

Note to ExCo from Secretariat

2 September 2016

Note to assist ExCo discussion at September meeting regarding application by Belgian Supervisory Authority for Police Information Management

The Secretariat recommends:

1. That the Belgian Supervisory Authority for Police Information Management be recommended for membership in accordance with the recommendation by Canada to the July meeting.
2. Given the provenance of the current rules, and the consequences for existing members of a narrowing of eligibility criteria, that the Executive Committee not engage in a fundamental review of membership criteria.
3. Noting France's comments to the July meeting, that the Executive Committee be open to receiving any formal paper from France providing a concrete basis and options for changing the membership criteria and explaining the benefits and consequences of doing so.

Introduction

On 25 May 2016 an application for membership by the Belgian Supervisory Authority for Police Information Management (SAPIM) was received by the Secretariat and passed to CA for assessment.

CA submitted a written report to the July meeting confirming that SAPIM met the criteria for membership and recommended grant of membership.

Consensus was not reached at the July meeting in relation to the SAPIM application (transcript of meeting discussion annexed below). In particular, FR expressed concern at grant of membership to an authority with a narrow sectoral mandate. The Committee agreed to defer this application to the September meeting and asked the Secretariat to prepare a paper to assist discussion.

This note offers some observations from the Secretariat's point of view. The Secretariat does not take a position on the substance of the Belgian application (simply adopting CA's analysis) but provides comment principally based upon:

- The ExCo's roles under the Conference's rules and procedures.
- The application of the Conference rules to the application.
- An historical understanding of how the rules have evolved to the current stage.
- The practical effect of any position taken by the ExCo on existing members.
- The need for the ExCo to explain its decisions to applicants and members.

This note addresses the issues in three parts:

- A. The SAPIM application and correct process.
- B. An historical review of the Conference's approach to authorities with a narrow mandate.
- C. Possible future directions.

A. The SAPIM application and correct process

In the current process the ExCo is performing a role under 2.1(g):

To decide on the accreditation ... of Members and Observers, pursuant to [the rules set out at articles 5.1 to 5.5].

Rule 5.1 provides that “Supervisory Authorities that meet the following criteria and successfully complete the application process ... shall be deemed Members of the Conference”. The balance of the rule sets out the criteria that CA, after assessment, has advised the ExCo SAPIM meets. Those criteria being:

- a. A public entity, created by an appropriate legal instrument based upon legal traditions of the country or international organisation which it belongs to;
- b. Has the supervision of the implementation of the legislation on the protection of personal data or privacy as one of its principal regulatory mandates;
- c. The legislation under which it operates is compatible with the principal international instruments dealing with data protection or privacy;
- d. Has an appropriate range of legal powers to perform its functions; and
- e. Has appropriate autonomy and independence.

Rule 5.2 provides that membership applications must be on the form provided by the Secretariat and submitted 3 months before an annual meeting. SAPIM has met those procedural requirements.

For the sake of completeness, it might be noted that the ExCo has separate roles under rules 2.1 i and j to “define the Conference’s strategic direction” and “amend and, where appropriate, implement these Rules of Procedure.” However, while these may be relevant to future action by the ExCo they are not relevant in relation to the accreditation application before the Committee.

It is the responsibility of ExCo to perform the role laid down by the Conference i.e. to assess the applications received by the deadline against the rules as laid down and to make a recommendation. For a membership organisation this is a core task for the governance body. The ExCo will be failing to perform its mandate if it chooses not to process an accreditation application properly submitted.

A failure to apply the criteria laid down in the rules would also be unfair to the applicant, a point made by the Chair at the July meeting as recorded in the transcript

Accordingly, Committee members should focus upon the membership criteria in assessing the SAPIM application. CA has done a detailed assessment and offered the opinion that the applicant meets the criteria. If other members disagree they are requested to frame their objections in terms of the criteria set out in the rules.

B. An historical review of the Conference’s approach to authorities with a narrow mandate

For its first 20 years the Conference had no formal membership criteria. While the norm for participation might have been national data protection and privacy commissioners the mandates were sometimes relatively narrow, sometimes limited solely to the public sector (e.g. Australia and

Canada from the 1980s). It is more proper to speak of participants in the Conference rather than members as there were no membership processes.

Although records are not complete, the Secretariat is aware that some participants had, like SAPIM, an exclusively law enforcement mandate. For example, the New Zealand Wanganui Computer Centre Privacy Commissioner, an officer of Parliament responsible for law enforcement databases with independence, investigative powers and complaints and access review functions, was a participant following the enactment of legislation in 1976.

Membership criteria were adopted in 2001 with the membership processes in operation thereafter. The 2001 accreditation principles addressed the issue of the breadth of an authority's mandate in a sentence preceding the membership criteria which stated:

Accredited data protection authorities will, by virtue of their broad functions and depth of experience, be the premier experts on the principles and practice of data protection and privacy in their jurisdiction. They will have the clear mandate to promote and protect data protection and privacy across a wide sphere of activity and all the necessary legal powers to carry out the task.

Given this statement, about the membership criteria there was a corresponding statement in the description of application processes which stated:

The committee will offer a recommendation to the Conference in respect of each application received and will propose a resolution to recognise the credentials of each approved authority within a national or sub-national category.

Comment: Authorities would have to meet one of the following criteria, be:

- A national authority;
- An authority operating within a limited sub-national territory (typically a state, province, canton or land in a federal country);
- An authority within an international or supranational body.

The committee may be requested to consider the credentials of authorities having narrower functions than otherwise acceptable for accreditation, typically operating within a specific area of activity (such as medical privacy) or performing just one kind of function (e.g. solely a complaints or advisory body) which may, at the discretion of the host of the Conference, be entitled to attend as observers but without the right to vote.

In other words, the criteria recognised that sub-national authorities – one form of DPA with a sectoral (and sometimes quite narrow) mandate could be accredited but that otherwise members would need a “wide sphere of activity”.

There were some internal tensions in the approach of the 2001 accreditation principles that were later to manifest themselves.

It might also be noted that one of the accreditation principles recognised that authorities would be created under laws drawing upon a diversity of international instruments:

Consistency with international instruments

The law under which the authority operates must be compatible with the principal international instruments dealing with data protection and privacy.

Comment: The principal international instruments are the OECD Guidelines (1980), Council of Europe Convention No 108 (1981), UN Guidelines (1990) the EU Directive (1995), and, as far as they are relevant, the UN Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (1991).

Some of these instruments recognise that countries might implement privacy laws using sectoral legislation.

From 2001 onwards the Credentials Committee had occasionally to grapple with the issue of what meaning to give “wide sphere of activity”. A few examples included:

- Swiss city DPAs (Zurich’s City Commissioner was turned down).
- An authority having solely a private sector jurisdiction – this initially was an unusual model but Korea’s KISA was accredited in 2004.
- The US Federal Trade Authority, whose jurisdiction covered just part of the private sector, it was accredited in 2010. It might also be noted that the FTC does not follow the normal DPA model but rather exercised privacy functions within the remit of a broader consumer protection body.

The 2001 accreditation principles and processes were replaced in 2010 by the current rules and procedures. Notably they omit the “wide sphere of activity” requirement. (Additionally the membership provisions no longer make any explicit distinction between national and sub-national authorities. However, it is unclear what significance attaches to that change.)

Recently the Ombudsman’s Office of the City of Buenos Aires has been accredited (2013). Although raising a different issue to the SAPIM case, the Buenos Aires DPA would likely have been rejected under the former “wide sphere of activity” requirement given the Zurich City precedent.

The Secretariat takes the view that the Conference deliberately dropped the “wide sphere of activity” requirement in 2010 with the intention that this no longer be a restriction on membership.

C. Possible future directions

The discussion at the July meeting was set in the context of the SAPIM application but was broadened by an intervention from FR framed along the lines of ‘what kind of future do you want for the International Conference?’ FR stated in part:

I think the precedent is the people’s choice to lead to discussion I think we should have which is what kind of future do you want for the International Conference. What kind of design do we want for this Conference. I think before accepting new members we should be clear on the strategy and in my mind I believe that sectoral data management authorities are not too sure if we should put them as real members because it starts today and tomorrow it will be another sector and it will as legitimately so we will say because the other sector agrees, why not accept others.

These general observations do not themselves make a concrete proposal for change. Before the Committee could consider whether the matter warranted action, and to consider if there is consensus on the Committee for action in any particular direction, it would be necessary for a paper to be prepared for the Committee that laid out the options for change and the implications.

Such options might be expected to range from a narrowing of membership to a tighter group of core DPAs (presumably involving a purge of authorities such as the FTC, Buenos Aires Ombudsman and KISA) through to a more open and inclusive ‘all comers’ model.

The Secretariat would not have the capacity to prepare such a paper at present and would therefore suggest that if a paper were to be prepared it would need to be undertaken in the first instance by FR.

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ICDPPC Secretariat

2 September 2016

Annex: Extract from transcript of ExCo meeting of 20 July 2016 (Agenda item: 3(b)i)

The Chair thanked Canada for processing the membership applications and providing its recommendation. “We will now take those recommendations and discuss them. The recommendation is that Armenia Personal Data Protection Agency, Belgium Supervisory Body for Police Information Management, Cote d’Ivoire Telecommunications Regulatory Authority and Philippines National Privacy Commission be approved as members of the Conference.

Do we have any dissent or discussion?

Netherlands:

France:

Chair:

Canada:

Chair:

France:

Chair:

[Redacted]

Netherlands

[Redacted]

Chair:

[Redacted]

Morocco:

[Redacted]

Chair:

[Redacted]

France:

[Redacted]

Chair:

[Redacted]

France:

[Redacted]

Chair:

[Redacted]

[Redacted]

[REDACTED]

Chair:

[REDACTED]