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Opinion 10/2004 on More Harmonised Information Provisions

Adopted on 25th November 2004

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 E (Services, Copyright, Industrial Property and Data Protection) of the European Commission, Internal Market Directorate-General, B-1049 Brussels, Belgium, Office No C100-6/136.

Website: www.europa.eu.int/comm/privacy

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MOVING FORWARD ON ACTION 6 OF THE WORK PROGRAMME FOR A BETTER IMPLEMENTATION OF THE DATA PROTECTION DIRECTIVE MORE HARMONISED INFORMATION PROVISIONS

I. Background – The European Legal Framework

The European Data Protection Directive 95/46/EC (“the Directive”) contains general provisions to ensure that data subjects are informed of their rights to data protection. These requirements are contained in the following articles:

- Article 6(1)(a), which requires that personal data be processed “fairly and lawfully”;¹
- Article 10, which contains minimum information that must be provided to the data subject in cases when the data are collected directly from him.
- Article 11, which contains minimum information that must be provided to the data subject in cases when data about him are collected from a third party.
- Article 14, which contains a requirement to inform the data subject before personal data are disclosed to third parties

Overall the requirements in the Directive distinguish between two types of information. These are:

a) Essential information, namely– the identity of the controller and of his representative, if any, as well as the purpose of the data processing except where the data subject already has this information; and b) Possible “further information” including - the recipient of the data, the response obligation and the existence of access and rectification rights, in so far as such further information is necessary having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

Furthermore, the Article 29 Working Party, (the WP) issued additional guidance in its Recommendation 2/2001 (WP 43, 17 May 2001) on certain minimum requirements for collecting personal data on-line in the EU. In its 2001 Recommendation, the WP gave important concrete indications on how the rules set out in the Directive should be applied to the most common processing tasks carried out via the Internet. It focussed in particular on when, how and which information must be provided to the individual user and it was the first initiative to spell out on the European level a “minimum” set of obligations in a way that can be easily be followed by data controllers operating web sites. The present

¹ As explained by Recital No. 38 of the Directive, “...if the processing of data is to be fair, the data subject must be in a position to learn of the existence of a processing operation and, where data are collected from him, must be given accurate and full information, bearing in mind the circumstances of the collection...”.

opinion of the WP follows on from this Recommendation addressing the issue of more harmonised information to be provided in both on-line and of-line contexts.

II. The Current Implementation Framework

The Commission's first report on the implementation of the Data Protection Directive (COM (2003) 265 final) looked at the implementation of the information provisions in the Directive. The report concluded that the *implementation of Articles 10 and 11 of the Directive showed a number of divergences. To some extent this is the result of incorrect implementation, for instance when a law stipulates that additional information must always be provided to the data subject, irrespective of the necessity test the Directive foresees, but also stems from divergent interpretation and practice by supervisory authorities.*

Indeed, the laws in the Member States vary very considerably with regard to the kinds of information that must be provided, the form in which it must be provided, and the time at which it must be provided. They also differ as to the kinds of additional information that may need to be provided to ensure a fair processing. Some Member States repeat the examples given in the Directive, others give somewhat different examples, and some give no examples at all. While some Member States stay quite close to the Directive's requirements, others have diverted considerably from them. More detailed information on national legislation is given in the **technical analysis** of the transposition of the 95/46 Directive in the Member States which accompanies the First Report on its implementation. (http://europa.eu.int/comm/internal_market/privacy/lawreport/data-directive_en.htm)

These differences led the Commission to conclude that:

“The present patchwork of varying and overlapping requirements as regards information that controllers have to provide to data subjects is unnecessarily burdensome for economic operators without adding to the level of protection.”

III. The work programme for a better implementation of the data protection directive (2003-2004)

In order to ensure a more consistent approach to information requirements, the Commission included “*More harmonized information provisions*” as a specific action item (Action 6) of the work program for a better implementation of the directive. In this Action item, two parallel areas of work are identified:

1. Action to ensure consistency between national information requirements and the Directive:

“In so far as information requirements placed on data controllers are inconsistent with the Directive, it is hoped that this can be remedied expeditiously through dialogue with the Member States and corrective legislative action by them.”

2. Article 29 Working Party collaboration in the search for a more uniform interpretation of Article 10

In the interests of moving forward on the second strand of action identified in Action 6 of the work program, the present opinion of the WP aims to establish a common approach for a pragmatic solution which should give a practical added value for the implementation of the general principles of the Directive towards developing more harmonized information provisions.

Such a pragmatic approach does not of course dispense the controllers from their present obligations to check their processing against the full range of requirements and conditions set up in the applicable national law in order to make it lawful.

IV. The reasons to develop a more harmonized EU data protection information regime

Four main reasons have been identified in support of more harmonized interpretation of Articles 10 and 11. These are:

1. The need to facilitate compliance across the EU

The Flash Eurobarometer 2003 survey of company practices clearly indicated that compliance with current information requirements is a problem. Responses from companies show that they do not always comply with data protection legislation by giving individuals the information to which they are legally entitled. For example only 37% of companies said they systematically provided data subjects with the identity of the data controller and only 46% said they always informed data subjects of the purposes for which the data would be used.

While the Eurobarometer survey suggested that larger companies are more likely to provide the relevant information than smaller ones, submissions to the review process on the directive stressed the difficulties even for larger companies seeking to comply with the current diversity of information requirements².

2. The need to improve citizen's awareness of data protection rights

The results of the special Eurobarometer Data Protection survey highlighted the low level of citizen's awareness of data protection rights.

Only 42% of EU citizens are aware that those collecting personal information are obliged to provide individuals with certain information, such as at least their identity and the purpose of the data collection.

Simpler notices that facilitate citizen's awareness could help improve the current levels of understanding of data protection rights and responsibilities.

² See for example the views of the EPOF (European Privacy Officers Forum): http://europa.eu.int/comm/internal_market/privacy/docs/lawreport/paper/epof_en.pdf or the EU Committee of the American Chamber of Commerce: http://europa.eu.int/comm/internal_market/privacy/docs/lawreport/paper/amcham_en.pdf

3. The need to present information with meaningful, and appropriate content to the data collection situation

While the Directive makes a clear distinction between the basic information and possible “further information”, this distinction has not always been taken up in national interpretations. The result is that in some cases all national information requirements have to be given in all data protection collection situations. Such kind of interpretation does not reflect the spirit of Article 10 which makes a clear distinction between essential information and possible “further information” which should be provided only to the extent that is necessary to guarantee fair processing having regard to the specific circumstances in which the data are collected.

The requirement to provide extensive information in all data protection collection situations, irrespective of the necessity test that the Directive foresees, does not take into account the limitations of space or time in a number of data collection situations.

4. The need to improve the quality of data protection from the individuals’ perspective.

On-line notices tend to be very long and contain legal terms and industry jargon. The value of such notices has been questioned in a study in 2002 by Consumers’ International entitled “Privacy@net, An International comparative study of consumer policy on the Internet”. This called for improved privacy information – and short, readable formats.³

V. Progress made so far – International Discussions

The need for improved information on data protection has also been recognized at international level and important steps have already taken place at:

- 1. The 25th International Conference of Privacy and Data Protection Commissioners in Sydney.** This led to agreement on the Resolution contained in Annex 1. This resolution highlighted the need for greater consistency at the global level and stressed that notices must include:
 - The information that is most important for individuals to know
 - The information that individuals are most likely to want to know and
 - The use of simple, unambiguous and direct language.
- 2. The workshop in Berlin in March 2004 that brought together public and private sector experts interested in building on the 25th International**

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<http://www.consumersinternational.org/publications/searchdocument.asp?PubID=30®ionid=135&langid=1>

Conference Resolution. These discussions led to agreement on a Memorandum the full text of which is contained in Annex 2. This Memorandum endorsed the key strands of the 25th International Conference Resolution stressing the importance of comprehension, plain language, brevity and consistency. In addition, the memorandum explores :

- **How multi-layered notices could fit in a framework for compliance.**
The memorandum suggests that information for data subjects could, where appropriate, be provided in a multi-layered format under which each layer should offer individuals the information needed to understand their position and make decisions. The memorandum also supported the idea of a framework for compliance. The idea is that in a multi-layered notice format the total format (i.e. all the layers taken together) must be compliant with relevant law, while each individual layer must communicate the information necessary for the individual to make an informed decision at that point in time.
- **Some of the key concepts to be included in short notices**
It also supports the need to encourage consistent formats for notices.

3. **In September 2004 research was presented at the 26th International Conference of Data Protection and Privacy Commissioners in Wroclaw, Poland which demonstrated the need for easily understandable fair processing and privacy notices.** Notices need to be short, with limited categories of information and text, and must be in plain language. To assist comprehension and memory retention – and to promote more general awareness of data protection issues - they should preferably use a common format or standardized template. Layered notices, with full information available on request, can be used to communicate information available and ensure compliance with applicable law.

The Wroclaw conference was also told of research undertaken by MSN in Germany and Hong Kong to test the reaction of individuals towards actual layered notices. In both locations, despite differing concerns, individuals preferred the layered approach to conventional notices and saw them as more customer-centric privacy statements. The potential for the layered notice approach to be used internationally and in internet transactions was particularly noted.

VI. Towards a pragmatic solution - EU Information Notices

At this stage, an important step would be to reach an agreement on the practical added value of developing information notices which would ensure a more harmonized interpretation of the Directive's relevant provisions across the European Union and that would meet simultaneously, the objectives of:

- Easier Compliance
- Improved awareness on data protection rights and responsibilities
- Enhanced quality of information on data protection

In the hope of encouraging a consistent approach to informing data subjects, a proposal is laid out below. This proposal is based on an analysis of the legal requirements set in the national data protection laws of the EU Members States and taking into account the Resolution of the 25th International Data Protection Commissioners Conference, the Berlin Memorandum which meets private sector's concerns, the needs of data subjects and, most importantly, the Directive 95/46/EC.

Principles of Proposal

- **Support for the principle that information provided to data subjects, should use language and layout that is easy to understand.** Comprehension by data subjects is an important objective so they can make informed decisions and have the knowledge and understanding to influence the practices of data controllers and processors. In this context it is important to ensure that information is given in appropriate manner to people with particular needs (eg. children).
- **Support for the concept of a multi-layered format for data subject notices.** Multi-layered notices can help improve the quality of information on data protection received by focusing each layer on the information that the individual needs to understand their position and make decisions. Where communication space/time is limited, multi-layered formats can improve the readability of notices
- **Acceptance of short notices as legally acceptable within a multi-layered structure that, in its totality, offers compliance.** The sum total of the layers must meet specific national requirements, while each individual layer will be considered acceptable as long as the total remains compliant. In this way, businesses can use a consistent short EU data protection notice in consumer communications as long as they ensure that consumers can easily access information required under the national data protection regime.

What information to be given in the EU Privacy Notices?

- Following the Directive a distinction can be made between two types of information to be given to the data subject upon collection of personal information. These are: Essential information **that should be provided in all circumstances** where data subject does not have this information already which includes the identity of the data controller and of his representative, if any, as well as the purpose of the data processing
- Further information which should be provided if it is necessary to guarantee fair processing **having regard to the specific circumstances in which the data are collected**

Going beyond this, there is also a third category of information which is nationally required and goes beyond the Directive's requirements, this includes information such as the name or address of the data protection commissioner, details of the database and reference to local laws.

The Working Party in its present opinion endorses the principle that a fair processing notice does not need to be contained in a single document. Instead –so long as the sum total meets legal requirements - there could be up to three layers of information provided to individuals as follows:

Layer 1 – The short notice

This must offer individuals the core information required under Article 10 of the Directive namely, the identity of the controller and the purposes of processing - except when individuals are already aware-and **any additional information which in view of the particular circumstances of the case must be provided beforehand to ensure a fair processing**. In addition, a clear indication must be given as to how the individual can access additional information.

Furthermore, there are some privacy-related situations in which it could be helpful to use even very short notices e.g. when the available space for information is extremely limited. So, very short notices could be developed for the display of mobile phones or other small devices. Sometimes even the use of pictograms can provide the necessary notice to the concerned persons. Obvious examples are the information on the installation of video-cameras or the use of RFIDs hidden in products.

Appendix 1 is an example of a short notice which could be adapted for use by a pan-European trading company.

Layer 2 – The condensed notice.

Individuals must at all times be able to access a notice of information to include all relevant information required under the Directive. This includes, as appropriate:

- The name of the company
- The purpose of the data processing
- The recipients or categories of recipients of the data
- Whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply
- The possibility of transfer to third parties
- The right to access, to rectify and oppose
- Choices available to the individual.

In addition, a point of contact must be given for questions and information on redress mechanisms either within the company itself or details of the nearest data protection agency.

The condensed notice must be made available on-line as well as in hard copy via written or phone request. Data controllers are encouraged to present this notice in a table format that allows for ease of comparison. Appendix 2 is an example of a condensed notice.

Appendix 3 demonstrates how a condensed notice template could be used to give passengers on transatlantic flights the same information proposed for the Short Notice by the Article 29 Working Party in its Opinion 8/2004 of 30 September 2004. Both examples are designed with internet transactions in mind but can be easily readapted for off-line transactions.

Layer 3 – The full notice.

This layer must include all national legal requirements and specificities. It may be possible to include a full privacy statement with possible additional links to national contact information.

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The examples are well-suited for on-line activity, especially where a click through is provided from the short or condensed notice. They can easily be adapted for hard-copy format for off-line transactions, provided the individual is given a simple means (such as a free phone number) to obtain the required information.

APPENDIXES

- Appendix 1 example of a short notice
- Appendix 2 example of a condensed notice
- Appendix 3 example of a condensed notice for air travellers