

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

The proposed new EU General Data Protection Regulation ('the Regulation') continues to generate discussion at the EU level. The latest comments issued by the Article 29 Data Protection Working Party ('Working Party') are a vocal challenge to the European Commission's broad powers foreseen under the Regulation. Opinion 08/2012, adopted on 5 October 2012, builds upon the Working Party's March 2012 input and covers (i) the definition of personal data, (ii) the notion of consent, and in particular (iii) 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.

(i) 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'.

(ii) 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.

(iii) 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 non-essential 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 non-essential but would benefit from legal certainty, and harmonization is necessary and possible in a technology-neutral way. In fourteen 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’, the Working Party’s successor organization under the Regulation).

Where a more flexible approach is necessary, rather than using a legislative act the Working Party advocates 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.

The Working Party believes that each provision specifying the power to adopt a delegated act should be dealt with in the following ways:

Content should be in the text of the Regulation itself:

- Art 9(2)(g) regarding what specific public interests justify processing of sensitive data.
- Art 31(5) on clarifying circumstances requiring notification of data breach.
- Art 32(5) specifying when a personal data breach is likely to adversely affect the personal data
- Art 44(7) regarding ‘important ground of public interest’ justifying transfer to third country.

- Art 83(3) on any additional requirements regarding processing for historical, statistical and scientific research purposes. If any limitation of data subjects' rights is anticipated, although there is no basis for this, it should be in the Regulation or delegated act at the time of Regulation.

Content best addressed by EDPB Guidance (either alone or together with a delegated act):

- Art 6(5) regarding 'legitimate interests pursued by a controller' which can be a legal basis for processing for various sectors and situations.
- Art 9(3) regarding what constitutes appropriate safeguards for processing sensitive data.
- Art 14(5)(b) for assessing when controllers can make use of 'disproportionate effect' exemption from providing data subject with information, by reference to practical situations.
- Art 23(3) for elaborating on principles of data protection by design and default.
- As necessary Art 30(3) regarding technical and organisational measures for secure processing. Inappropriate to lay down 'state of the art' for different sectors, should be technology neutral.
- Art 33(6) regarding when a processing operation is likely to present specific risks, requiring a PIA (in the alternative or in addition to proposed delegated act).
- Art 34(8) regarding 'high degree of specific risk' identified in a PIA, necessitating prior consultation with DPAs.
- Art 35(11) regarding requirements to have DPO and their professional qualities (additional to proposed delegated act).
- Art 37(2) specifying tasks of DPO (additional to proposed delegated act).
- Art 43(3) on BCRs for processors (additional to proposed delegated act).
- Art 44(7) on appropriate safeguards when transferring to a third country based on a legitimate interest pursued by the controller or processor (additional to proposed delegated act).

No further legislation or guidance needed at all

- Art 8(3) regarding how to obtain 'verifiable consent' of a child's guardian to processing, and specific measures for MSMEs. Obligation on controller to make reasonable efforts already clear.
- Art 9(3) on criteria and conditions for processing sensitive data.
- Art 12(5) criteria and conditions for manifestly excessive requests and fees regarding information requests by data subjects.
- Art 14(7) for further specifying rights and obligations regarding provision of information regarding data subject, save re 'disproportionate effect' exemption.
- Art 15(3) for specifying criteria and requirements for communication of content of data in context of right of access, save for need to clarify whether Art 15(1)(g) also means sending the actual personal data being processed.
- Art 22(4) regarding further elaboration of the accountability principle.
- Art 26(5) regarding processor responsibilities including when using BCRs.

- Art 28(5) regarding maintenance of documentation by the controller.
- Art 43(3) on criteria for BCRs or their approval.

Agree content best addressed by delegated act

- Art 14(5)(b) on main conditions and safeguards regarding what is ‘disproportionate effect’ exempting controller from providing data subject with information.
- Art 17(9) on the right to be forgotten, the requirements for applying this right to different sectors or processing operations (should be issued at the same time as the Regulation).
- Art 20(5) regarding suitable measures to safeguard data subject’s legitimate interests, as an exception to prohibition on profiling (EDPB further guidance also useful).
- Art 31(5) for further details regarding notification of data breach, as well as including greater clarity in the Regulation (should be issued at the same time as the Regulation).
- Art 32(5) further details regarding when a personal data breach is likely to adversely affect the personal data as well as including greater clarity in the Regulation (should be issued at the same time as the Regulation).
- Art 33(6) regarding when a processing operation is likely to present specific risks, requiring a PIA.
- Art 35(11) regarding requirements to have DPO and their professional qualities.
- Art 37(2) specifying tasks of DPO.
- Art 39(2) regarding data protection certification mechanisms.
- Art 43(3) on BCRs for processors.
- Art 44(7) on appropriate safeguards when transferring to a third country based on a legitimate interest pursued by the controller or processor.
- Art 79(7) for updating amounts of administrative fines.
- Art 81(3) for ‘public interest’ reasons and safeguards for processing of health data.
- Art 82(3) for criteria and safeguards when processing employment data.

Should be in a recital to the Regulation:

- Possible further explanation of Art 9(2)(g) regarding what specific public interests justify processing of sensitive data.

Should be left to national law:

- Art 12(5) regarding the maximum fee that can be charged for manifestly excessive requests for information by data subjects.