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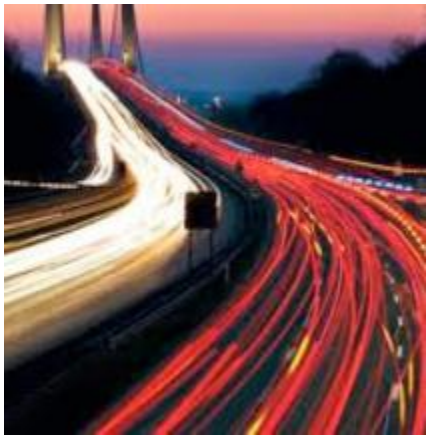

The Belgian Data Protection Opinion Opines on the EU Draft Regulation

On November 21, 2012, the Belgian Data Protection Authority (DPA) adopted a long awaited opinion on the European Commission's proposals for a revised data protection legislative framework (Opinion). In its Opinion, the DPA focuses mainly on the draft EU Data Privacy Regulation (Draft Regulation) that affects the private sector.

In its opinion, the DPA generally welcomes the Draft

Regulation, but notes that it needs clarifications and improvements.

With respect to the positive aspects, the DPA appreciates, among other things, the Draft Regulation emphasis on:

- The explicit legal recognition of the Binding Corporate Rules regime for data controllers and processors.
- The abolishment in most cases of the current filing system of data processing activities and its replacement by a detailed internal documentation of all data processing operations maintained directly by data controllers and processors. However, the DPA states that specific procedures should be implemented to: (i) raise awareness of the need to comply with the law, and (ii) inform data protection authorities upon request.
- The specific information security measures that data controllers and processors must implement.
- The improvement of the rules applicable to the transfer of personal data outside of the European Union, specifically since the Draft Regulation provides that adequacy decisions may no longer be subject to any kind of authorization or prior permit.

The DPA also provides, among other things, criticisms on certain aspects of the Draft Regulation. For example:

- The Opinion disapproves the definition given to judicial data since administrative offenses and civil sanctions are not part of its defined scope.
- The Opinion strongly opposes the choice in the Draft Regulation to limit the prior authorization powers of DPAs to the field of international data transfers. Currently, Belgium has procedures in place, which empower several sectorial committees with prior authorization competences (e.g. sectorial committee

on the national registration number which grants permits for the use of the national registration number). The DPA considers that this system established to protect personal data in the public sector should be integrally maintained.

- The DPA is not in favor of the choice in the Draft Regulation of a compulsory appointment of a Data Protection Officer. The DPA would rather see this appointment as optional.
- The DPA rejects the "one stop shop" rule. This rule is applicable to the processing of personal data which takes place "in the context of the activities of an establishment" of a data controller or a data processor in the EU and where the controller or processor is established in more than one Member State. This provision provides that the local DPA of the "main establishment" of the controller or processor is competent for the supervision of the processing activities of the controller or the processor in all Member States. The opinion stresses that this principle is in practice difficult to implement and may lead to conflict between DPAS.

The DPA stresses that it reserves the right to opine again on the Draft Regulation. Therefore, more information on the subject may be expected very soon.

The Opinion of the DPA is available in French here

The Belgian “SNCB-Gate”

On December 23, 2012, a Belgian consumer association, Net Users' Rights Protection Association (NURPA), announced that SNCB Europe (SNCB), the national railway operator of Belgium, mistakenly disclosed the personal data of over 1.46 million of its customers on its website. After several false and contradictory statements, SNCB admitted that the disclosure was caused by an internal operation and eventually apologized.

The disclosed personal data were freely accessible via a basic query on a public search engine and included first names, last names, genders, dates of birth, email addresses and, in some cases, home addresses and phone numbers. The significant amount of data included personal data of Belgian politicians such as the Vice Prime Minister of Belgium, the Belgian Minister of Public Companies as well as high-ranking members of European Commission and the U.S. Department of State.

The incident created a rarely seen public outcry in Belgium. More than 1700 SNCB customers filed a claim before the Belgian Privacy Commission (DPA). According to Articles 31 and 32 of the Belgian Data Protection Act (Act), the power of the DPA is limited to a mission of mediation, however the DPA can inform the Public Prosecutor of any offence it is aware of. Following a meeting with SNCB representatives on January 4, 2012, the DPA ruled that the SNCB violated the Act and transmitted the case to the Belgian Public Prosecutor.

The Public Prosecutor will now have to decide whether to present the case for a criminal trial. In case of a trial, the SNCB could be convicted to pay an important fine.

How to Deal with the Transfer of Traffic Data to Debt Collectors?

The European Court of Justice decided under which circumstances a telecommunications service provider may disclose traffic data to its debt collector and how the latter must process such data. The Court stresses the importance of specific stipulations in the parties' agreement: the agreement must contain provisions guaranteeing (i) the lawful processing of the traffic data by the debt collector, (ii) the processing by the assignee only for the purpose of recovery and (iii) that the debt collector complies with these provisions at all times.

The case (Josef Probst v mr.nexnet GmbH (Case C-119/12) (2012/C 174/21)) concerns a German consumer who failed to pay outstanding charges claimed by its telecommunications service provider. This service provider assigned the claim to its debt collector by a contract, however the consumer claimed that the contract was void as (i) the disclosure of the traffic data to the debt collector went beyond what was strictly necessary for billing purposes and (ii) the assignee did not "act under the authority" of the telecommunications service provider (paragraph 97(1) of the German Telecommunications Act, which is the transposition of Articles 6(2) and (5) of the ePrivacy Directive). On November 22, 2012, the Court held that article 6(2) not only relates to processing personal data for billing purposes but also for debt collection. The telecommunications service provider can lawfully disclose traffic data to its debt collector on the condition that the debt collector (i) only processes traffic data necessary for the purpose of debt collection and (ii) acts exclusively on the instructions and under the control of the provider (article 6(5) ePrivacy Directive). It is important to explicitly describe this power of supervision in the assignment contract. Thus, the contract must contain provisions ensuring

that the assignee processes traffic data lawfully and that these provisions are complied with at all times. National courts will determine whether these conditions are met. However, here, the Court gives some guidance about cumulative provisions that are able to meet these conditions:

- Use of the data by the assignee exclusively for the purpose of the debt collection;
- All protected data must be irreversibly erased or returned if no longer required for such purpose;
- Each party is entitled to check that the other party has ensured data protection and data security in accordance with this agreement;
- Confidential documents and information transferred may be made accessible only to such employees as required for the purposes of performing the contract;
- The parties are to require those employees to maintain confidentiality in accordance with this agreement.

Thus, the Court stresses the importance of explicit stipulations in a data processing agreement (pursuant to Article 17 of the Data Protection Directive), next to the general obligations to respect the privacy and to ensure data protection.

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