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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL on the protection of individuals with regard to the
processing of personal data by the Union institutions, bodies, offices and
agencies and on the free movement of such data, and repealing
Regulation (EC) No 45/2001 and Decision No 1247/2002/EC
= Statement of the Article 29 Working Party

Delegations will find in annex a Statement of the Article 29 Working Party on above - mentioned subject adopted at the 110th plenary meeting.

Statement of the Article 29 Working Party

Brussels, 5 April 2017

Given that the Commission took the commitment to **review Regulation 45/2001** when the data protection package was adopted, the **WP 29 welcomes the Commission's proposed reformed Regulation** and the fact that it was tabled early enough for this text to be adopted and enter into force at the same moment as the data protection package in order to offer a coherent and modernized legal framework for the protection of personal data in the EU.

However, the WP 29 calls on the **necessity to ensure that rights and safeguards afforded to data subjects within the proposed revision of Regulation 45/2001 are in full consistency with Regulation 2016/679** (hereafter the "GDPR"), in particular concerning the requirements to provide the possible restrictions to the rights of data subjects by law, as foreseen in Article 52 of the Charter of Fundamental Rights. The WP 29 also notes that this proposal interacts on some important aspects with the EDPB organization, its new field of competences and the national competences of DPA in Justice and Home Affairs (JHA) matters. It thus feels the need to **address the following comments and suggestions on three points of the proposal to the co-legislators**.

1. Clarify the position and reporting obligations of the staff of the EDPS Secretariat devoted to the EDPB

The GDPR expressly foresees that the staff of the EDPS involved in carrying out the tasks conferred on the Board of the EDPB shall be subject to separate reporting lines from the staff involved in carrying tasks conferred on the EDPS (article 75, par. 3) and that this staff composing the secretariat of the EDPB provided by the EDPS will perform its tasks exclusively under the instructions of, and report to, the Chair of the Board of the EDPB (article 75, par 2 and recital 140).

However, the WP 29 noticed that the initial draft of the Regulation does not reflect enough explicitly this separation as it foresees that all the staff of the EDPS should be ‘subject exclusively to his or her direction’ (article 55, par. 4).

The WP 29 therefore underlines that this paragraph of the draft Regulation (par. 4 of article 55) should be clarified by the introduction of a reference to article 75 of the GDPR, to preserve the independence of the staff coming from the EDPS and placed under the authority of the Chair of the EDPB. Consequently, this would aim at preserving the independence of the EDPB itself. Indeed, the Secretariat of the EDPB is intended to have a central drafting and managing role within the EDPB, while the EDPS himself will also be a member of the EDPB. The distinctive reporting lines between the staff composing the Secretariat and the EDPS thus should be unaffected.

2. Reinforcing the advisory role of the EDPB on new EU legislative proposals

Article 42 of the proposed Regulation provides for the COM, following the adoption of legislative proposals ‘of particular importance for the protection of individuals’ rights and freedoms with regard to the processing of personal data ... also to consult the European Data Protection Board’, and that in such cases ‘the European Data Protection Supervisor and the European Data Protection Board shall coordinate their work with a view to issue a joint opinion.’ The WP 29 recalls that the GDPR expressly states in Article 70 that it shall, on its own initiative or at the request of the Commission, “advise the Commission on any issue related to the protection of personal data in the Union”. Since the EDPB is intended to become the independent EU body in charge of contributing to the consistent application of the data protection rules throughout the Union, including by advising the Commission (recital 139 GDPR), the WP 29 considers that its advisory role, including on any legislative acts or recommendations or proposals under GDPR and the Data protection Directive, should be fully recognized by the proposed Regulation, so that the Commission consults the EDPB on all relevant proposals, also prior to formal adoption.

Indeed, in practice, the EDPB will benefit from a wide and practical competence of its members, including the EDPS. It is also a way to reconnect the national and the European levels and to strengthen the bridge built by the GDPR to bring the European closer to its citizens. In order to avoid overflow and to limit the workload to what is practicable in order to ensure an efficient consultation of the EDPB, the WP 29 suggests however that the EDPB may define internal procedures.

Given these elements, it is essential to be coherent in the interpretation of the legal framework and that the EDPB and EDPS will ensure synchronisation of their opinions.

In order to implement this, the WP 29 recommends that the text should be reviewed along the following lines:

The text should reflect in Article 42(2) that the Commission shall (and not “may”) consult the EDPB on the draft legislative acts or recommendations on the processing of personal data of individuals protected by EU law.

Any consultation of the EDPB and of the EDPS should also take place before the proposal is tabled in order to be efficiently taken into account by the legislator or the institution.

3. What should be the new governance model for the supervision of EU agencies, bodies and offices on JHA matters?

The WP29 notes that the draft Regulation proposes a standardization of the models of coordinated supervision is proposed.

The WP29 notes that recital 65 underlines that, in certain instances, the EDPS shares a coordinated supervision model with the national supervisory authorities and recalls that the EDPS is the supervisory authority of Europol with a specific model of cooperation with the national supervisory authorities established through a cooperation board with advisory function.

This recital also mentions that a single model of coordinated supervision should be promoted in the Union and that the Commission should submit legislative proposals with a view to amending Union legal acts providing for a model of coordinated supervision, in order to align them with the model of the new Regulation.

Eventually, the last sentence of recital 65 indicates that the EDPB should serve as a single forum for ensuring the effective coordinated supervision “across the board”.

The WP29 considers that this recital 65 is unclear, especially read in conjunction with Article 62 to which it corresponds. This recital seems to imply that the supervision model laid down in this draft new Regulation will become the rule for all bodies, agencies, offices and IT systems in the field of Justice and Home Affairs. This model implies that where a Union act refers to this provision, the EDPS shall work with the national data protection authorities, and coordinate with them within the forum of the EDPB (Article 62). However, these two provisions do not clearly state if the prevailing supervision model should be the Europol model, with the EDPS as sole supervisor, or the coordinated supervision model including more the national DPAs

Should the Europol model prevail for all bodies, agencies, offices and IT systems in the field of Justice and Home Affairs, the WP29 underlines the need to ensure that the expertise of national DPAs, involved so far in the supervision and with a long practical experience at national level on these sensitive issues concerning sovereignty is not lost and that national DPAs should not lose the information they currently have access to as regards the activities of the bodies, agencies and offices where they are involved in the supervision.

In addition to its supervising role, the EDPS plays the role of the secretariat of all offices, bodies and IT systems (except for Eurojust).

Therefore, the WP 29 considers that the main issue at stake with the harmonization of the supervision models therefore concerns the model of governance for the agencies, bodies, offices and IT systems in the field of Justice and Home Affairs having a specific supervision model implying the national DPAs, as well as for the future agencies or bodies.

Consequently, the WP29 is in favour of evaluating on a case by case basis the supervision models of each of the bodies, agencies, offices and IT systems in order to provide its analysis on these supervision models and to identify harmonized coordination approaches. A working subgroup of WP 29 will be mandated soon to start this examination.

For supervision of personal data processed by bodies, agencies, offices and IT systems such as VIS, SIS, CIS, Schengen, and maybe Prüm related issues where there is a strong link between national and European data processing, the WP29 is of the opinion that a coordinated supervision model which foresees the equal participation of the EDPS and of the national DPAs, according to their respective competences, should absolutely be preserved. The EDPB should be the forum where all these supervisory authorities (national + EDPS) would coordinate themselves and act as much as possible on an equal footing.

The WP 29 recommends that recital 65 and Article 62 should therefore clearly state the need for an examination on a case-by-case basis of existing coordinated supervision models and for respecting an equal footing of all the DPAs should be preserved. These provisions should also be strengthened as regards the fact that the EDPB should be the forum where the EDPS and national DPAs will meet and coordinate, with an added reference to the fact the Secretariat of the EDPB should organize this cooperation.

Background information

The Article 29 Working Party on the Protection of Individuals with regard to the Processing of Personal Data is an independent advisory body on data protection and privacy, set up under Article 29 of the Data Protection Directive 95/46/EC. It is composed of representatives from the national data protection authorities of the EU Member States, the European Data Protection Supervisor and the European Commission. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC. The Article 29 Working Party is competent to examine any question covering the application of the data protection directives in order to contribute to the uniform application of the directives. It carries out this task by issuing recommendations, opinions and working documents.

http://ec.europa.eu/justice/data-protection/article-29/index_en.htm