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**Declaration of the Article 29 Working Party on Enforcement**

**Adopted on 25th November 2004**

## THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

set up by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995<sup>1</sup>, having regard to Articles 29 and 30 (1)(a) and (3) of that Directive and 15(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002, having regard to its Rules of Procedure and in particular to Articles 12 and 14 thereof, has adopted the present Declaration:

### Introduction

The Article 29 Working Party has considered the role of enforcement in the enhancement of compliance with data protection legislation by data controllers. Enforcement is one of the various activities undertaken by national data protection authorities to ensure compliance. In its “Strategy Document”, adopted on 29 September 2004(WP 98)<sup>2</sup>, the Working Party stated that the promotion of harmonised compliance is a strategic and permanent goal of the Working Party. It also stated that it is convinced of the necessity of moving forward in the direction of promoting better compliance with data protection laws throughout the European Union and that, in this respect, it will make a joint effort to improve the situation.

In order to guarantee that Data Protection Authorities can fulfil their tasks of monitoring the application of national data protection legislation, article 28 of the Data Protection Directive (95/46/EC) endows the authorities with certain powers. In particular, article 28(3) states that supervisory authorities shall have:

Investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties;

Effective powers of intervention, such as, for example, ...ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions;

The power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities.

The Working Party also notes that the Data Protection Directive (95/46/EC) calls upon the Member States to work together. In particular, article 28(4) of the Directive stipulates that the supervisory authorities shall cooperate with one another, by exchanging all useful information and exercising their powers, if necessary, on request of an authority of another Member State. Such a co-operation may be particularly useful when carried out bilaterally between two data protection authorities concerned, for example between the data protection authority of the country where the concerned data subject lives and the data protection authority of the country where the data controller is established.

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<sup>1</sup> Official Journal no. L 281 of 23/11/1995, p. 31, available at: [http://europa.eu.int/comm/internal\\_market/en/media/dataprot/index.htm](http://europa.eu.int/comm/internal_market/en/media/dataprot/index.htm)

<sup>2</sup>[http://europa.eu.int/comm/internal\\_market/privacy/docs/wpdocs/2004/wp98\\_en.pdf](http://europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2004/wp98_en.pdf)

The Article 29 Working Party intends to further develop the enforcement of national data protection legislation within the European Union, in order to enhance harmonised compliance, in line with its “Strategy Document”. In particular, the Article 29 Working Party commits itself to developing proactive enforcement strategies, increasing enforcement actions and intensifying its cooperation efforts by enhancing arrangements for mutual assistance.

The Working Party’s wish to further develop the enforcement of national data protection legislation in the European Union is made against the background of an internal survey carried out by the Article 29 Working Party on recent enforcement practices in Member States, after several years of experience with enforcement of the Directive in the Member States, the results of the Eurobarometer surveys on data protection in the European Union<sup>3</sup>, and the *First report on the implementation of the Data Protection Directive (95/46/EC)* of 15 May 2003 COM (2003) 265 final<sup>4</sup>. In the latter report, the European Commission reviewed the general level of compliance with data protection law in the EU and the related question of enforcement. Although national situations vary, the European Commission notes the presence of three inter-related phenomena:

An under-resourced enforcement effort and supervisory authorities with a wide range of tasks, among which enforcement actions have a rather low priority;

Very patchy compliance by data controllers, no doubt reluctant to undertake changes in their existing practices to comply with what may seem complex and burdensome rules, when the risks of getting caught seem low;

An apparently low level of knowledge of their rights among data subjects, which may be at the root of the previous phenomenon.

### **The concept of enforcement**

Within the European Union, enforcement may have different meanings. In a broader sense, enforcement could be understood as any action leading to better compliance, including awareness raising activities and the development of guidance. In a narrower sense, enforcement means the undertaking of investigative actions, or even solely the imposition of sanctions.

The grounds for starting an enforcement action in the narrow sense can vary; on the one hand, enforcement action can be based on concrete information that there is a breach of the data protection legislation. Such information can come from a complaint, from the press, etc. On the other hand, Data Protection Authorities can develop their own investigation or audit programs. Such programs could be aimed at providing a more accurate picture of the implementation of particular data protection rules or data protection legislation within particular sectors, with a view to developing policies of the data protection authorities, providing guidance, etc. The purpose of such programs can also be checking whether or not data controllers comply with the rules, and aim at underlining to data controllers what is expected of them. In investigation or audit programs, the use of formal powers, and the imposition of sanctions at a national level, could turn out to be necessary.

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<sup>3</sup> [http://europa.eu.int/comm/internal\\_market/privacy/lawreport\\_en.htm#actions](http://europa.eu.int/comm/internal_market/privacy/lawreport_en.htm#actions)

<sup>4</sup> [http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003\\_0265en01.pdf](http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0265en01.pdf)

For the purposes of this document, enforcement action is understood in the narrow sense as *ex officio* investigations or inspections, with a view to checking compliance. This may involve the use of formal powers and may result in the imposition of sanctions, depending on the applicable national laws.

## **Why enforcement?**

The Working Party is of the view that awareness raising activities, the provision of guidance and advice to both data subjects and data controllers, the promotion of codes of conduct, etc, are no doubt important means for achieving compliance. The data protection authorities agree that there can be a relationship between a low level of knowledge of their rights among data subjects and compliance. A better knowledge of rights can enhance data protection awareness in society. Nevertheless, additionally, enforcement actions in a narrower sense, including the imposition of sanctions, are also a necessary, and often last resort, means to ensure compliance. By applying enforcement and sanctions, data protection authorities discourage non-compliance with the law and encourage those who effectively comply to continue doing so. The Article 29 Working Party believes that enforcement is an important instrument in the compliance “toolbox”, and it therefore, aims to contribute to a more pro-active stance towards enforcement of data protection legislation within the European Union.

### **- Enhancement of enforcement by the Article 29 Working Party**

Data Protection Authorities have a different history with regard to enforcement programs and enforcement priorities. Their enforcement powers and resources also vary. Nevertheless, all Data Protection Authorities of the European Union are committed to ensuring that there is sufficient enforcement of data protection legislation on a national level, with due respect to national particularities. These different backgrounds and national differences should not stand in the way of a joint effort by the authorities to take a more pro-active stance towards enforcement at the national level.

Of course, adequate powers and sufficient resources are a prerequisite for performing effective enforcement actions. The Article 29 Working Party therefore calls upon Member States to ensure that the supervisory authorities are sufficiently empowered and resourced at a national level.

To stimulate compliance with data protection law, the Working Party will continue with its role of dealing with “soft” enforcement cases with an EU wide dimension, like it has done on several occasions, for example with the Intel microchip-ID or Microsoft .Net Passport cases.

Furthermore, the Article 29 Working Party has decided to exchange best practices, discuss enforcement strategies that can be applied nationally and across countries, and to investigate possibilities for the preparation of EU wide, synchronized national enforcement actions in the Member States.

With regard to the exchange and adoption of best practices, and the discussion of strategies for enhancing mutual assistance, available networks will be used. In addition to this, national enforcement cases will be published on the data protection website of the European Commission.

An EU wide, synchronized national enforcement actions would entail co-ordinated national ex officio investigations taking place in a certain period of time, focused at similar national processing and based on questionnaires agreed at EU level. In the third pillar, the national inspections of the JSA Schengen concerning Article 96 data serve as a good example of a synchronized action. The aim of such synchronized actions will primarily be to analyse whether and how the rules are being complied with in the sector, and, if necessary, the issuing of further recommendations. Before doing such investigation, the Article 29 Working Party will ensure that there is sufficient awareness among data controllers of the relevant data protection requirements and the regulations applicable to that sector are sufficiently clear. This may be achieved, inter alia, by the guidance provided by documents adopted by the Article 29 Working Party. The implementation of the recommendations issued after these investigations will be monitored and, if necessary, sanctions could be imposed according to national laws.

With regard to identifying issues, cases or sectors that could be eligible for investigation, the following criteria will equally be taken into account:

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1. Clearness of description and definition of the subject of the investigation.
2. Clearness of existing material norms with regard to data protection, for example, guidance or recommendations.
3. Possible contribution to awareness raising among the data subjects (for example focussing on information provision to data subjects);
4. Sufficient proximity of the rules subject to the synchronized action at national level;
5. Importance of the processing of personal data within the business or sector, and/or impact on privacy. The level of possible detriment is also an important criterion in this respect;
6. Existence of other Article 29 Working Party activities with potential detrimental interference with regard to that area of investigation at the moment of undertaking the investigation, such as the development of data protection legislation at EU level or EU wide data protection codes of conduct.

Early 2005, the Working Party will develop a list of candidate issues, cases or sectors and will determine their eligibility for EU wide synchronized national investigations to be undertaken in the year 2005 and 2006, with due regard to the diversity that exists in terms of the powers, policies and resources of national data protection authorities. Further work on developing reasonable and practicable criteria for the identification of issues, cases or sectors worthy of investigation will also be carried on by the Working Party. The Working Party notes that this is regardless of specific urgent cases that might arise during the year clearly requiring immediate joint investigation. The EU wide synchronized national investigations will be announced publicly with the indication of the sectors and/ or aspects of compliance subject to the investigations.

Done at Brussels, on 25 November 2004

*For the Working Party*  
The Chairman  
Peter Schar