



**COUNCIL OF
THE EUROPEAN UNION**

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**DAPIX 43
COMIX 210**

OUTCOME OF PROCEEDINGS

from: Working Party on Information Exchange and Data Protection (DAPIX)

on: 14-15 March 2012

Subject: Summary of discussions

1. Approval of the agenda

The agenda as set out in CM 1902/12 was adopted.

2. Presentations of opinions on the Commission proposals for a comprehensive reform of EU data protection rules

- **Presentation by Mr Peter Hustinx, European Data Protection Supervisor (EDPS)**

The EDPS expressed his global support for the Commission proposal of a Regulation. The new legislation should indeed ensure more effective and coherent data protection, and would at the same time enhance legal certainty. He welcomed the use of a *regulation* as legal instrument for general uses on data protection, replacing directive 95/46 and reminded that he had supported this option in an opinion last year.

Supported in his view by the Chairman of the Article 29 WP, he criticized the proposed Directive for data protection in the law enforcement area, regretting the choice for a separate instrument, which provided a level of protection inferior to that of the proposed Regulation. In addition, the EDPS admitted that the fact that the proposed Directive was covering domestic processing could be regarded as a positive element of the reform, but estimated that the level of protection had not been sufficiently increased. He also objected to the lack of comprehensiveness of the package, as it left the current data protection rules for the EU institutions unaffected. He also regretted the unclear delineation between the scope of the two instruments, especially in the area of security.

Commenting on the proposed Regulation, he stated that the interaction between EU and national laws could be enhanced and clarified. He criticized the numerous provisions empowering the Commission to adopt delegated or implementing acts. He estimated that the legislator should reconsider the specific derogations granted to SMEs. Amongst the negative elements of the Regulation, the EDPS pointed to the possibilities for restricting rights, the excessive role of the Commission in the consistency mechanism and the mandatory nature of imposing administrative sanctions.

Regarding Article 5 of the proposed Regulation, the EDPS welcomed the several improvements introduced to Article 6 of Directive 95/46/EC, and in particular the principles of transparency and of "data minimisation". However, he called for an additional clarification of the notion of "compatible use". He reminded that the Article 29 Working Party was about to set out guidelines clarifying the notion of "compatible use".

- **Presentation by Mr Jacob Kohnstamm, Chairman of the Article 29 Working Party**

Mr Kohnstamm stated that the Article 29 Working Party would finalize its opinion on the package by the end of March. He welcomed the data protection package and the choice of a regulation as legislative instrument for general rules on data protection. He pointed out the necessity to reduce the administrative burden for the private sector. Whilst expressing his support to the option of making one single data protection authority competent for all data processing operations carried out throughout the European Union by a particular data controller (one-stop shop principle), the Chairman of the Article 29 Working Party underlined the legal uncertainty resulting from transfer of data to third countries. He indicated that a number of G29 members were expressing reservations concerning the choice of criteria for determining the territorial competence of the data protection authorities. He compared the role of the lead data protection authority (DPA) to a "front office", acting in a structured way of cooperation with other competent supervisory authorities. He pointed out that the lead DPA would not be authorized to investigate outside its national scope. He concurred with the EDPS in that the number of employees a company employed should not be the decisive criterion for differentiating as to the applicability of a number of data protection rules, but that it should rather hinge on the data protection risk inherent in specific types of data processing operations. Finally, he expressed the doubts of the 29 Article Working Party on the functioning of the European Data Protection Board, in particular the powers of the Commission to interfere and the role of the EDPS. He also stressed that the increased powers of the national DPAs should be matched by an increase in staff and budgets.

Considering the proposed Directive, Mr Kohnstamm regretted that the objective of a consistent and comprehensive data protection package had not been attained, as the data protection rules in the draft Directive were well below those in the draft Regulation.

- **Questions from the delegations to Mr Hustinx and to Mr Kohnstamm**

Answering to several delegations emphasising the necessity to distinguish the rules applicable to **the public and the private sector**, Mr Hustinx argued that the public sector was already falling within the scope of Directive 95/46, which did not distinguish between the public and the private sector. He was of the view that the implementation of the Directive to the public sector did not raise specific concerns. Mr Kohnstamm subscribed to this view. The EDPS also rejected the idea of sector-based legislative instruments, considering that such a choice would generate overlaps between the legislations.

Regarding the reservation of a few delegations on **the form of the legislative instrument**, the EDPS stated that data protection was not a right defined at national level but a European fundamental right with a long history at European level. The chairman of the 29 Working Party added that the choice for harmonised rules implied a lessening of flexibility at national level.

Regarding the way in which the Commission proposal deals with the processing of data for other purposes than those for which the data were collected, Mr Hustinx argued that EU data protection rules should provide for strong guarantees and the current rules under national data protection legislations allowed for too much divergence.

On the data protection rules applicable to social networks, the EDPS broadly agreed with the application of data protection rules as proposed by the Commission, including the way in which it had drafted the so-called household exception.

As regards transfer of **personal data to third countries** as a consequence of unilateral obligations imposed by third countries, one delegation pointed to the pressure faced by European companies. Mr Kohnstamm urged to let fundamental rights prevail on such pressure, but agreed that companies should not be victims of the legal conflict between the rules of some third countries and EU data protection rules. He added that Article 42 was allowing transfers to third countries by way of appropriate safeguards.

Answering questions related to **institutional changes**, the EDPS welcomed the provisions strengthening the independence of supervisory authorities. However, he stressed that their competences and powers should be clarified, and that the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms should be taken into account for that purpose.

The EDPS welcomed the role of the European Data Protection Board, acting as the successor of the Article 29 Working Party. Mr Kohnstamm tackled the role to be played by the EDPS in the European Protection Board and queried about the chair of the board. One delegation called for a limitation of the role of the Commission in the Board.

3. General Data Protection Regulation

- **Article-by article discussion (Articles 1-21)**

Delegations discussed Articles 5 to 9. The outcome of these discussions will be set out in a separate Presidency note to be issued later.

4. Any other business

No items were raised under this heading.