

ARTICLE 29 Data Protection Working Party



Brussels, 13 December 2011

Michel Barnier
European Commissioner for
Internal Market and Services
European Commission
B - 1049 Brussels
Belgium

Dear Mr Barnier,

The Article 29 Working Party (Working Party) welcomes the proposal for a Regulation on administrative cooperation through the Internal Market Information System (IMI Regulation). This Regulation will create a binding legal framework for the Internal Market Information System (IMI), thereby creating the necessary legal certainty for handling personal data of EU citizens within IMI.

The Working Party appreciates the efforts made by the European Commission to draft a proposal for an IMI regulation with the objective to provide a comprehensive data protection framework by setting the rules for the processing of personal data.

The members of the Working Party - the national data protection authorities - and the European Data Protection Supervisor have repeatedly stressed the importance of having a comprehensive legal framework for the functioning of IMI. In view of the extent and complexity of IMI, this Regulation constitutes a key prerequisite for the planned expansion of its scope.

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 C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No MO59 6/36.

Website: http://ec.europa.eu/justice/policies/privacy/index_en.htm

In the past, the Working Party has contributed to the debate on data protection issues related to IMI. In its Opinion of 20 September 2007 (WP 140), the Working Party presented a comprehensive analysis of the implications of the exchange of personal data through IMI for the fundamental rights of individuals, in particular the right to privacy. The Working Party would like to take this opportunity to refer once again to the results of that working paper.

In a letter dated of 26 July 2011 the Working Party expressed its expectation that its views and comments will be considered in the further process of the discussion, since the new legal framework on IMI gives raise to issues at Member State level.

At the meeting of the Plenary of the Working Party on 13-14 October 2011 its members were informed by the Commission about the main aspects of the draft proposal. In a meeting between the Working Party and the Commission on 27th October 2011 the draft proposal was further discussed.

In this respect the Working Party appreciates the opportunity to contribute to the discussion by offering some comments on selected provisions of the proposal.

In general, the Working Party notes that the IMI Regulation and its provisions on handling personal data should also be seen in the context of the intended review of the European legal framework for data protection, which the Commission has announced for early 2012. Due to mutual coordination within the Commission it should be ensured that the data protection regulations concerning IMI are consistent with the new EU legal framework for data protection.

In detail the comments refer to the following issues:

1. Retention of personal data for five years
2. Retention of personal data from inactive cases
3. Processing of special categories of data
4. Establishing a repository of information
5. Access of the European Commission to personal data
6. Access of “external actors” to personal data

7. Right of access, correction and erasure
8. Specification of the authorities responsible for data processing
9. Coordinated Supervision
10. Specific provisions on special use (alert mechanism)

1. Retention of personal data for five years

Article 13 of the proposal for an IMI Regulation provides for extending the length of retention of personal data stored in IMI from the current six months to five years, while the data are to be blocked 18 months after the formal closure of an administrative cooperation procedure and processed only for purposes of proof of an information exchange by means of IMI or with the data subject's consent. According to Article 14 (3) of the proposal personal data relating to IMI users are also to be retained for five years after such person ceases to be an IMI user.

The Data Protection Directive 95/46/EC (Directive) states that personal data must be kept no longer than is necessary for the purposes for which the data were collected or are further processed (Article 6 (1) (e) of the Directive and Regulation (EC) 45/2001 accordingly).

The Working Party believes that the need to give IMI users full direct access (reading and writing) to the personal data for an additional eighteen months and to store personal data for a total of five years after closure of a case has not yet been sufficiently proved. No sufficient evidence has been provided that, in the practical application of IMI so far, the current retention period of six months has not been adequate for clarifying follow-up questions. The Commission should provide specific statistics and information on the recourse by the users to personal data stored in IMI, including in particular information and statistics on access to data relating to the "closed requests". Any extension of the retention period on the mere basis of expectations raises concerns.

Taking the current information available into account the blocking of the data after eighteen months and the retention after five years does not seem to comply with the principle of proportionality of the processing of personal data. It also

has to be noted that the provision under article 13 (3), stating that “personal data blocked pursuant to this Article shall, with the exception of their storage, only be processed for purposes of proof of an information exchange by means of IMI, or with the data subject’s consent”, needs explanation on the actual scope and on the reasons justifying such provision.

In addition, the Working Party considers the full direct access of IMI users for eighteen months and a general retention period of five years to be particularly problematic because sensitive data, such as alerts and information about entries in criminal records, can also be affected. Extending the above mentioned periods may lead to conflicts with national legislation, for example on deleting criminal records. There is a risk that an individual’s criminal record, which according to national law must be deleted from the national criminal register, would continue to be stored in IMI due to the longer retention period and could therefore be used to the detriment of the data subject. In such cases, IMI would virtually constitute a back-up register containing data which should have already been deleted according to national legislation.

The argument that the five-year retention period is necessary to ensure the data subjects right to access is questionable. In the view of the Working Party, however, this argument does not sufficiently take into account the fact that the competent national authorities are already required by national law to store personal data exchanged via IMI and their recipients. The national authorities are thus able and responsible for upholding the rights of the data subject while respecting national regulations.

Further, it seems questionable whether the decision of the European Court of Justice (ECJ) of 7 May 2009 (C-553/07 – Rijkeboer) can be used to justify a five-year retention period. The Court distinguished between “basic data” (i.e. personal data stored by a local agency on the basis of law) on the one hand and information about the recipient to whom those basic data was disclosed and the content thereof on the other hand. The latter category refers to the processing of basic data. The case in which the judgement was made was characterized by the fact that access to the data referring to the recipient and to the content of the data disclosed was limited to one year, while the basic data could be stored for a much longer period. The Court found that, due to this imbalance, the rights of

data subjects were not adequately upheld, as it was possible to store basic data much longer than the right of access to information about the recipients and content of the data disclosed was granted (European Court of Justice, C-553/07, marginal note 66).

With respect to the data stored in IMI the matter of facts are different: IMI is first of all a tool for exchanging information between competent authorities, not for storing it. This is made explicitly clear in Article 3 of the draft proposal where it is stated that “IMI shall be used for exchange of information between competent authorities in the Member States”. Data stored in IMI can thus not be divided into the categories of basic data and data on the recipient and content of the data disclosed in the meaning of the ECJ judgement but belongs only to the category of data on the processing of basic data (i.e. information on the recipient and the content of the transmitted data).

The particularities of IMI lead to the consequence that the ECJ’s decision seems not to be applicable as justification for a five year retention period. Such a long retention period (including the possibility for IMI users to have full direct access to the data stored in IMI for eighteen months after formal closure of the case) may change the character of the system from a tool for exchange of information to a file administration tool.

File administration is however not covered by the scope of this Proposal. The use of IMI for such a purpose would require an entirely different legal framework and the customisability of the system in accordance with the national legislation and other requirements for the particular application that is connected to IMI.

2. Retention of personal data from inactive cases

The Working Party sees critical that, under Article 13 of the proposal, data are not to be deleted until after five years have elapsed from the formal closure of the administrative procedure. The proposal does not cover the deletion of data in inactive cases with the consequence that such data could remain open unnecessarily and for an unreasonably long time. In addition, inactive cases retained over a longer period might contain outdated data.

To avoid a legal gap and a lack of clarity the draft proposal should also contain a provision on dealing with inactive cases. The Working Party thus recommends that first the “formal closure” of the administrative procedure should be defined under strict / precise terms in the Regulation (e.g. under Article 5 “Definitions”) and second the IMI Regulation should either set a specific deadline for “manually” suspending inactive cases, or create a basis for automatic deletion.

3. Processing of special categories of data

The processing of special categories of data is already regulated by the Directive 95/46/EC and the Regulation 45/2001/EC. It is questionable why IMI requires a special legislation in this matter because the proposal is mainly referencing to the relevant legal framework in place and does not clearly state if or how it means to change these rules in the context of the IMI.

Article 15 (1) of the proposal allows the processing of special categories of data and refers to Article 8 (1) and (2) of Directive 95/46/EC and respectively Article 10 (1) and (2) of Regulation (EC) 45/2001. In particular the reference to Article 8 (2) of the Directive and respectively Article 10 (2) of the Regulation raises further question. Currently, sensitive data may only be processed through IMI on the basis of a specific legal provision or with the data subjects consent. The general reference to Article 8 (2) of the Directive will substantially broaden the justifications for the processing of sensitive data. The Working Party therefore recommends narrowing down the reasons for justification on the relevant grounds.

In addition, the processing of sensitive data creates the need for special attention to compliance with data protection standards. In its opinion WP 140, the Working Party has already commented on the handling of specially protected data in IMI and pointed out the data protection risks in this context. In this context the different use of the terms “appropriate safeguards” (Article 15 (1)) and “appropriate specific safeguards” (Article 15 (2)) needs further explanation.

It also has to be criticised that the reference to “appropriate safeguards” is only a reference to an undefined legal term. The Working Party's analysis of Article 8 of Directive 95/46/EC, which also refers to “adequate safeguards”, revealed

significant differences in the implementation of these safeguards in national law (cf. Advice Paper on special categories of data (“sensitive data”) of 20 April 2011; available on the website of the Article 29 Data Protection Working Party). It may therefore appear that sensitive data are, in practice, no more protected than data that do not fall under this category. Given that sensitive data exchanged through IMI should be specially protected due to their nature, in the Working Party’s view additional specific legal and organisational safeguards should be considered.

The IMI Regulation should also clarify that special categories of data may be inserted by the users (i.e. the competent authorities) and processed only if appropriate additional safeguards are in place in compliance with national data protection legislation to do justice to the increased need for additional protection of sensitive data.

4. Establishing a repository of information

The Working Party has reservations about the intention expressed in Article 13 (2) of the proposal to establish a repository in which “the personal data included in such a repository may be processed for as long as needed for this purpose”, for example where necessary to comply with a Union act. This provision makes it possible to avoid the general rules in Article 13 of the IMI Regulation concerning blocking and deletion. Further explanation is needed regarding the actual scope of the planned repository and why it is necessary.

5. Access of the European Commission to personal data

The role of the Commission as defined in Article 9 of the proposal gives rise to further questions since some of the provisions seem to create a legal basis for access to personal data processed in IMI by the Commission. Ambiguities regarding the Commission’s future role also arise from the explanatory memorandum of the proposal, where it states that “the Commission could also take an active part in IMI workflows”.

The Working Party is critical of a possible expansion of the Commission’s role and a resulting expansion of its possible access to personal data of EU citizens.

In the interest of clarification, the Working Party recommends specifying the wording of the relevant passages in Article 9 and the explanatory memorandum and making clear that the Commission has no access to personal data processed in IMI. An exception – as is presently the case – would be allowed only in special cases in which special legislation provides for information-sharing between a Member State and the Commission.

6. Access of “external actors” to personal data

Article 5 (i) of the proposal defines “external actors” as “natural or legal persons other than IMI users that may use IMI (...) in accordance with a specific pre-defined workflow”. In addition, Article 10 governing the access rights of IMI actors and users contains a clause allowing external actors to use IMI.

The Working Party has concerns against the opening of IMI to external users, because IMI was designed to serve the exchange of information between Member States’ authorities but not between authorities and individuals or businesses. Opening its use up to external actors would fundamentally alter this intention of IMI and would have direct implications for issues of data protection and data security. If the strategy of closed user groups is to be abandoned, it will be necessary to revisit the issue of overall system security in particular. The present proposal does not yet adequately address the implications of opening IMI to external actors. In view of the current status of development, the Regulation should not open IMI or describe the role of external actors.

In the Working Party’s view, the possibility of data subjects to exercise their rights directly using IMI, which Article 10 (7) also provides for, does not constitute access by “external actors” as defined in Article 5 (i). The two forms of access to IMI have to do be distinguished: In one, data subjects are exercising their rights to information about data relating to them; in the other, IMI is to be used for communications between private agencies and administrative authorities of the Member States. This distinction should also be reflected in the regulatory structure (Article 18 covers the rights of data subjects in physical terms; this article specifies the rights of access, correction and erasure. The form of granting access should therefore also be covered in this article).

7. Right of access, correction and erasure

The right of access, correction and erasure is already regulated by the Directive 95/46/EC and the Regulation 45/2001/EC. It is questionable why IMI requires a special legislation in this matter.

According to Article 12 of Directive 95/46/EC and Art 14 of the Regulation 45/2001/EC personal data must always be deleted or corrected if they are incomplete or inaccurate. Article 18 (2) of the proposal does not meet this standard, as it states that personal data blocked for 18 months and retained for a total of five years should not be corrected or deleted, unless it can be “clearly demonstrated” that such correction or deletion is (i) necessary to protect the rights of the data subject and (ii) does not undermine their value as proof of an information exchange by means of IMI.

These two criteria inappropriately restrict the rights of data subjects and set an unreasonably high barrier to correction or deletion. This creates the risk that rights of correction and erasure will in fact be impossible to exercise, which would mean that inaccurate or incomplete data would remain in the system for five years.

In general, the required steps for practicing the right to access etc. should be elaborated in a more transparent way. This includes the specification of further procedural aspects (addressee of the requests, formal requirements, etc.)

8. Specification of the authorities responsible for data processing

Information exchange by means of IMI creates a complex network of controllers and processors. This means that it may not always be clear whether actors are processors, controllers or both. Given the various roles and actors in IMI, it is therefore necessary to define which actors are regarded as controllers for which kinds of data processing. The Working Party also refers to its comments in Opinion 7/2007 (WP 140).

9. Coordinated Supervision

Article 20 (3) governs the coordinated supervision by the European Data Protection Supervisor and the national supervisory authorities of the IMI system and its use. For effective supervision of IMI and its use, coordinated and harmonized supervision among the EDPS and national supervisory authorities should be ensured in practice.

The Working Party recommends that the IMI Regulation should at least: (i) set out and divide more clearly the respective data processing activities of IMI actors that fall under the respective competences of national data protection authorities and the European Data Protection Supervisor, (ii) refer explicitly to the active cooperation required among the authorities involved to ensure adequate coordination of supervision, and (iii) specify how this cooperation will be carried out in practice, for example, in terms of information exchange.

With harmonized supervision and compliance of the use of IMI being the goals, it may be desirable to hold regular meetings, based on the rules of procedures to be adopted. However whilst effective coordination is essential, any development of a coordinated supervision mechanism must recognise the limited resources of data protection authorities, avoiding the setting up of new and costly mechanisms, and making use - instead - of the already existing and operative *fora* for cooperation between DPAs.

10. Specific provisions on special use (alert mechanism)

The data protection provisions in the proposal for an IMI Regulation refer to the general functions of the system and define the principles to be respected in this context. However, the proposed regulation does not cover the especially sensitive use of IMI beyond general information exchange, as is currently the case with the alert mechanism, for example. The alert mechanism is a warning system defined in Article 29 (3) and Article 32 of the Services Directive: “Upon gaining actual knowledge of any conduct or specific acts by a provider ... that, to its knowledge, could cause serious damage to the health or safety of persons or to the environment, the Member State of establishment shall inform all other Member States and the Commission within the shortest possible period of time.”

Due to its exceptional impacts on the data subjects, the alert mechanism requires special data protection guarantees. This concerns in particular the information of the data subject if and by whom an alert was / will be issued. Due to the possible detrimental consequences for the affected data subject a member state which supplies the information should inform the person concerned thereof as well as about the means of redress available. Further provisions are also needed on questions concerning specific rights of access to alerts, suspension of alerts no longer needed, specific rules on deletion, etc. In order to prevent a regulatory gap, the IMI Regulation should therefore also contain special, legally binding provisions for information exchange which goes beyond general use of IMI.

The Working Party would highly appreciate your taking these comments into account and trusts that its considerations will contribute to the Commission's effort to put forward a legislative proposal which meets the objective to provide a comprehensive data protection framework by setting the appropriate rules for the processing of personal data. The Working Party remains at your disposal for further consideration.

Jacob Kohnstamm
Chairman

Cc: Ms Viviane Reding, European Commission Vice-President in charge of
Justice, Fundamental Rights and Citizenship
Mr. Jerzey Buzek, President of European Parliament
Mr. Yves Leterme, Presidency of the Council of the European Union