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Strategy Document

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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 E (Services, Intellectual and Industrial Property, Media and Data Protection) of the European Commission, Internal Market Directorate-General, B-1049 Brussels, Belgium, Office No C100-6/136.
Website: www.europa.eu.int/comm/privacy

THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and in particular Articles 29 and 30 paragraph 1 (a) thereof,

Having regard to the Rules of Procedure of the Working Party², and in particular Article 12 and 14 thereof,

HAS ADOPTED THE PRESENT DOCUMENT

1 Introduction

The Working Party on the Protection of Individuals with regard to the Processing of Personal Data (Article 29 Working Party) was created by Directive 95/46/CE, of the European Parliament and the Council, of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (“the Directive”)¹. Since its establishment in 1996, the Article 29 Working Party has played a key role promoting harmonisation of data protection in order to achieve a high level of data protection in the EU, fostering compliance with the data protection standards set up by Directive 95/46/CE and providing guidance and advice to the different actors in the data protection arena.

Its contributions whether by advice, opinions or recommendations clarify and add value with the aim of achieving a high degree of protection for those whose personal data are processed under the rule of the EU Law. Nevertheless, some facts like changes in membership in the Working Party (especially the recent incorporation of 10 new members), the need to share a common view of the goals of the group and to review its results to improve efficiency, mean that it is advisable for the Working Party to reflect, from time to time, on its role, priorities, efficiency and the challenges it faces in order to meet the public expectations of its work.

Furthermore, some other fundamental considerations and their impact in data protection in the EU make this exercise unavoidable at this moment:

- data protection in the European Union has an enhanced basis after the solemn promulgation of the European Charter of Fundamental Rights of the European Union (“the Charter”)² by the European Council of Nice on the 6th of December of 2000. The Charter enshrines data protection as a fundamental right of the Union in its Article 8, establishing that the existence of fully independent Data Protection Authorities to monitor compliance is an integral part of the right.

¹ OJ L 281, 23.11.1995, p. 31, available at:
http://europa.eu.int/comm/internal_market/en/media/dataprot/index.htm

² OJ C 364, 18.12.2000, p. 1

- the Treaty Establishing a Constitution for Europe³, apart from including and making the Charter an integral part of it, further enhances the basis of data protection by recognising at Article 50 that everyone has the right to the protection of personal data concerning him or her, and states that compliance with data protection rules shall be subject to the control of an fully independent authority.
- Directive 2002/58/EC, of the European Parliament and of the Council, of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), states in its second recital that it seeks to respect the fundamental rights and observes the principles recognised by the Charter of fundamental rights of the European Union, specially, those set out in Articles 7 and 8 of the Charter and in Article 15.3 of Directive 2002/58/EC also confers to the Article 29 Working Party the task of protecting the fundamental rights and freedoms and the legitimate interests in the electronic communications sector.
- the development of a global Information Society which entails great technical, legal, social and economical changes involving the intensive processing and worldwide exchange of personal data, poses new challenges to the privacy of individuals.

2 Role of the Article 29 Working Party

The Directive established a Working Party on the Protection of Individuals with regard to the Processing of Personal Data as a fully independent advisory body and mainly linked its activities to the Commission tasks. National Data Protection Authorities, the European Data Protection Supervisor and the European Commission are the members of the Article 29 Working Party.

The Working Party activities flow from the tasks and functions foreseen in Article 30 of the Directive which constitutes what may be regarded as its terms of reference:

- To examine any question covering the application of the national measures adopted under the Directive in order to contribute to the uniform application of such measures
- To give the Commission an opinion on the level of protection in the Community and in third countries
- To advise the Commission on any proposed amendment of the Directive, on any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data and on any other proposed Community measures affecting such rights and freedoms
- To give an opinion on codes at Community level
- To inform the Commission if it finds that divergences likely to affect the equivalence of protection for persons with regard to the processing of personal data in the Community are arising between the laws or practices of Member States

³ OJ C 169, 18. 7.2003, P. 1.

- To make, on its own initiative, recommendations on all matters relating to the protection of persons with regard to the processing of personal data in the Community.

The European Court of Justice has pointed out in the *Rechnungshof* and *Linqvist* cases that Directive 95/46/CE has a wide scope that goes beyond the Internal Market framework. Coherently with this approach and with the explicit recognition of data protection as a fundamental right made by the Charter of Fundamental Rights, the Working Party has exercised its power to make recommendations on its own initiative to comment on data protection and privacy in the EU generally, and it has particularly welcome the opportunity to provide opinions for the European Parliament.

Furthermore, the Working Party has also been, in a position to help resolve a compliance concern in several occasions like in the Intel microchip-ID or Microsoft .Net Passport cases. This role has even been enshrined in binding legal instruments, like in the Safe Harbor Decision⁴, which established a panel of European Data Protection authorities to deal with complains in specific cases.

The Working Party also notes with regret the lack of independent advice in the Council as regards data protection issues. This is important more now than ever after the stress put by the European Parliament⁵ on the need for a comprehensive and trans-pillar European privacy and data protection regime under the supervision of the competent data protection authorities.

These considerations and the evolving status of Data Protection in the EU legal framework must influence the activities of the Working Party in the coming years in terms of continuing to produce the best possible advice and guidance, providing real European added value, and enhancing communication with the European society and institutions.

3 Challenges and Priorities

This section of the Strategy Document intends to make public the specific matters the Working Party feels will be prominent in its agenda for the next months and years.

This list of issues must not be regarded as a closed list and does not necessary reflect any special priority because all of them deserve the utmost attention from the Working Party. They are also a mixture of matters than can be included within the advisory function to the European Commission attributed to the Working Party by the Directive as well as some others more related to its broader role in the context of the evolution of the concept of data protection as a fundamental right in the European Union and its Member States.

⁴ Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (2000/520/EC). OJ L 215, 25.8.2000

⁵ European Parliament resolution on the First Report on the implementation of the Data Protection Directive (95/46/EC) (COM(2003) 265 - C5-0375/2003 - 2003/2153(INI)). ([A5-0104/2004](#)). All the documents adopted by the European Parliament can be found in:

3.1 Harmonised compliance

Even though the promotion of harmonised compliance is a strategic and permanent goal of the Working Party, the completion of the work programme for a better implementation of the Directive (First Report on the implementation of Data Protection Directive⁶) is a priority for the next months. Further to the debate on the review of the Directive, the Article 29 Working Party has received a clear mandate to assist the Commission and the Member States to achieve a better implementation of the Directive. Because of that, everybody expects the Article 29 Working Party to make a substantial contribution and there is a clear commitment from all its members to work very hard in that direction.

The lack of adequate enforcement and compliance of the data protection legislation has been clearly pointed out by the European Commission in the Report. The Commission has identified a number of causes of this situation, namely: under-resourced enforcement effort, reluctance of data controllers to change their existing practices when the risk of getting caught seems low and little knowledge by data subjects of their rights. Regardless of the specific causes, the members of the Working Party are convinced of the necessity of moving forward in the direction of promoting better compliance with data protection laws through out the European Union and, to this respect, will make a joint effort, in the framework of the activities of the Article 29 Working Party, to improve the situation⁷.

Furthermore, work on European wide data protection codes of conduct is another way to promote a better compliance and, apart from the legal obligation for the Working Party to issue an opinion, the very process of the drafting of the codes of conduct and the interactions between the proponents of the code and the Working Party is viewed by it as an excellent opportunity to enhance data protection practices in Europe.

3.2 Delivering European added-value advice

One of the most prominent activities of the Working Party in the past and in the foreseeable future is the essential role of delivering timely and quality advice to the European institutions.

The Working Party advises the Commission on any proposed amendment of this Directive, on any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data and on any other proposed Community measures affecting such rights and freedoms. Thus, the Working Party understands the Commission has to inform it and ask for its advice in all cases where

⁶ http://europa.eu.int/comm/internal_market/privacy/lawreport/data-directive_en.htm

⁷ This priority is also part of the Work Programme for the year 2004 and it has also been the subject of one of the sessions of the last European Spring Data Protection Authorities Conference, held in Rotterdam (The Netherlands) in April 2004. As a clear indication of the importance attached to the issue, the Article 29 Working Party has recently set up a working group to deal with practical and efficient ways to foster a better enforcement of the national laws implementing the Directive in all Member States.

Other examples of this commitment and serious work on the field can be found in the Work Programme for the year 2004: simplification of international transfers (Binding Corporate Rules, more uniform implementation of derogations of Art. 26.1 of the Directive), simplification of notification requirements (a specific working group has been set up several months ago to deal with this issue and is very well advanced in its tasks), improvement of the enforcement of the data protection regulations across the EU and better harmonisation of information requirements.

new initiatives are taken in these fields. This allows it to influence the legislative process so that the European legislation takes into account the main principles and requirements of data protection.

But delivering advice it is not only a question of examining new legislation. It also deals with providing guidance in matters connected with technological developments or where there is the need to achieve a harmonised approach by all data protection authorities, clarifying at European level controversial aspects or simply informing the public about the right way to implement sound data protection policies. In those cases, the Working Party is the appropriate place to address these issues from a common perspective rather than only from the national one.

3.3 Practical co-operation

Co-operation among data protection authorities is highly desirable, both in their daily operations and as part of the planning of joint actions, and must be a prominent component of any strategic plan or policy.

Several instruments are now in place to foster practical and efficient co-operation among European data protection authorities and are current examples of this commitment:

- The biannual workshop on complaints handling and its Internet Network for exchange of information and handling trans-national cases
- The regular and informal exchange of information among the different DPAs in the form of questions and answers relating to the law and practice in every Member State
- The recent setting up of an on-line IT experts network
- The provisions for joint work that can be found in the document on Binding Corporate Rules,
- The work on simplification of the notification of personal data processing for companies established in several Member States
- The meetings and the leadership of the group of the national authorities involved with the enforcement of Community measures relating to unsolicited commercial communications or ‘spam’

Finally, there is a strong will on the part of all the Data Protection Authorities of the Working Party to promptly answer any question or to fulfil any request of co-operation received from any other such Authority of another Member State to the greatest extent possible within its powers and competences.

3.4 Enhanced transparency

The Working Party is a recognised source of authoritative opinions and statements in the field of data protection and its visibility has increased over time. This evolution makes it necessary to reflect on the most efficient way to communicate with the outside world.

To improve its visibility the Working Party would probably need to re-organise its public relations and its press activities. The chairman will, with the help of the secretariat, establish a press contact register and will try to link the group’s activities with those of the members.

The Working Party also welcomes the desire of other stakeholders to know about, to be consulted on and to be able to contribute to its work. The Working Party intends to respond positively to this desire and recognises the added value which the co-operation of these stakeholders can bring to securing European-wide data protection compliance.

3.5 Co-operation with European institutions and bodies

The European Commission is the institution with whom the Article 29 Working Party works more closely as it has advisory powers to the Commission and its opinions must be sought before some Commission decisions are taken. Moreover, the Commission is a member of the Group and also plays a fundamental role providing the Secretariat. The Article 29 Working Party wishes to build on this current relationship to develop effective data protection in the EU and to add value to its work.

Furthermore, as it has been mentioned already, over time the relationship between the Working Party and the European Parliament has become closer, with the latter endorsing most of the opinions of the Working Party in its Resolutions on data protection matters. The Working Party believes this dialog and co-operation must be improved further as the European Parliament, representing the views and concerns of the European citizens, has always been very sensitive to the safeguarding and promotion of the fundamental right of data protection.

In addition, as pointed out before, the non existence of specific independent advice on data protection issues inside the Council requires improved contacts between the Council and the Working Party with a view to promote consistent data protection policies and norms.

Furthermore, steps have been taken towards closer co-operation between the Working Party and the data protection Joint Supervisory Authorities set up under the Schengen, Europol and CIS Conventions and Eurojust Council Decision because it seems appropriate to move to closer co-operation in some areas that touch both the First and the Third Pillar of the Union, like international transfers of passengers data or immigration policies.

The European Union institutional legal framework has recently been completed by the appointment of the first European Data Protection Supervisor (EDPS)⁸ and close co-operation and co-ordination is crucial, mainly in the area of giving advise on new legislation that can have an influence in the protection of individuals' rights and freedoms with regard to the processing of personal data, given the respective advisory roles of both the Article 29 Working Party and the EDPS.

Even though the EDPS being a member of the Article 29 Working Party guarantees co-ordination between both bodies to a certain extent, it is necessary to develop synergies and common strategies to better serve their common goal of good data protection policies being developed and implemented in the European Union.

⁸ Set up by Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. OJ L 8, 12.01.2001, p. 1

3.6 Monitoring new technologies

New technologies have a crucial role in promoting economic, social and human development but, at the same time, if not properly implemented, could cause considerable adverse impact in the framework of guarantees for fundamental rights, especially for privacy and data protection, enshrined in European Law.

For that reason, the impact of new technologies on privacy has always been a prominent issue on the agenda of the Working Party, as common expertise and guidance is essential in this field. Since its very early documents there has been an ongoing interest in the relationship between emerging technologies and data protection and the Working Party has always tried to provide advice on their privacy compliant design and implementation.

From the expertise developed in the anticipation of challenges for data protection in relation to technologies, the Working Party identified several areas which, in the short term, should be the focus of its attention. These include Radio Frequency Identification, new tools for enforcing intellectual property rights, mobile and geo-localisation services and developments in E-Government. In the future, focus on nanotechnologies could be needed⁹.

The Working Party will also closely monitor the developments in other fields like genetics or biometrics (in particular, the inclusion of biometric data in identification and travel documents) and issue further advice in addition to that already published should this be necessary.

3.7 International transfers of personal data and Global Co-operation

International transfer have become in recent years, after the entering into force of the Directive in 1998 and, particularly, since the negotiations of the Safe Harbor Agreement between the US and the European Commission, one of the most prominent issues in the field of data protection. Given the current circumstances and the need to both safeguard the level of protection afforded within the EU and to influence the international forum from its well established data protection tradition, it will remain a top issue for the time being.

Most probably, the work in this area will still centre on the international transfer of passengers data to the immigration and custom authorities in different countries which are establishing new policies in this respect, in the European Union initiatives also in this field and in the advice regarding the adequacy of protection offered by third countries.

However, there is another promising area of work in this field: the use and implementation of Binding Corporate Rules as a mean for multinational companies to ensure sufficient guarantees with regard to data protection for worldwide intra-group transfers by means of a tool better adapted to the situation than contracts but

⁹ The science of developing materials at the atomic and molecular level in order to imbue them with special electrical and chemical properties. Nanotechnology, which deals with devices typically less than 100 nanometres in size, is expected to make a significant contribution to the fields of computer storage, semiconductors, biotechnology, manufacturing and energy. Envisioned are all kinds of products, including extraordinarily tiny computers that are very powerful, building materials that withstand earthquakes, advanced systems for drug delivery and custom-tailored pharmaceuticals as well as the elimination of invasive surgery, because repairs can be made from within the body. Definition taken from <http://www.techweb.com/encyclopedia/>

guaranteeing a similar level of data protection for the persons whose data are being sent abroad.

The Working Party also remains interested in the increasing developments in other jurisdictions connected with the transfer of personal data. In that respect, it can be mentioned that the Group follows with great interest the work carried out in the Council of Europe and would, whenever possible, co-operate and co-ordinate its activities with them as well as with the data protection and privacy working groups of the OECD.

In addition, there is also a very promising field of co-operation to promote data protection in countries that are becoming recipients of an important number of transfers of personal data from different Members States of the EU, particularly countries in Latin America, Asia and Africa with the view of encouraging steps ensuring data protection guarantees for their citizens as well as a mean to facilitate their integration into the international market by looking for a recognition of an adequate level of data protection.

Finally, it is worth stressing the need to foster the transatlantic dialog and strengthen the links with bodies playing a role in connection with privacy in countries like Canada and the United States of America.

3.8 Yearly Work Programme

In order to increase the transparency of the activities of the Working Party and its openness to the society, the Article 29 Working Party will continue publishing a yearly Work Programme. The Work Programme will constitute an outline of the intended tasks of the Working Party and a clear indication of its priorities for the next year.

The Work Programme always reflects the pro-active approach of the Article 29 Working Party giving priority to topics that affect many individuals and to those in which it can have a decisive influence (e. g. technology, infrastructure and planning of IT products) by encouraging privacy enhancing policies.

It will also serve as a benchmark, both internal and externally, of the achievements of the Working Party and will, thus, enhance the accountability of the Group. This is, of course, without prejudice of duly justified deviations from the agreed Work Programme due to external circumstances that nobody was able to foresee when the Work Programme was drawn up at the beginning of every year and that may force the Working Party to react and use time reserved, in principle, for different tasks.

3.9 Working Methods and Resources

The Article 29 Working Party makes all efforts to work in the most effective and efficient way. It intends that its outputs should be as timely, clear and practical as possible. It will be mindful of the best ways to communicate its views and be flexible in the methods to deliver these to the target audience.

The Working Party performs an essential role by contributing, through its fully independent actions, to the promotion and establishment of a society which respects the value of the fundamental right to data protection. Given the increased demands arising from the growth to 25 members and the growing workload resulting from the enlarged scope of the interests pursued by the Working Party, including technology changes and more inter-institutional and international contacts, the Article 29 Working Party calls for a recognition of the need to enhance the value of , and, where necessary, to increase both

human and financial resources of the Secretariat in order to ensure the continued effective performance of its functions.

4 Conclusion

The Article 29 Working Party is firmly committed to its responsibilities to foster better and harmonised data protection practices in the European Union as well as to work in the manner as set out in this document in order to promote the fundamental right to data protection.

In addition, it is resolved to closely monitor the developments of data protection in Europe and, where necessary, to adjust its priorities to better serve the citizens –whose personal data are processed in the EU- in the constantly changing and evolving world of technology and privacy and to take further action to update its strategy according to the challenges that arise in the future.

Done at Brussels, on 29 September 2004

For the Working Party
The Chairman
Peter Schaar