# WORKING PARTY COMMENTS TO THE VOTE OF 21 OCTOBER 2013 BY THE EUROPEAN PARLIAMENT'S LIBE COMMITTEE

On 21 October 2013 the Civil Liberties, Justice and Home Affairs (LIBE) committee of the European Parliament (EP) voted on the general data protection Regulation and the Directive for the law enforcement sector.

The Working Party has analysed the outcome of the vote in LIBE committee in order to identify the remaining points of concern which the Working Party feels should be addressed during the negotiations, whilst recognising the many improvements made by the EP to the text proposed by the European Commission in January 2012. These comments concentrate on main issues, without prejudice to possible additional questions.

The Working Party is pleased to see that many of its suggestions and recommendations have been taken on board. It particularly welcomes the fact that the LIBE committee remained committed to the "package approach" and enhanced the European Union's progress towards a comprehensive framework for data protection by voting on both the Regulation and the Directive.

The Working Party also welcomes that the LIBE committee left no doubt that the Regulation should apply for both the private and the public sector. The Working Party considers a harmonised approach to both sectors as a key condition in order to ensure a high level of data protection not only in the private but also in the public sector.

## REGULATION

### Key concepts

*Consent*

The Working Party supports the fact that the LIBE committee has not changed the proposed definition on consent, thereby keeping the requirement for consent to be explicit. Already in its opinion on consent, the Working Party made clear that for consent to be valid, there should be no doubt about the data subject's intention to consent. Therefore only statements or actions, not mere silence or inaction, can constitute valid consent. At the same time, the Working Party would like to stress that consent cannot be a valid legal basis where a significant imbalance between the positions of the parties concerned might prejudice the freedom of the data subject to consent.

*Purpose limitation*

In addition, the Working Party welcomes the deletion of Article 6(4) of the Commission's proposed text, which seriously undermined the purpose limitation principle. Personal data must be collected for 'specified, explicit and legitimate purposes' and not be 'further used in a way incompatible' with those purposes. Further processing for a different purpose does not necessarily mean that it is incompatible, but the compatibility must be assessed on a case-by-case basis. Processing in a way that is incompatible with the purposes specified at the time of collection is prohibited and cannot be legitimised by simply relying on a new legal ground. The principle of purpose limitation has always been one of the basic data protection principles.

The Working Party has therefore stressed, most recently in its opinion on purpose limitation, the need to uphold this principle and is pleased to see the LIBE committee has addressed this.

*Sanctions*

Furthermore, the Working Party welcomes the European Parliament’s approach of substantially increasing the powers of the DPAs to issue effective and dissuasive sanctions. In order for data protection authorities to be able to enforce, they should have strong and convincing powers. Being able to impose fines that are sufficiently deterrent will greatly help in ensuring compliance.

However, the Working Party doubts whether there is a justification for privileged sanctioning in case of a European Data Protection Seal as put forward in Article 79(2b). Moreover, should that privilege be sensible, it should provide for a fine only in case of gross negligence or intentional non-compliance. Last, the Working Party would like to stress, that besides the three categories of sanctions laid down in Article 79(2a), the power to impose a ban on processing according to Article 53(1g) is a sanction and should be included in the catalogue of Article 79(2a).

**Access by public authorities and data transfers to third countries**

The Working Party considers that general, massive and systematic surveillance of EU citizens is not acceptable in a democratic society. In this respect the Working Party welcomes the proposal of the LIBE Committee to provide for mandatory information to individuals when access to data has been given to a public authority in the last 12 months. Being transparent about these practices will greatly enhance trust. However, this proposal is not sufficient to ensure a real and effective protection of European citizens and needs to be accompanied by the conclusion of an international agreement, especially between the EU and the US. This agreement should offer a robust and solid framework of protection.

In this respect, for law enforcement authority requests, a more transparent legal framework such as the use of Mutual Legal Assistance Treaties (MLATs) or international agreements in case of disclosures not authorised by Union or Member States’ law, is also much welcomed. The Working Party does furthermore believe that in cases where a MLAT (or comparable international agreement) is in place, the competent authority under the MLAT (or comparable international agreement) should be the authority dealing with the request rather than the data protection authority. Naturally, where necessary, the competent authority under the MLAT should consult the data protection authority.

With regard to data transfers in general, already in its opinion of March 2012 on the proposed package of the Commission, the Working Party stressed that all data transfers outside the EEA must be governed by legally binding instruments. The Working Party welcomes the fact that the LIBE committee in its amended version has ensured this, amongst others by deleting Article 44(1)(h).

*Binding corporate rules for processors (Art.43)*

In addition to BCRs for controllers, the Working Party in June 2012 established a framework to authorise BCRs for processors and officially allows companies to apply for it since January 2013. The Working Party was therefore pleased to see the possibility for organisations to apply for a BCR for processors reflected in the Commission’s proposed text. Unfortunately, following the LIBE vote, amended Article 43 excludes the possibility of BCRs for processors, covering transfers to external subcontractors in BCRs for Controllers.

Considering the Regulation provides for an enlarged role for processors in ensuring adequate data protection and also considering the introduction the accountability principle, the Working Party feels that BCRs for processors are a valuable tool in ensuring adequate protection when transferring data and should therefore not be deleted. BCR for processors provide for an obligation of information towards the controller that all sub-processors' activities, which allows him or her to object to any new sub-processing and to duly inform the data subjects. The Standard Contractual Clauses of 2010 also cover this situation.

**Governance**

Where data subjects in several member states are likely to be affected by processing operations of a company or where a company has more than one establishment in the EU, the Working Party is in favor of the concept of a lead authority and a clear obligation for data protection supervisory authorities to cooperate. Such a mechanism will contribute to a consistent interpretation and application of the EU legal framework, and to enhancing legal certainty. The Working Party therefore supports the amended text as adopted by the LIBE committee in so far as it provides for a lead authority that acts as a single contact point for the controller and takes care of the decision making procedure in which all concerned supervisory authorities take part and which ensures a legally binding outcome.

The Working Party would however be in favor of providing for even more proximity for citizens. The starting point should be that local cases should be dealt with by the local data protection supervisory authority. In cross border cases, possibilities of data subjects to seek redress locally against decisions having an impact on them could also be strengthened.

The Working Party also believes that giving the data subject a right to oblige the local supervisory authority to bring proceedings against the lead authority (Art. 74(4)) is inappropriate. This mechanism will neither contribute to a good cooperation between the supervisory authorities nor to a consistent application of the Regulation.

The Working Party furthermore welcomes the proposed alterations concerning the consistency mechanism. It is especially pleased that the Commission’s suspension power according to Articles 60, 62 (1a)(2) has been removed, as it was not in line with the supervisory authorities’ independence (WP 191).

**Exemptions provided for pseudonymous data**

Notwithstanding the fact that pseudonymisation can be a useful tool to enhance the protection of personal data, the Working Party would like to reiterate that pseudonymous data is personal data, so far as the possibility of re-identification exists, with reasonable means, to be applied by the controller or any third party.

*Legitimate interest*

The Working Party appreciates that the legitimate interest of the controller or of a third party to whom the data is disclosed could be a legal ground for processing, as is also the case under the current Directive 95/46, provided it is not overridden by the rights and interest of the data subject. It also welcomes the introduction of the additional requirement that the processing should be in line with the reasonable expectations of the data subject in the context of its relationship with the controller.

The Working Party is concerned however that the wording of recital 38 as proposed by LIBE could give rise to misinterpretation and could be misunderstood as an exemption for the controller's obligation to carry out the important balancing test underlying this legal ground when processing pseudonymous data. The use of appropriate anonymisation/ pseudonymisation techniques as a means to provide safeguards to ensure fair processing of personal data may play a role in determining whether the legal ground of legitimate interest can be legally used, but it remains only one factor among many. For the sake of legal certainty, the Working Party would strongly advise deleting this particular sentence.

The Working Party reminds that direct marketing in the context of online behavioural advertising and e-mail marketing should in general be subject to the data subject's prior consent. It is concerned that Article 6(f) read in conjunction with the revised Article 19(2) could be interpreted in a way that direct marketing purposes are always regarded as an overriding legitimate interest and calls for a clarification in Article 19(2).

*Profiling*

The Working Party notes that Article 20 concerning profiling has changed from a general prohibition of some categories of measures based on profiling to allowing profiling in specific cases. It however appreciates that additional safeguards are provided for, such as the prohibition of purely automatic decision-making and of profiling when this has discriminatory effects.

The Working Party does however have similar concerns with regard to the wording of the new recital 58a as with the amended recital 38. Recital 58a provides that profiling based solely on pseudonymous data should be presumed not to significantly affect the interests, rights and freedoms of the data subject. Considering profiling can potentially have a large impact on an individual's life, even when pseudonymous data is used, the Working Party strongly advises not to include such a recital in the final text of the Regulation.

**Certification**

Amended Article 39 provides controllers and processors the possibility to request from the data protection supervisory authority to certify that the processing of personal data is performed in compliance with the Regulation, subject to a reasonable fee. The audit to establish compliance may be done by a third party, but the final certification must be done by the supervisory authority, who is not granted any discretionary powers in this regard.

The Working Party is in favour of encouraging certification, but feels a better definition and description of the elements of the certification process should be included. The Working Party fears that the role of the data protection supervisory authorities currently envisaged in Article 39 will greatly impact on the supervisory role and independence of the data protection authorities. In addition, the provision would practically mean that in case of non-compliance of a controller or processor, the data protection supervisory authority should first prove that this non-compliance stems from a deviation from the model that was certified, before any other action can be considered. This would in many cases make enforcement very difficult, if not impossible.

Instead of certifying individual companies, the Working Party would prefer a mechanism in which data protection supervisory authorities (or the EDPB) provide guidance by setting the requirements and safeguards that certification schemes should meet to ensure compliance. Subsequently, it could be foreseen that the data protection supervisory authorities (or the EDPB) certify the certifier, by appointing/approving one or more independent bod(ies) that can certify companies.

**Administrative burden**

The Working Party recognises the need to provide exemptions from some specific obligations applying to controllers for certain processing operations. The Working Party however feels that instead of the total number of employees of a company, as proposed by the Commission, it would be more suitable to take into account the nature and extent of personal data processing, as well as the number of staff directly involved in the processing of personal and and/or the number of data subjects concerned. The Working Party has doubts whether the changes proposed by the LIBE committee (5000 data subjects per year and not processing special categories of data) provide for a sufficiently scalable approach.

**Icons**

The Working Party understands the idea of trying to make it easier for data subjects to understand what processing operations and privacy practices a certain controller (or processor) undertakes. The Working Party however does have reservations about the manner in which this is proposed in Article 13a, especially since icons for practices that are not allowed under the Regulation are provided.

**Accountability**

The Working Party considers that a strong accountability principle contributes to a more effective data protection framework. It notes that the LIBE committee has deleted many of the requirements in the amended version of Article 28, focussing more on the rights of data subjects and the responsibility of the controller to ensure it is in compliance and be able to demonstrate this. Deleting this however also may make it more difficult to monitor compliance and establish possible breaches of the Regulation, but is nevertheless welcome where it is ensured that data controllers take genuine steps towards accountability rather than introducing a tick-box.

**DIRECTIVE**

The Working Party welcomes the amendments made by the LIBE committee to the proposed Police and Justice Data Protection Directive. The amendments show a clear wish to improve the original Commission draft on many levels. The Working Party supports in particular the fact that the Parliament maintains the applicability of the Directive to both domestic and trans-border processing operations. As it has stated before, there are no good reasons to make a distinction in the data protection rules for personal data, because it can never be predicted up front if data could become part of a trans-border case in the future.

The Working Party furthermore welcomes the proposal of the LIBE committee indicating the Directive should be regarded as minimum standard. This way, Member States can ensure a higher level of data protection where necessary, should the final text of the Directive not match the current level applicable in their Member State. That said, the Working Party remains in favor of as much harmonisation of the rules as possible providing a high level of data protection, also in order to facilitate trans-border cooperation by law enforcement authorities.

In its Opinion providing further input into the discussions on the Directive, the Working Party has made suggestions for a new provision on how to process different categories of data subjects, as well as for a new provision on access by supervisory authorities to all data, including classified information and welcomes many of its suggestions have been taken over.