

ARTICLE 29 Data Protection Working Party



Brussels, 3 December 2015

Mr Martin Schulz
President of the European Parliament
Rue Wiertz 60
1047 Brussels
Belgium

Dear Mr Schulz,

Following the opinions and statements already issued relating to the general data protection reform package¹, the Article 29 Working Party (hereafter: WP29) would like to express its views on some identified areas of particular concern that need further attention during the ongoing trilogue process between the European institutions on the Draft directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data (hereafter: the Directive).

It is indeed crucial that the results of these negotiations lead to the adoption of a new regulatory framework that respects the fundamental rights of individuals and the interests of all stakeholders while not leading to a lowering of the standards enshrined in the Union's and the Member States' current acquis.

In this regard, the WP29's view is that the current text of the directive fails to comply with these requirements.

More specifically, in the Council's version of the text, the WP29 is concerned that exceptions to key data protection principles are so wide ranging that they interfere with the fundamental rights of the persons whose personal data is processed and are not limited to what is strictly necessary.

¹ In particular, this statement is a follow up to :

- Opinion 01/2012 on the data protection reform proposals adopted on 23 March 2012 (00530/12/EN WP191)
- Opinion 08/2012 providing further input on the data protection reform discussions (01574/12/EN WP199)
- Core topics in the view of trilogue on the data protection regulation of 17 June 2015

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 for Justice and Consumers, B-1049 Brussels, Belgium, Office No MO-59 02/013.

Website: http://ec.europa.eu/justice/data-protection/index_en.htm

Additionally, the WP29 asks that key data protection principles are maintained in substantial provisions of the text and not moved to recitals².

In particular, Article 4(2) of the Council version of the text permits that a controller could process data for other purposes as long as they correspond to purposes covered by the draft directive. This would jeopardize the purpose limitation principle and not strictly prohibiting profiling on the sole basis of sensitive data would open ways for discrimination. Furthermore, the exceptions to data subjects' rights are laid down in such vague wording that they could become the rule and go beyond what is strictly necessary and proportionate to the purposes pursued. Obligations of the data controller with regard to security and, more precisely, data protection impact assessments and data breach notifications are either inexistent or lightened to the point that respect for the principles of necessity and proportionality and effectivity of supervision is challenged.

Respect for fundamental rights of the persons whose personal data is processed; especially in a law enforcement context, is a prior condition for the credibility of the reform engaged by the European institutions for several reasons.

Above all, it is a political responsibility. As recently reaffirmed by the Court of Justice of the European Union in its judgment in the Schrems v Data Protection Commissioner case³, in our democratic societies, Member States and EU institutions are accountable for ensuring an effective protection of their citizens' fundamental rights to privacy and data protection against unnecessary and disproportionate interferences.

The data protection reform package therefore has to meet citizens and, in general, civil society's expectations in this regard.

Consistency between the level of protection achieved in the text of the draft Directive and the text of the draft regulation is key to successful negotiations. In this respect, laying down less stringent requirements on the data controllers subject to the draft directive rather than the draft regulation could create an incentive for data controllers to consider their competences as covered by the directive and even jeopardize ongoing negotiations on the draft regulation considering the latter entails stricter rules.

Setting a high and equivalent level of data protection throughout the European Union, the Directive should allow Member States wishing to do so to establish a higher level of data protection without adversely affecting its credibility as an effective instrument for ensuring real harmonization of national data protection levels to the top.

In this perspective, although the WP29 understands that the directive does not cover the activities performed by intelligence services with regard to national/public security of the Member States, it would encourage Member States to incorporate the principles adopted under this directive into national legislation regulating these activities.

² For instance, the WP29 refers to Article 5 which has been removed from the Council's version of the text and replaced by a reference included in Recital 21. Similarly, the Council has deleted Article 25 dealing with the cooperation with the supervisory authority and made a reference to this crucial requirement in Recital 40 instead.

³ C-362/14 – 6 October 2015

Finally, the enforcement of data protection requirements, far from obstructing law enforcement agencies and judicial authorities in their duties to prevent, investigate, detect or prosecute criminal offences and ensure the execution of criminal penalties is, on the contrary, a prior condition to their effective achievement. As an example, accuracy and security of the personal data processed contribute to these purposes and are crucial to guaranteeing that citizens trust towards their governments.

Compliance of the draft directive with the data protection current and upcoming acquis is vital to the democratic message that should be conveyed in and by the European Union. It is also key to the success of the adaptation of the existing framework to the challenges posed by the development of the digital society.

The Working Party reaffirms its commitment to continue working with all interested parties offering its support to ensure that the negotiations lead to an efficient outcome and a Directive that provides a high level of protection of personal data in the Union in full compliance with our acquis. In this regard, you will find in annex of this letter the Working Party's general remarks and specific comments on the draft Directive.

Yours sincerely,

On behalf of the Article 29 Working Party,

Isabelle FALQUE-PIERROTIN
Chairwoman

Annex: [Opinion 03/2015 on the draft directive on the protection of individuals with regard to the processing of personal data - Core topics during the trilogue process](#)

A letter in identical terms is being forwarded to Ms Jourová, Commissioner Justice, Consumers and Gender Equality, Mr Fonseca Morillo, deputy Director General of DG Justice, Consumers and Gender Equality, Mr Avramopoulos Commissioner for Migration, Home Affairs and Citizenship, Mr Moraes Chairman of the LIBE Committee of the European Parliament, Ms Lauristin LIBE Committee of the European Parliament, and Mr Braun Permanent Representation of Luxembourg