

ARTICLE 29 Data Protection Working Party



Brussels, 14 January 2011
D(2011)

Vice-President Viviane Reding
Commissioner for Justice, Fundamental
Rights and Citizenship
European Commission
B – 1049 Brussels

Dear Vice-President Reding,

The Article 29 Working Party strongly welcomes the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – A comprehensive approach on personal data protection in the European Union (COM(2010) 609 final) of 4 November 2010.

The Working Party has a keen interest in the review of the data protection legislative framework and has advised you on this on several occasions. The Working Party has also committed itself to providing you, at your request, with further opinions on several matters such as consent, notification, sensitive data, and the application of Article 28(6) of Directive 95/46/EC – based on the specific national experience gathered by its DPA members over the past years. The Working Party has recently also issued an opinion on applicable law.

The Working Party is very pleased to see that many of the suggestions it has made so far have, to a significant degree, been included in the Communication. In particular, the Working Party supports your ambition to ensure a high level of data protection for citizens, and to strengthen their rights, so that citizens can actually exercise them. The increased transparency that is sought for data subjects in the Communication is indeed vital. Also, improving and facilitating the methods for the exercise of rights of access and rectification is important.

In addition, the Working Party supports your ambition to ensure more harmonisation of data protection rules, more simplification where possible, and the ambition to reduce administrative burdens.

In this letter, the Working Party would nevertheless like to bring to your attention certain key aspects that in its view deserve further elaboration in the future legal framework. These are the following.

- a. Further strengthening of data subjects' rights
- b. More attention needed for accountability
- c. Increasing impact of privacy by design
- d. Mutual recognition in international data transfers
- e. Funding and independence of national DPAs

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No MO59 06/36.

Website: http://ec.europa.eu/justice/policies/privacy/index_en.htm

- f. Strengthening the powers of the Article 29 Working Party
- g. The need for one comprehensive framework

a. Further strengthening of data subjects' rights

The Article 29 Working Party very much welcomes your efforts to strengthen and make effective data subjects' rights by ensuring that the new legal framework contains the safeguards required to make these rights enforceable in all areas including those that had been regulated so far wholly or partly by Community law. In this context, it would like to highlight two aspects:

i. Right to be forgotten

The Communication indicates that the Commission will examine ways of “clarifying the so-called ‘right to be forgotten’, i.e. the right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes”. The Working Party considers that more elaboration of this right would indeed be necessary. It should be clearly explained what the added value of such a right would be over and above the existing rights, such as the right to have data deleted or the right to object, and in which context such a right would be most useful.

ii. Collective redress

Important as it is, the Working Party considers that the fundamental right to data protection cannot be sufficiently guaranteed if the focus lies too much on the actions taken by the individual and on him exercising his individual rights. On the contrary, considering the increasing complexity of the processing of personal data, one could even argue that nowadays the individual's responsibility for the exercise of his rights appears as burdensome and disproportionate. For example, effective transparency, allowing for extensive choices by individuals, might appear desirable but can be counter-productive considering the complexity of certain processing operations and the sheer number of choices that an individual might be faced with.

Although enforcement of individual claims should be possible, regardless of whether a data protection authority has been involved or not, in practice it may be difficult for individuals to find easy access to justice, due to the relatively high costs and risks of going to court and the low value of the claim, if only considered on its own merits.

Therefore the Working Party would encourage the Commission to pursue strongly its ambition to ensure collective redress by extending the power to bring an action before the courts to data protection authorities as well as to civil society organisations and associations representing data subject's interests. Through collective redress, the costs, responsibility and risks of exercising individual rights are collectivised. Particularly considering the fact that individuals are reluctant to go to court on their own ¹, which is partly due to the fact that the harm is often of an immaterial nature, or at least difficult to quantify, collective redress would be an important enforcement of data subjects' rights.

However, the practical consequences and the potential impact on the different stakeholders should be carefully evaluated before setting up collective redress mechanisms in Europe.

¹ 70% of European Union citizens would be prepared to defend their rights before the courts if they could join with others (Eurobarometer survey on EU citizens and access to justice, 2003)

b. More attention needed for accountability

In view of the above, the Working Party would urge for a clarification and reinforcement of the responsibility of the data controller to ensure real compliance, through the adoption of appropriate measures to implement data protection principles.

The elements that the Communication highlights to enhance data controllers' responsibility - such as making the appointment of a data protection officer mandatory and obliging data controllers to carry out data protection impact assessments - are very welcome. They are both elements of accountability, a concept that the Working Party has endorsed in its opinion on the matter of July 2010².

Although the Working Party supports the two elements the Commission has highlighted, it does feel stronger language is necessary. Maintaining a good reputation, ensuring trust and minimising legal and economic risks are becoming more crucial for data controllers in all sectors. Accountability-based mechanisms aim at delivering these goals and are likely to lead to more effective data protection in practice. The new legal framework should therefore in any case explicitly require data controllers to implement appropriate and effective measures to put into effect the principles and obligations of the legal framework and demonstrate this on request. The Working Party would hereby like to reiterate its advice of July 2010 to thus include the accountability principle in the new legislative framework. In all cases, the accountability principle should reflect and complement but not replace the general obligation to comply with all the principles of the Directive.

c. Increasing impact of privacy by design

Because of new technological possibilities, the processing of personal data has not only increased substantially, it has also become less transparent and more complex. The Working Party therefore urges you to consider introducing the obligation in the Directive whereby not only data controllers, but also the developers and manufacturers of new products and services should be required to incorporate safeguards for the processing of personal data from the phase of development and thereafter. This is the so-called privacy by design principle.

If combined with the accountability principle (see point b), this would require data controllers to consider and demonstrate the use of privacy technologies, where appropriate, and would therefore also result in a stronger demand for such technologies and more incentives for the industry to provide adequate and timely solutions.

d. Mutual recognition in international data transfers

In the Communication, the Commission indicates its intention to “improve and streamline the current procedures for international data transfers, including (...) ‘Binding Corporate Rules’ in order to ensure a more uniform and coherent EU approach”.

The Working Party strongly supports this ambition. The procedures for transfers should indeed be improved, streamlined, and their implementation simplified. The aim of these steps should be to have appropriate transfer instruments that are effective in ensuring adequacy, such as Binding Corporate Rules (BCRs), and that any procedures for approval by DPAs are

² Opinion 3/2010 on the principle of accountability, WP173, 13 July 2010

shortened and simplified while at the same time maintaining a high level of protection for individuals. However, this also requires improving and streamlining the rules applying to international data transfers, which should be clarified so as to ensure that they are transposed in a truly harmonised manner at national level.

Furthermore, procedures should be further harmonised. In particular, in cases that by their very nature are cross-border it is of the utmost importance that the European Union has a uniform, coherent and harmonised approach. To this end, the Working Party has invested a lot in the concept of BCRs and in the principle of Mutual Recognition, whereby DPAs accept the positive analysis of BCRs by another DPA as a sufficient basis for providing their own transfer authorisation. It should be ensured that BCRs can be used in the same manner in all Member States. Furthermore, the Working Party suggests that the Commission investigates to what extent and under what conditions the principle of Mutual Recognition can be formalised and made more binding in the new legal framework, or whether a similar result could be accomplished with other means.

e. Funding and independence of national DPAs

The Commission's communication states that it will examine how to strengthen, clarify and harmonise the status and powers of national data protection authorities, including the full implementation of the concept of "complete independence". The Working Party welcomes this announcement. To be able to have the same level of data protection in all Member States in the EU, it is vital that all DPAs have relatively equal budgets proportionate to the numbers of data controllers they regulate and the individuals whose personal data is processed. If the difference in the budgets is too large, or not proportionate to the regulatory role DPAs are asked to carry out, the concept of a level playing field is at risk. The Commission has also previously indicated that it expects Member States to provide adequate funding for DPAs. However, in the current and predicted future economic climate, with many DPAs already experiencing budget cuts, it is highly unlikely that Member State governments will be in a position to maintain, let alone increase, current, funding in the years to come.

The Working Party would like to emphasize that such adequate funding is all the more necessary since the new comprehensive legal framework will enlarge and expand the supervisory duties and tasks of the national DPAs. Accordingly, it is necessary for the Commission to consider mechanisms to foster DPAs' independence - including those related to their funding - that should be related to objective standards. The Working Party would therefore like the Commission to consider several complementary alternative sources of funding for DPAs, which may range from a fully fee-based ("polluter pays") model (based e.g. on notification fees and the levying of fines for breaches of the law) to a fully State-funded, possibly GDP-indexed model. Both may have advantages and disadvantages, and it is important that Member States are at liberty to select the model (including a mixed-type funding mechanism) that is best adapted to their respective legal and cultural traditions – providing it can ensure adequate, effective operation of national DPAs. If it would be helpful, the Working Party is prepared to provide more information and evidence of successful funding models currently in operation in Member States.

f. Strengthening the powers of the Article 29 Working Party

In a time where data processing operations increasingly have a cross-border nature and national DPAs are confronted increasingly with data protection issues that are similar across

the EU, it is an absolute necessity that the powers of DPAs are harmonised. Without this, the European data protection regime will remain vulnerable to criticism, not only in matters that can be dealt with at national level, but most especially in matters that play out at a European or even global level.

To ensure an effective harmonised policy in cases with a cross-border dimension, including processing that relies on EU-wide databases, there should also be a mechanism to ensure the harmonised application of the EU legal framework in concrete supervision cases. The Article 29 Working Party should have a more important role in this context.

The Working Party itself should be empowered to ensure compliance in cross-border cases. It therefore subscribes to the analysis of the Commission, expressed in the Communication, that “the continuing divergent application and interpretation of EU rules by Data Protection Authorities, even when challenges to data protection are the same across the EU, calls for a strengthening of the Working Party’s role in co-ordinating DPAs’ positions, ensuring a more uniform application at national level and thus an equivalent level of protection”. In particular, the Working Party should be able to address cross-border issues and adopt related opinions that have a more binding character. Naturally, subsidiarity should remain the baseline, but ultimately the Working Party should be able to give direction and co-ordinate DPAs’ actions in cases that have significant effects in more than one EU Member State.

In order to achieve this goal, however, the Working Party should have sufficient autonomy and independence, which would include having its own budget and its own permanent secretariat. The Working Party’s independence is a prerequisite to the reinforcement of its powers. The Communication currently does not address that issue. The Working Party therefore calls on the Commission to increase its ambition in this regard, also given the changes brought about by application of the Lisbon Treaty – which will also modify the mechanisms for supervision on collection and exchange of information in areas that were previously outside the scope of Community law.

g. The need for one comprehensive framework

The need for a single comprehensive legal framework, incorporating all areas, including the former third pillar, must be crystal clear. Therefore, the future legal framework should be a “lex generalis”, in the sense that its general provisions should be applicable in all instances, subject to conditions and exceptions that should have the same general scope. This model does not prevent that the general provisions could be further specified for certain sectors of activity – either in the same or in other instruments – but these specifications would have to be fully consistent with the general framework (see, for example, the e-Privacy Directive).

Furthermore, one comprehensive framework would also include one comprehensive structure of supervision and effective co-operation between supervisory authorities. Co-operation between DPAs in charge of ensuring lawfulness of data processing should be strengthened in all matters and integrated into the legal framework, including by envisaging stable mechanisms similar to those currently applying to ex first pillar matters, so as to foster a harmonised approach across the EU and beyond.

Without a truly comprehensive data protection framework expressly laying down the required general provisions for EU data protection, including all issues mentioned in this letter, it will be unnecessarily complex for data subjects to effectively exercise their rights. The Working

Party therefore urges the Commission to address these issues clearly and unambiguously in the new legislative framework.

The Working Party trusts that you will take these remarks into careful consideration in your review process. I would kindly ask you to keep us informed of the developments and to involve us throughout this process. If there is any further way the Working Party could be of assistance, it would be glad to do so.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman