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COMMISSIONERS
“PRIVACY – A HUMAN RIGHT”
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With the commercial valorisation of our personal data and the Internet, have we arrived at a moment of mutations? And if this is the case, will the values that we defend allow us to face up to them?

The world-wide network upsets our frontiers: the physical frontiers between Nations, the frontier between that which falls within the domain of the secret of our private lives and that which does not, the frontier between oneself and the others, so true is it that, if the Internet is a link without equal between Men, the virtual world might falsely lead us to think that the liberty of some no longer stops where that of the others begins. At the same time, the Internet perhaps creates new frontiers, less noticeable, within each of us, owing to these “virtual identities”, these successive “masks” that we can borrow on the network, in an enormous carnival of “cyber-permanence” where we would play between the true and the false, intoxicated by what the philosopher Alain Finkielkraut calls “fatal liberty”.

Protection of personal data and privacy was forged at the time of the concerns raised by the centralized and mass computerisation of the ‘70s. Can it teach us anything when we, in the space of twenty years, have passed from the fear of panoptic power, from absolute transparency and from “Big Brother” to the kaleidoscopic register and these inter-individual surveillances by means of webcams or “electronic spyholes” which no longer serve to help us see the face of a visitor before opening the door, but rather to photograph and store the image of the unknown faces for whom we do not open.

1. The mutation is indisputable.

The recognition of specific rights of the citizen concerning treatment of information takes its origin in History, the history of our States, the remarkable history of the conquest of our liberties and the history of our fears.

It was Sweden and the Land of Hesse that opened the way; Sweden, in the name of transparency as a necessary counterpart to the welfare State's files; the Land of Hesse, as was the case later for France, in memory of the dark history of the '40s in Europe, which left hardly any illusions about the risks linked to the organisation of information, to the possibilities of sorting and selection, to classing the human being according to categories or to origins. Personal data protection cannot be dissociated from that history.

Just as it appears impossible to dissociate it from the history of the Nations who during the past thirty years have freed themselves from a totalitarian or authoritarian State. It is, thus, the right of access to information which is proclaimed as an antidote to the anonymous denunciations, to these private lives pillaged by the political police looking for a pretext, anxious to impose silence, submission or proscription.

It is a question of *habeas corpus*, and of public liberties. Some people are even talking about a "habeas data". Numerous countries, furthermore, consecrate the right of access to, and the protection of, personal data as fundamental guarantees.

2. The more recent appearance of a "market" for personal data with client profiles that are bought and sold will change the landscape. In the past, personal data essentially consisted of information of an administrative or political nature. Now, our personal data have acquired commercial value. Therefore, personal data protection is seeing its perimeter enlarged to fit the dimensions of the world-wide market. The Internet will, obviously, largely contribute to this.

Cookies, traces recorded by the servers, risk capturing information without the knowledge of the internauts; the Internet could become the new "universal notebook, the appraisal of consciences" once evoked by Balzac.

Under the combined effect of European initiatives, and, everywhere in the world, the action of numerous associations of consumers or of defence of Human Rights, concerns for personal data protection will become, far beyond questions of history and geography, shared concerns.

It is, no doubt, a paradox, but in this domain, “globalisation” will, no doubt, have contributed to universalization of the protection invented by Europe. The fair processing of the data, full information given to the people concerned, the recognition of a right of access and rectification, the right to refuse that personal data be disclosed to others or exploited for other purposes, are now almost unanimously perceived and presented as a condition of confidence.

The citizen and the consumer will be better informed, sometimes abundantly, of the guarantees of data protection, which are sometimes presented as a service ancillary to the principal object of the contract. Everyone takes possession of data protection. And this is, no doubt, considerable progress.

This privatisation of data protection will be the triumph of subjective rights. But it is also privacy in “self service” available to everyone according to choice, just as you can configure a navigation software. Technical tools appear at the service of a data protection conceived as a relative value, which will to a large extent depend on the offers, the preferential tariffs, the advantages and compensations that might be proposed, and on the degree of confidence one may have in one’s “partner”.

We then change from the register of fundamental rights to that of the contractual clause.

We once talked about fundamental rights as being “inalienable and sacred”, privatising data protection seems to establish a right that could at the same time be “sacred” but “alienable”.

The new contract culture has its requirements and its limits.

3. **Its requirements** are expressed in renewed terms with regard to the State and the new technologies of information implemented by the administration.

“Privacy, sacred value”, “alienable” but on condition that there is a compensation: if privatising data protection is favourable to exchange, and particularly commercial exchange, it remains perhaps hesitant where it concerns conciliation with other values of general interest when its benefits will no longer be individual, but collective, no longer of immediate, but of medium or long term.

One might regret this. I think, on the contrary, we should be delighted.

In our societies, where the question of the social link is posed, the new requirements of our fellow citizens for a perfect understanding of the risks, including technological risks, no doubt force the public powers to ensure better education, more public debates for the collective benefit of greater confidence.

Thus, these mutations indeed lead us towards establishing a new basis for the social contract. And it is not strange that the development of the new technologies, and particularly the Internet, invites us to do this.

4. This privatisation of data protection, however, has **its limits**.

In fact, we have in twenty years passed from a problem of the file to a problem of computer traces. The constitution of a file was, in the past, the result of a will, of a choice, by the administration or a company. We were on file because someone wanted us on file. Today, we can be on file simply due to technology. What happens to these traces that reveal our tastes, our centres of interest, our movements, the people we talk to, our private lives? Who can have access to these? For how long?

“A multi-form world, instantly and almost intolerably precise”, like the imagination of Jose Luis Borges’ character, the famous Funes, who had “alone, more memories than all men since the world became world”.

But, different from Funes’ memories, these traces are no longer in our possession: they are stored by our telecommunications operator, by our Internet access provider, by our bank, by the hospital, or by the motorway toll booth. We no longer have a “private corner”, and we intuitively feel that this part of ourselves no longer belongs to us, that we can no longer control its use, as you can with a personal diary kept in the desk drawer.

What happens to these traces and their duration of storage are the questions that easily escape the individual relationship between a person and his contractual partner. In reality, these are questions of public liberties.

5. And this was the intuition behind our legislations twenty years ago. New rights have been granted to the citizen with regard to the processing of his personal data. But the simple recognition and exercise of these rights do not alone allow us to establish an equilibrium between information technology “informatique” and liberties “libertés”. **Implementing an independent authority appeared as an indispensable condition to this equilibrium.**

It is not a question for the States to delegate the power of decision granted by their democratic legitimacy, neither in this matter nor in others. It is no more a question of it being suitable to prefer expertise to public debate, which would be another form of technocracy. But, indeed, in these debates, it concerns placing the cursor at the best point of balance between security and liberty, and we should rejoice in the fact that an increasing number of States have wished to seek advice and opinion of an authority, less directly subject to the contingencies of time and opinion, before deciding on the decisions they have to take.

6. “Privacy – A Human Right”, of course. “A Human Right” in the singular, because it concerns one Human Right among others just as fundamental: the right to safety, the right to property, equality faced with public duties and taxation, not to mention social rights, the right to housing, the right to health care, and the right to work.

But “A Human Right” in the singular also, because it concerns men and women in real situations: the consumer, the employee in the company, the citizen who votes, the internaut who connects himself to the world, the person who gives the care necessary for our health, or who gives attention to our security. Through these concrete situations, that we invite you to discuss, it concerns nothing more than to approach a fair arbitration between security and liberties, to place the cursor well.

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The present circumstances, no doubt, impose on us, collectively, to be even more attentive, if not more vigilant, to certain movements of the cursor which might be thoughtless or precipitated. In any event, they impose on us never to abandon the search for a fair equilibrium.

The 23rd International Conference of Data Protection Commissioners will reverberate the echo of the world. We will be, at the same time, its witnesses and its interpreters. Our responsibility has, no doubt, never been as great.