europe - which are willing to accede.

Only internationally agreed standards can provide the legal basis for the free flow of information and data that we urgently need in our globalised world

Where fundamental values and essential aspects of private life are at stake, state authorities have a duty to establish an efficient regulatory and enforcement framework of protection, and data protection authorities have the duty to effectively apply this legal framework, notably by enhancing their international co-operation.

