

ARTICLE 29 Data Protection Working Party



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Dear Ms Juhansone,

The European Union is making real progress on modernizing data protection for the 21 st century. After several years of intense negotiations within the European Parliament and the European Council, the review process has reached a critical stage. At this time, at which the three institutions are about to enter into the trilogue, WP29 would like to share its views on the texts that are now on the table, highlighting those issues that it feels are in need of further improvement.

WP29 would like to stress first that it is important that the new regulatory framework should not lower the current level of protection and not undermine the core principles and rights currently provided in the Directive 95/46, which have stood the test of time well.

The text should furthermore be clear, simple and easy to understand. There must be as little doubt as possible about the rights and protections that the Regulation affords to individuals. Compliance details can be kept away from the face of the Regulation and should be issued under the form of guidance by the EDPB and by DPAs.

The objective of protecting personal data should be achieved without limiting innovation. On the contrary, we believe that data protection can help building trust and thus offer a competitive advantage. Accountability is a fundamental principle of the new regulatory framework that will help with ensuring an effective implementation and compliance with the rules by businesses. The regulation should apply to any controller whatever the risk for privacy is but should allow for flexibility and scalability.

Taking these three concerns as the starting point, the Working Party herewith provides its input on those issues that it believes need further consideration. Notwithstanding the importance of all the points raised in the annex, the following in particular deserve your special attention.

Relation between the instruments

First of all, it should be absolutely clear that the Regulation contains the general rules for data protection in the EU and that the proposed Directive provides an exception exclusively for data protection in the law enforcement sector for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. Any broadening of the scope of the Directive to exclude from the scope of the Regulation certain processing

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, Freedom and Security, B-1049 Brussels, Belgium, Office No MO59 02/34

Website: http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm

activities, performed by controllers either from the public or private sector for the general objective of “the safeguarding against and the prevention of threats to public security” is not acceptable as this will significantly lower the level of protection in some areas that are currently covered by Directive 95/46. It will furthermore increase the number of organisations that would have to apply twin regimes, which will lead to complexity and confusion.

The WP29 would also like to take this opportunity to reiterate that consistency should be ensured between both instruments, especially on the definitions, principles, individuals’ rights and powers of supervisory authorities, so as to end up with a uniform framework on data protection covering all data processing activities in a coherent manner.

Definition personal data

To ensure the general objective of maintaining a high-level of protection of personal data is upheld, personal data should be defined in a broad manner in line with technological evolution. The definition of personal data should therefore take into account the situation in which people can be “singled out” on the basis of identifiers or other information and could subsequently be treated differently. This definition should also take into account the recent CJEU rulings considering why and to what extent IP addresses and other online identifiers are as a general rule to be considered personal data.

Furthermore, the Working Party encourages pseudonymization as a privacy enhancing technique, minimizing data processing and reducing the risks to data subjects. Pseudonymized or pseudonymous data should however not be defined as a new category of data, allowing for derogations from certain obligations defined under the Regulation.

Principles of compatible use and purpose limitation

The Working Party agrees that it should be possible for controllers to process personal data for purposes that are not incompatible, provided there is a legal basis. Further processing for archiving, scientific, statistical and historical research purposes should also remain possible and can be considered as a not incompatible purpose. However, enabling controllers to process data for a purpose that is incompatible is not allowed under the current EU framework as it directly violates one of the corner stone principles of data protection, the purpose limitation principle. Undermining this principle would mean a lowering of the level currently provided by Directive 95/46, which should not be accepted.

Effective protection of data subject rights

The Regulation is a great opportunity to reinforce and improve data subjects' rights. Indeed all surveys confirm the high social expectations for more personal empowerment and control on individual’s privacy. It is not acceptable that existing rights can be reduced with the new rules. Moreover, portability is a positive move that must be encouraged with the introduction of a large and independent right for data subjects.

In order to efficiently protect data subjects, Data Protection Authorities should be equipped with appropriate powers of enforcement and sufficient resources. With respect to enforcement, sanctions should be strongly reinforced to constitute a real deterrent “stick” wherever the controller is a public or a private entity. But digital regulation cannot rely only on sanctions. In order to ensure legal certainty, the DPA can be entitled to assist the data controllers and processors’ in their compliance efforts by providing guidelines and tools.

A new governance model

For all these provisions to be implemented, WP29 believes in a new governance model for Europe based on proximity to citizens and efficiency for business. Powerful DPAs, competent where their citizens are targeted, and increased cooperation between them, particularly via a lead DPA and, where necessary the EDPB, should ensure effective supervision in all circumstances. The latter should be given a real functional and financial independence with the possibility to issue binding decisions, guidelines or other measures.

The DPAs, assembled in the WP29, welcome the efforts made by all European Union institutions up to now to shape the new data protection legal framework for the EU. We hope that the input herewith provided by the Working Party will help to ensure that the forthcoming negotiations lead to an efficient outcome and a new legal framework that provides a high level of protection of personal data in the EU.

Yours sincerely,

On behalf of the Article 29 Working Party,

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Chairwoman