

## ARTICLE 29 Data Protection Working Party



Brussels, 20 April 2011

Françoise le Bail  
Director General  
Directorate General Justice  
European Commission  
B – 1049 Brussels

Dear Madame Le Bail,

In your letter dated 30 September 2010, you requested the Article 29 Working Party to deliver input to the Commission on the current practices at national level, the problems encountered in implementing the Directive, as well as some suggestions for improvements or changes in relation to the following questions:

1. How is Article 8 of the Directive on ‘specific categories of data’ currently implemented at national level? Is there a need to review this concept, particularly as regards the categories of sensitive data and/or the exceptions?
2. How could the current notification system (Articles 18 and 19 of the Directive) be simplified and harmonised in order to limit the administrative burden for data controllers, while at the same time continuing to ensure effective protection for data subjects?
3. How do national DPAs make use, in practice, of article 28(6) of the Directive (“Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State.”)? Is its implementation currently problematic and, if so, how could it be improved?

As requested the Working Party has discussed the topics and has drafted 3 advice papers on these matters, which are attached to this letter. In the advice papers on sensitive data and notification, several options have been suggested, and the members of the Working Party have been asked to indicate their preference for one of the three options in each paper.

The options with regard to sensitive data:

1. Maintain the current concept of a general prohibition of processing of sensitive data and a closed list of data categories, with possible amendments to the data categories and/or exceptions. The list of special categories of data should be regularly revised.

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 MO-59 06/036.

Website: [http://ec.europa.eu/justice/policies/privacy/index\\_en.htm](http://ec.europa.eu/justice/policies/privacy/index_en.htm)

2. General prohibition of a list of data categories (current + possible additional) which by their nature should be regarded as sensitive; leave discretion for Member States to decide upon further data categories (approach corresponds to Art. 6, 11 Council Convention 108 and Section 13 of the Madrid Resolution on International Standards). Include a general definition of sensitive data which also takes the processing context into account.
3. “Precautionary Principle” (on the basis of Council of Europe Convention 108): Processing of sensitive data only allowed under specific safeguards. Discretion for Member States to decide upon further data categories.

The three options with regard to notification:

1. Organisations should only be required to notify in case of risky processing.
2. The system of notification shall be abolished completely.
3. The existing comprehensive notification requirements must be retained.

In addition to options on notification as set out above, the members of the Working Party who favoured the first or second option were asked to indicate whether they would like to leave the option for a basic registration system (this register would contain only basic information, such as contact details and nature of the business) to the Member States themselves, or whether they think that this idea should not be considered at all .

The outcome of the preference poll is that:

- a narrow majority of the members of the Working Party favours option one regarding sensitive data (maintain the current concept of sensitive data and a closed list of data categories, with possible amendments to the data categories and / or exceptions).
- a vast majority voted in favour of option one with regard to notification (notify risky processing only). With respect to the follow up question there is a very narrow majority in favour to leave the creation of a basic registration system up to the Member States.

With regard to the advice paper on Art. 28(6), there were no different options from which the members of the Working Party could choose. Cooperation between DPAs is seen as very important in the increasingly cross-border society and therefore making cooperation more effective and efficient is deemed crucial. A prerequisite for better cooperation between DPAs is harmonising their powers (investigation, sanctions) and ensuring their independence.

Because the three advice papers each deal with very specific issues and only give a limited picture of the Art.29 Working Party position, they should be read in combination with the Opinion of the Article 29 Working Party and the Working Party on Police and Justice on the Future of Privacy (WP 168) and with the letter on the Communication on the revision of the Directive sent to Vice-President Reding on 14 January 2011, both of which I have attached for your convenience.

Since it is still uncertain what the future legislative proposal will entail, the advice papers must be read in the context of the nature of the future data protection legal framework. The choice to be made by the Commission on whether it will be a Directive or a Regulation, or perhaps a combination of these two instruments, influences greatly the issues at hand. Furthermore, the level of harmonisation that is to be achieved under the future legal framework will also influence the input from the Working Party, as the issues dealt with in the three advice papers are strongly linked to this (future) level of harmonisation as well as to the possible changes made to the definition of applicable law.

Indeed, as the Working Party has recommended in its opinion on applicable law (WP 179), the rules on applicable law need simplification and clarification. As mentioned in the opinion, and regardless of the form of the legal instrument, great care should be taken regarding the risks linked to “forum shopping”.

I would like to stress that full harmonisation could have unintended consequences due to the huge varieties of practical cases, the diversity of national situations and cultural sensibilities. However, “forum shopping” could also have consequences as regards the level of protection and could ultimately also harm data subjects.

Considering the remarks made above, on behalf of the Working Party, I would like to wish the European Commission a lot of wisdom with the drafting of the new data protection legal framework and once the proposal for a new legal framework is finalised, the Working Party will provide the European Commission with comprehensive advice on the proposal.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm  
Chairman