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# PRIVACY LAWS & BUSINESS

DATA PROTECTION & PRIVACY INFORMATION WORLDWIDE

## EDPS aims to be proactive and focus on external relations

New European Data Protection Supervisor (EDPS), Giovanni Buttarelli, promises an active dialogue with regulators, industry and civil society plus some new initiatives. **Laura Linkomies** reports.

“My goal is for the European Union to speak with one voice on data protection,” Giovanni Buttarelli said in an interview with *PL&B* at the end of January. “This is a historical moment for data protection because of the surveillance

debate, the new security threats, the ongoing data protection reform, and the transatlantic dialogue. After more than 22 years of experience in data protection, I now have a unique opportunity to be in this privileged

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## Hong Kong DPA sets sights on cross-border data transfers

The Privacy Commissioner issues guidance and encourages companies to follow it whether or not transfer rules are implemented by the government. **Paul Lanois** reports.

On 29 December 2014, the Hong Kong Office of the Privacy Commissioner for Personal Data (the Privacy Commissioner) published guidance on personal data protection in cross-border

data transfers (the Guidance Note). This Guidance Note was released in light of the Privacy Commissioner’s call earlier in 2014 for “a renewed

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**“ comment ”**

## Is privacy investment on the rise?

Some commentators say that large companies have started to act as if the EU DP Regulation was already in force – and bodies such as the European Data Protection Supervisor (EDPS) are making preparations to be ‘ready from day one’ as the new EDPS Giovanni Buttarelli told me last month (p.1). In the US, TRUSTe research shows that 30% of organisations budgeted more than \$1 million for privacy in 2014. So organisations understand that compliance is still less costly than data breaches.

The new EU DP regulation would bring about new compliance costs, even if it relies on the accountability principle (p.35). One large cost area is international transfers, whether it be drafting BCRs or other arrangements. The easiest solution would be to find common ground between EU BCRs and APEC CBPRs (p.11) but the EU is not yet satisfied that the two systems offer similar protections, although commonalities exist. Also, watch out for the Hong Kong Commissioner’s new interpretation on international transfers (p.1).

So why is there delay with the EU DP Regulation? The Commission’s proposal was always very ambitious. We are still waiting for the Council to agree a common position and the negotiations have become very political – Germany, France and the UK are holding up the negotiations, for different reasons. If agreement can be found by June, it is hoped that the trilogue will be conducted by the end of 2015 (p.9). In the meantime, the Council of Europe is progressing with Convention 108 reform that includes assessments of candidate countries (p.7) and follow-up checks on Member States which have signed and ratified the convention.

See p.18 for the most comprehensive tables ever on global privacy laws and bills. While Europe was the first to regulate, with Sweden’s Data Act of 1973, most new laws are now enacted elsewhere (p.14). Australia has new privacy principles but they may not aid compliance (p.30) and Canada’s Supreme Court has issued a controversial ruling on searching mobile phones in the context of an arrest of a person (p.29).

**Laura Linkomies, Editor**

PRIVACY LAWS &amp; BUSINESS

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Do you have a case study or opinion you wish us to publish? Contributions to this publication and books for review are always welcome. If you wish to offer reports or news items, please contact Laura Linkomies on Tel: +44 (0)20 8868 9200 or email [laura.linkomies@privacylaws.com](mailto:laura.linkomies@privacylaws.com).

*EDPS... from p.1*

post at the right time.”

Previously Assistant Supervisor at the EDPS, Buttarelli explained that his priority over the next five years is to be proactive in promoting a culture of data protection – in addition to his supervisory role with the EU institutions, this will mean active involvement in advising policymakers in order to come up with innovative legislative solutions. He said that he will urge the Council to speed up the process of finding common ground on the draft EU Data Protection Regulation, and try to find workable solutions that would be flexible for technological innovation without compromising individuals’ right to privacy.

### PROACTIVE EDPS

Buttarelli said that thanks to the solid foundations, his office has much experience, but will look different in five year’s time due to the DP reform. “We will be more specific- this means not only issuing opinions but helping to identify practical solutions. The mandate of the EDPS will be characterised by putting much more effort on DP core business issues.”

This aim will be reflected in the advisory role of the EDPS with regard to decisions to be adopted by EU institutions, but also legislative proposals from the Commission and positions of the European Parliament and the Council.

“Gradually, the implementation of the advisory role of the EDPS has become more prominent, in parallel with the EU Data Protection Article 29 Working Party. We coordinate our efforts – the EDPS is in contact with the Commission services and knowing what is on the agenda, alerts the working party of when it will issue opinions. Recently there have been no issues where the opinions of Article 29 group and the EDPS have been conflicting. But this does not mean that they duplicate each other – for example, on cloud computing, the Article 29 opinion was rightly based on existing legislation whereas the EDPS issued an opinion that focuses on the future. This synergy works and will increase.”

The European Parliament has

recently requested the EDPS to have a more active role in its advisory function. Buttarelli said that this proposal will also be discussed at a forthcoming Civil Liberties, Justice and Home Affairs (LIBE) committee, and that the Commission and the Council are also now on the same page.

“My aim is to be equally close and distant from the three bodies. There are some special links with the Parliament because of the continuous stream of meetings and hearings I attend, but I will not place any one of these institutions in a special position. The Council has now rightly returned to the practice of consulting the EDPS and will be finally consulted again on the reform package.”

### EDPS FUNCTIONS UNDER THE EU DP REGULATION

While the EDPS supervisory role in terms of DP Authorities is still not 100% clear as we wait for the outcome of the negotiations on the EU DP Regulations, the office is already actively preparing to take on new functions as Secretariat to the European Data Protection Board (EDPB).

“We did not advocate a role in providing a secretariat but this was a key point for the Commission. The role is still a question mark until the form of the One Stop Shop has been agreed. If the EDPB decisions will be binding, and it will be a legal body, its decisions will be appealable in European courts. Another solution, originally in the text of the Regulation, and acceptable to me, is a situation where the decisions of the EDPB would be influential but only form soft guidance.”

“The main question, however, is about selectiveness. The EDPB can only deal with fewer than 15 cases per year. We need to be smart and use as much as possible all other channels, and escalate only complex cross border cases to the board. The mechanism of lead authority could survive even without binding decisions by the EDPB. The legislator should be aware that if it chooses a model of truly binding decisions, it should also deal with all the relevant consequences of granting legal personality to the board.”

Buttarelli said that the EDPB and the national DPAs would be working

together to consider the design of this infrastructure.

“We already started a preliminary analysis, due to the constraints of the multiannual financial framework, to plan for the consequences in terms of budget. Any solution requiring video conferences, subgroups, translation services and publications needs to be considered now for its cost.”

To achieve consensus in a few hours or a few days, the DPAs would need a platform to share documents. The EDPS is now evaluating the security aspects and how to allow for quick and safe exchange of information.

“We share our initial analysis with the Art 29 DP Working Party – we would like to be sure that the EDPB will be ready to function on day one. We have the knowledge to provide the secretariat. It should be composed of data protection experts who can be immediately helpful to the DPAs – a mix of EU flavour, EDPS experts and representatives of national DPAs. We already encourage temporary secondments from national DPA offices.”

Buttarelli said that he would like to have his office regarded as the ‘EU data protection house’ – a focal contact point where colleagues can visit to exchange views on a routine basis and organise, for example, seminars.

“We would like to be more of a key player – not a data protection ‘Ayatollah’ or compete with colleagues, but a facilitator of cooperation. We will offer advice and infrastructure to help so that the DPAs can hopefully think of my office as their house too.”

### GLOBAL INFLUENCE

“There is a high expectation for the EDPS to have EU leadership on data protection, that was also the language of the vacancy notice,” Buttarelli said. This means to have a global vision and to be influential. But how does he form a coherent view of what is required at EU level? Buttarelli’s previous roles have certainly prepared him well; he led the working group that drafted the Telecoms directive, and the national delegation for Italy at the time when the DP Directive was negotiated. He explained that this kind of privileged access to information, close relationship with EU institutions, attending events at Parliament,

Council and Commission have enabled him to form a European view, and that will now be applied at the global level.

Data protection concerns are, of course, not merely European issues – the recent EDPS opinions on building EU-US trust, or cloud computing are good examples of the tendency of the EDPS to think of the global picture, Buttarelli said.

While not necessarily wanting to take the lead on all issues, the EDPS wants to be more influential: “We are not going to play a minor role only related to the supervision of EU institutions. We are going exactly in the opposite direction.”

Buttarelli explained that the EDPS is an independent institution and does not take part in the negotiations on the transatlantic agenda as such. He said that he seeks to meet the key players to embed EDPS views in at an early stage. Also at EU level, the EDPS is involved in the informal inter-service consultations.

The strategic implications and the importance of data protection on a larger scale will be one of the key themes for the EDPS in the next few years. Buttarelli said that with regard to the EU-US relations, there is only one critical point remaining of the EU’s 13 recommendations on Safe Harbour, but that is the most important – the redress mechanism. He said he hoped that President Obama will have success with his new privacy Bill.

“We fully support the Commission’s position to have a solution on Safe Harbour within six months. The Article 29 Group took part in the Safe Harbor negotiations – and criticised

this instrument a lot at the time – but now we would be happy to see it properly applied. This has not been the case; the agreement has been in dead waters – the EU institutions repeatedly insist on having more information on implementation.”

On adequacy opinions, Buttarelli stated that the emphasis is now on the new approaches under the DP reform rather than evaluating more countries. The EDPS will be issuing opinions on any new adequacy applications, but Buttarelli did not envisage big changes.

“Europe has been quite generous with specific third countries as a sort of political investment which has not been successful in all cases. Now, 20 years after the adoption of the Directive, adequacy findings are less relevant than in the past. There is still space for them under the Regulation, and there are countries such as Japan that will insist on them and this may play a role. But perhaps the emphasis will be more on sectoral adequacy findings.”

The US has insisted on bringing data protection to the Transatlantic Trade and Investment Partnership (TTIP, p.11) – a trade agreement to be negotiated between the European Union and the United States, but the Commission has clearly highlighted that fundamental rights are not negotiable and not part of the Council mandate.

“We still wait for the outcome. In principle, according to what the Commission has said, we should not expect substantive provisions on data protection. But I cannot exclude a possibility that indirectly some provisions relevant to data transfers – especially related to

cloud computing services – could be there. A trade agreement could be achieved in full synergy and clarity on data protection by minimising as much as possible the impact on the reform.”

#### NEW AREAS OF WORK

Buttarelli wants the EU to be a beacon of respect for digital rights and the EDPS to foster an ethical dimension to data protection. The EDPS will have a role in encouraging new privacy friendly technologies, especially to enhance transparency and accountability.

There will be much greater co-operation at national and international level on surveillance and new technologies. The EDPS is also keen to talk to designers to persuade them that by concentrating on DP friendly solutions, they can prevent problems in the future. Buttarelli said that he wants to invest more expertise in this area.

“We need to be more conversant with new technologies and assist the legislator – not by legislating on a certain piece of technology but being able to assist in identifying a solution which achieves the objective of the law.”

One of the novelties in the work of the EDPS will be the ethical dimension of new technologies in the Big Data world. The EDPS will establish a network of people who work on the sociological and ethical dimension to explore what the best practices could be. Data protection could be the driver to ensure that certain solutions are acceptable by the public, Buttarelli said. “We also need to consider what the social benefits of Big Data are.”

#### *Hong Kong... from p.1*

focus”<sup>1</sup> on cross-border data transfers “to ensure that the international status of Hong Kong as a financial centre and a data hub will be preserved.”

#### BACKGROUND

Section 33 of the Hong Kong Personal Data (Privacy) Ordinance (PDPO) currently provides a stringent and comprehensive framework regulating the transfers of data outside Hong Kong. It regulates

transfers of personal data from Hong Kong to a jurisdiction outside Hong Kong, as well as transfers of personal data between two jurisdictions where the transfer is controlled by a Hong Kong data user. The act of storing personal data outside Hong Kong will also trigger the application of section 33. However, the section is not yet in force, despite its enactment in 1995. According to the minutes of the meeting of the Legislative Council’s Panel on Constitutional Affairs held on 17 March, 2014, the issue was considered and discussed as

part of the Privacy’s Commissioner’s annual report, but no resolution was taken in relation to cross-border data transfers or the implementation of section 33 of the PDPO. As a result, there is currently no restriction in effect on cross-border data transfers in Hong Kong.

The Hong Kong government has not yet announced if and when it intends to bring section 33 into force. As noted in the Privacy Commissioner’s press statement, the Guidance Note is at this stage simply “a guide for voluntary compliance as the