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EU—Article 29 Working Party Opinion 08/2012: Further input on the EU Data Protection Reforms



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The proposed new EU General Data Protection Regulation continues to generate discussion at the EU level. The latest comments issued by the Article 29 Data Protection Working Party are a vocal challenge to the European Commission's broad powers foreseen under the regulation. Opinion 08/2012, adopted on 5 October, builds upon the Working Party's March 2012 input and covers the definition of personal data, the notion of consent and, in particular, the proposed delegated acts within the draft regulation. The Working Party notes with disapproval a leaked document indicating that some national delegations in the European Council have called key concepts of data protection into question. It stresses that attention on the key concepts of personal data and consent is misplaced and advises that if there are disproportionate outcomes in applying the terms of the regulation, those provisions and exceptions of the regulation should be modified rather than discarding the key concepts themselves.

Defining personal data

The Working Party proposes some changes to the definitions of personal data and data subjects. Recognizing the notion of identifiability in personal data, the Working Party suggests including a phrase in Recital 23 that data protection law also applies to any information "allowing a natural person to be singled out and treated differently." Likewise, the Working Party would like the definition of a data subject to include a person who can be identified "or singled out and treated differently." Reflecting a previous Working Party opinion justifying why IP addresses should be considered personal data, this opinion suggests reversing the language in Recital 24, which states that online identifiers "need not necessarily be considered as personal data in all circumstances," preferring instead that such identification numbers, location data, online identifiers "should as a rule be considered personal data."

Notion of consent

The Working Party welcomes the changes to consent included in the draft regulation which strengthen individual rights. Joining in debate over the word "explicit" in the context of consent, the Working Party is of the opinion that its inclusion is an important clarification to the meaning of consent and that its deletion would be highly undesirable.

Delegated acts

The greater part of the Working Party's opinion deals with the delegated acts foreseen by the draft regulation. These are powers under Article 86 of the regulation for the commission to adopt acts which supplement or amend nonessential parts of the regulation, increasing potential harmonization. The regulation contains 26 different opportunities for the commission to adopt such acts, which the Working Party regards as excessive. The Working Party stresses that there should be a substantiated need for the possibility to adopt delegated acts and that "just in case" is not a sufficient basis for including the powers.

The Working Party analyzes each opportunity for a delegated act in the regulation, separating the various issues that could be dealt with under each article, and makes an assessment whether in its view that delegated act is the best possible tool for elaborating upon or clarifying the legal obligations under the regulation. The Working Party comments that for purposes of legal certainty, all essential elements of the law should be included within the regulation itself, and in five cases of delegated acts, it concludes that the issue should be clarified in the text rather than leaving it for a delegated act.

Delegated acts should be reserved for circumstances where the issue is nonessential but would benefit from legal certainty, and harmonization is necessary and possible in a technology-neutral way. In 14 cases, the Working Party agrees that a delegated act is the most appropriate course of action, most often in combination with further guidance from the European Data Protection Board (EDPB).

Where a more flexible approach is necessary, rather than using a legislative act the Working Party advocates are relying on guidance from the EDPB to contribute to harmonization. While such guidance is not legally binding, the Working Party points out that it has proven valuable and authoritative, and allows consideration of practical scenarios. In several cases, therefore, the Working Party notes particular issues which it assesses would be better dealt with in this way.

In some cases, the Working Party believes that no further guidance is necessary at all and that the precise details of compliance should be left to data controllers, subject to supervision, enforcement and judicial review. In general, where the delegated act contemplates specific measures or adjustments for MSMEs—micro, small and medium enterprises—the Working Party is opposed to any delegated act which would provide an exemption that is not already in the text of the regulation and sees no basis for placing less stringent obligations on controllers of smaller size, especially where data subject's rights are at stake.

For a full version of this article, including a breakdown of how the Working Party thinks each proposed delegated act should be dealt with, please see the Lorenz [website](#).

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