

## **Annex 2**

### **Proposals for Amendments regarding exemption for personal or household activities**

#### **The situation under Directive 95/46/EC**

Article 3(2) of the current Data Protection Directive (95/46/EC) states that the Directive shall not apply to the processing of personal data done by a natural person in the course of a purely personal or household activity. Recital 12 refers to activities which are exclusively personal or household, and clarifies that activities such as correspondence and the holding of records of addresses are excluded from the Directive. The exclusion of processing done for personal or household activity is reflected in many Member States' domestic data protection laws, through the absolute exclusion of such activity from their scope or through exemption from certain parts of the law. The situation varies from country to country with some laws applying to personal or household processing to some extent. For example, some laws exempt personal processing from the data protection principles but not from the Data Protection Authority's powers of investigation.

In practical terms, this means that – on the whole - Data Protection Authorities have little – or no – involvement with issues arising from private citizens' processing of personal data for their own personal or household activities. Instead, DPAs have focused their attention almost exclusively on processing done by corporate entities or by natural persons – i.e. individuals - acting in a professional capacity – for example financial advisors or doctors. It is important to decide whether the current treatment of personal or household processing is sustainable given the enormous qualitative and quantitative changes that have taken place in this sphere since the current Directive was drafted. We will conclude that the processing of personal data done for exclusively personal or household purposes should remain exempt from the law's substantive provisions. However, we will also argue that the law must provide much clearer guidelines to help DPAs – in particular – to determine whether the processing falls within the scope of the exemption or not. We will also argue that there is a strong case for certain parts of the law – for example DPAs' power of investigation – to apply to all the processing of personal data, regardless of the circumstances in which it takes place. This should give DPAs the discretion to carry out a thorough investigation where processing is proving problematic for a particular reason and where it is not clear – in borderline cases - whether the processing falls within the exemption or not. This could allow DPAs to make meaningful interventions in particular cases whilst not setting them up to be the regulator for all the processing of personal data that individuals perform on the internet – an impossible task now and one that will grow even more unachievable in the future.

The Article 29 Working Party notes that - historically – the personal or household activities exemption in data protection law has been quite distinct with regard to its scope from the exemption relating to the purposes of journalism or artistic or literary expression. However, increasingly, this is not the case. Rather than relating to individuals' correspondence or their holding of records of addresses, for example, the queries and complaints DPAs receive increasingly concern individuals' *publication* of personal data, either about themselves or about other individuals. It would be wrong to say that all of an individual's personal online activity is being done for the purposes

of journalism or artistic or literary expression. However, the advent of ‘citizen’ bloggers and the use of social networking sites to carry out different forms of public expression, mean that the two exemptions have become conflated. The interaction between the two exemptions – and their scope - could have a significant impact on competing rights. It is certainly the case that an inappropriate level of scrutiny and regulation of natural persons’ personal or household processing activities by DPAs could inhibit individuals’ freedom of speech and could in itself constitute a breach of the individual’s right to privacy. WP29 also notes the positive effect of much online data processing done by natural persons – in terms for example of cultural exchange, the development of new forms of discourse and democratisation. Data protection law must be applied in such a way that these positive aspects of individuals’ personal use of the online world are allowed to flourish.

### **The development of personal or household processing since the Directive**

The reference to correspondence and holding records of addresses in Recital 12 – though merely illustrative – perhaps suggests that the current Directive’s approach to personal or household processing has an unrealistically narrow scope that no longer reflects individuals’ capacity to process data for personal and household activities and has therefore become anachronistic. However, the same references appear in the proposed Data Protection Regulation.

There can be no doubt that ‘ordinary’ citizens’ access to information technology has expanded enormously since the current Directive was drafted in the early-1990s. At that time the processing of personal data performed by individuals for their personal or household purposes would typically be very limited. For example, an individual might:

- Keep an address book of friends and acquaintances on a home PC
- Have files relating to their own commercial affairs – e.g. bank statements, mortgage payments or insurance documents
- Hold records relating to family members’ health checks, school reports and so forth
- Have a basic mobile phone containing individuals’ contact details
- Keep a personal diary containing references to friends and workmates

Although individuals will typically still engage in the sorts of activities listed above, access to the internet – uncommon for natural persons in the mid 1990’s – and more functional information and communications technology (ICT) has opened the way for a range of personal processing activities that the current Directive could not have been expected to anticipate.

For example, today an individual might:

- Run their own website hosting instructional videos of their hobbies – for example flower-arranging
- Use a social networking account to make contact with people all over the world who also have a passion for flower-arranging
- Sell their unwanted birthday presents on an e-commerce site

- Keep a ‘blog’ describing their latest flower-arranging projects and containing commentary of the day to day experience of working in a floristry shop
- Take part in an online petition campaigning against a ban on the importation of tulip bulbs
- Use a mobile phone to share geo-location data with friends so it’s possible for flower-arrangers to meet up in local cafes
- Use e-commerce sites and payment systems to purchase flower-arranging supplies.

The main difference in personal processing that the internet and more powerful ICT have brought about is the possibility for ‘ordinary’ citizens to make personal data about themselves or others available worldwide, to anyone, instantly. Previously, this was a facility only available to certain organisations, for example media or publishing companies. This has inevitably caused legal uncertainty – particularly in terms of the respective liability of individuals posting information – sometimes about themselves but more often about other people - on the internet and of the various organisations responsible for hosting it and making it searchable. Another problematic issue concerns whether an individual posting personal data openly for a worldwide, unrestricted audience can still be considered to be processing the data for personal or household purposes. The latter issue was considered by the Court of Justice in its *Lindquist* and *Satamedia* judgement, which is referred to later in this opinion. It is fair to say that development in individuals’ use of the internet continues to cause legal uncertainty in a number of areas. WP 29 urges the legislature to use the process of introducing new data protection law as an opportunity to reduce as far as possible the legal uncertainty that currently surrounds various aspects of individuals’ personal or household use of the internet.

Access to the internet and more functional ICT has brought many positive new possibilities to individuals – for example instant access to knowledge, services and the possibility of contact with other people worldwide. However, data protection authorities are also experiencing an increasing number of complaints emanating from individuals’ personal use of the internet. A typical complaint might be that a pupil has used a social networking site to say post a derogatory, inaccurate or hurtful message about a teacher. Currently some data protection authorities would reject any complaints about the pupil on the grounds that the processing of personal data involved would fall within the personal or household processing exemption. Some data protection authorities also take the view that other elements of the law – for example those relating to libel or harassment – are more appropriate instruments for dealing with issues such as ‘cyber-bullying’. It is the case though that some DPAs do – increasingly – take on the role of mediating individuals’ internet postings.

### **Criteria for deciding whether processing is being done for personal or household purposes**

The wording of the personal or household processing exemption in the Directive and in national law is relatively clear at first sight. However, DPAs are finding it increasingly difficult to say which processing is personal or household and which is not – because, as explained above, individuals now have the ‘publishing power’ once only available to organisations. A good example of the difficulty data protection authorities can face is where a group of individuals use a social networking site to run

a campaign against a company they believe engages in environmentally damaging activities. It can be difficult to establish objective criteria for distinguishing a loose grouping of individuals pursuing what is a personal cause for each of them – exempt from the Directive - from a formally constituted entity with full data controller responsibilities. However, despite the difficulty, WP29 has developed a set of basic criteria that shall be used in determining whether or not particular processing is being done for personal or household purposes.

None of these criteria are, in themselves, necessarily determinative. However, a combination of these factors shall be used to determine whether or not particular processing falls within the scope of personal or household processing

- *Is the personal data disseminated to an indefinite number of persons, rather than to a limited community of friends, family members or acquaintances?*
- *Is the personal data about individuals who have no personal or household relationship with the person posting it?*
- *Does the scale and frequency of the processing of personal data suggest professional or full-time activity?*
- *Is there evidence of a number of individuals acting together in a collective and organised manner?*
- *Is there the potential adverse impact on individuals, including intrusion into their privacy?*

These criteria could be particularly useful in the initial part of an investigatory process where – for example following the receipt of a complaint – the DPA needs to determine with objectivity and certainty whether the processing in question is being done for personal or household activities or not. This is why we believe that there is a strong case for the DPAs power of investigation provided for in Article 52 of the draft Regulation to be amended to make it clear that DPAs can investigate any processing of personal data to determine a) whether it falls within the terms of the exemption and b) if not, to take action as it would against any other data controller, as is appropriate in the circumstances. However, it is important that DPAs enjoy sufficient discretion here as for logistical reasons they may need to be very selective in terms of the cases they decide to investigate. Again, the criteria set out above will allow the selection process to take place fairly and objectively.

### **Two options for the regulation of personal or household processing**

WP29 can see two basic options regarding the future data protection approach to the processing of personal data done for personal or household purposes.

1. The Regulation should replicate the situation under the current Directive – i.e. processing done for personal or household purposes shall fall absolutely outside its scope. However, DPAs will need to use detailed criteria - such as those set out above - to determine as objectively as possible whether particular processing is or is not being done exclusively for personal or household purposes. The development and use of these criteria is essential given the increasing difficulty – described in this opinion - of determining personal from non-personal processing. Of course once processing is found to fall outside the scope of a person's personal or household purposes, then data protection law

will apply to it. However, depending on its scale and nature, processing done by natural persons could be treated in the same way as processing done by micro and similar enterprises – i.e. the application of the rules should be effective but relatively ‘lite’.

2. The regulation should differ from the current Directive in that all processing of personal data performed – even for exclusively personal or household purposes – should to some extent come within the scope of the Regulation.

This possibility is to some extent already recognised at the end of recital 15 of the draft Regulation, which clarifies that controllers and processors providing the means for the processing would nonetheless remain subject to the Regulation. They have a role to play in ensuring the processing complies with data protection law.

Furthermore, an additional possibility could be to require natural persons processing personal data about other individuals for personal or household reasons also, to a certain extent, to:

- Comply with the Regulation’s basic security requirement – albeit in a ‘lite’ manner
- Respect other individuals’ access, rectification, ‘right to be forgotten’ – for example where a friend requests that information about him or her is taken down from a social networking page
- Make sure any information processed about other individuals is done in compliance with the data protection principles – e.g. the data should be accurate and up to date
- Have a legal basis for processing the personal data
- Tell other individuals that data has been posted about them deal with objections

Note that DPAs should have full powers to investigate whether a natural person’s processing is indeed being done for personal or household purposes. The general power set out in Article 52,1(D) of the proposed Regulation should apply. This power would be particularly useful where there is borderline personal / non-personal processing that comes to a DPAs attention through a complaint from a member of the public, for example.

WP29 can see the attraction of a more complete form of data protection regulation, especially given the increasing number of problems that individuals’ private use of the internet is causing for other individuals. However WP29 also recognises that it would be disproportionate and unworkable in practice to expect natural persons processing personal data for personal or household purposes to be subject to the full weight of the Regulation. Such an outcome would also be unacceptable in terms of its inhibiting effect on other fundamental rights – e.g. the right to freedom of speech and association. The implications of an individual being required to grant subject access to a private diary entry about a friend or acquaintance – and to ensure its content is accurate and not kept for too long - needs careful consideration. This could be a case of data protection law over-extending itself. It is also worth thinking through what members of the general public might think about the possibility of what they see as

their personal communications being inappropriately opened up to ‘official’ regulatory scrutiny. This could jeopardise a long tradition of respect for individuals’ private lives. It is also difficult to envisage how – in reality – DPA’s could ‘police’ individuals’ personal or household processing. The logistical and practical issues might be insurmountable.

On balance, WP29 is attracted to the approach of genuinely personal or household processing remaining exempt from the Regulation, but DPAs having an express power to investigate the nature of the processing and whether it falls within the exemption or not. There is clearly a role for public education and initiatives by DPAs, civil society and those providing information society services to help citizens to make better information choices as to what personal data – about themselves or others – they post on the internet. However, we need to be mindful of the logistical challenge of attempting to raise awareness on the part of all of the EU citizens that post information on the internet, or who have information posted about them by others. This is a particular issue given the complicated relationships between the various organisations responsible for delivering and regulating online services.

Even if there is a partial-coverage or ‘lite’ approach to the regulation of personal or household processing, it would perhaps be unrealistic to expect ‘ordinary’ members of the public to comply with even the most basic features of data protection law. The implications of even partial coverage for personal or household processing need to be thought through carefully, in logistical, broad policy and public acceptability terms.

### **Other relevant elements of the law**

In expressing its attraction to maintaining the exemption, WP29 is nonetheless mindful of the extremely serious, and growing, problems that can be caused for individuals by third parties posting information about them on the internet, for example on social networking sites. Where this is being done for personal or household purposes and therefore falls within the terms of the exemption, there is no action that DPA’s will be able to take to protect individual victims of malicious or otherwise damaging postings. WP29 recognises, therefore, the importance of other elements of the law in terms of protecting individuals against damaging material posted for domestic or household purposes. WP29 notes that there is no pan-EU law that defends individuals in these circumstances, but that there are a number of Member State national laws that are relevant here – for example laws relating to:

- libel
- harassment
- malicious communications
- threatening behaviour
- incitement, and in some cases
- persecution, or
- discrimination

Whilst DPA’s can have no formal role in enforcing these laws, they should – as far as is practicable – be prepared advise individuals as to other sources of redress when they are the victims of personal data processing that falls within the scope of the personal and household processing exemption. DPA’s should also continue to monitor

the situation closely and if there is evidence that individuals are going unprotected from serious harm, WP29 should be prepared to issue an opinion as to how the situation might be rectified. DPA's should also continue to work with leading players in the industry – for example social networking companies and search-engines – to make it easier for individuals to have malicious or damaging content taken down from the internet. (WP29 notes the future significance of the right to be forgotten in this context.) WP29 also notes, though, that it is necessary to draw a distinction between a failure of online etiquette and a contravention of the law, and to recognise that even though an individuals may object to information being posted about them, in some cases they may have no legal remedy.

### **Treatment of personal or household processing under the proposed Data Protection Regulation**

Given the scale of individuals' use of the internet and ICT for their personal purposes – something that is sure to increase as the next generations of 'digital natives' conduct more and more of their personal activity online – it is essential that the proposed Regulation adopts an approach to personal or household processing that:

- Makes it as easy as possible for data protection authorities, individuals and organisations to determine which processing is being done for personal or household purposes and which is not and to understand the responsibilities that individuals and organisations have in respect of such processing.
- Recognises that individuals should continue to be free to process personal data for genuinely personal or household purposes without unnecessary interference from data protection or other agencies.
- Recognises that the availability of increasingly sophisticated information technology to the public can affect the boundaries of personal or household processing. This could present a need for individuals to be held accountable for the information they process – particularly if there is a detrimental effect on another individual's privacy.
- Strikes the right balance between the protection of privacy and the right to receive and impart information.
- Recognises the logistical challenge – perhaps the impossibility – of expecting hundreds of millions of European social network users to comply with data protection rules, albeit in a limited way. But also recognises the positive role of DPAs and other organisations in respect of the 'informational' education of users of social networks and other services.
- Provides realistic application of data protection rules in respect of natural persons – i.e. individuals – whose processing activity falls outside scope of the exemption – because it is being done as part of a professional activity for example. Arrangements could mirror those that apply to micro-enterprises, depending on the scale and nature of the processing

### **The approach under the proposed Data Protection Regulation**

Recital 15 of the proposed Regulation says that:

*This Regulation should not apply to processing of personal data by a natural person,*

*which are exclusively personal or domestic, such as correspondence and the holding of addresses, and without any gainful interest and thus without any connection with a professional or commercial activity. The exemption should also not apply to controllers or processors which provide the means for processing personal data for such personal or domestic activities.*

WP29 is pleased that it is proposed that there should continue to be an exemption relating to personal or household processing, and that continuity of language is largely preserved. However, WP29 is concerned that the new elements of the provision, namely the references to gainful interest and connection with a professional or commercial activity, could cause confusion.

### **Gainful interest**

WP29 assumes that the reference to ‘gainful interest’ is meant to make it clear that the processing of personal data done for the purposes of commercial activity does not fall within the exemption. The term ‘gainful interest’ certainly suggests financial advantage. WP29 fully accepts the intention of the wording. However, there is no doubt that individuals can engage in activity that results in ‘gainful interest’ but can do so in a purely personal capacity. The example above – where an individual sells their unwanted birthday presents on an e-commerce site is an obvious example of ‘personal’ gainful interest. Another example might be where a child uses the internet to raise sponsorship money for a charity run – should this fall within the scope of data protection law? On the other hand there is processing done by individuals – or groups of individuals - that is not for gainful interest but is clearly not being done for personal or household purposes and that should fall within the scope of data protection law – conducting an organised political campaign might be an example.

The logistical implications of bringing tens – or hundreds of millions – of European users of online auction sites within the scope of the Regulation needs to be thought through carefully. It is wrong to impose the full responsibilities of a data controller on individuals who merely use the internet to sell their own personal possessions, for example. (Such activity will involve the processing of personal data in respect of the ‘profiles’ individuals use to take part in online auctions.) If the intention is to exclude processing done in pursuit of a formal commercial objective from the exemption – rather than processing that merely results in ‘making money’ - then the wording should reflect this.

### **Connection with a professional or commercial activity**

Again, the rationale for this wording is understandable. However, many individuals use social networking sites or blogs to comment on their experiences at work, for example. In our example above an individual blogs about his day to day experience of working in a floristry shop, perhaps talking about customers and other staff members. WP29 does not accept that the processing of personal data done for a purpose such as this should necessarily fall outside the exemption, simply because any internet user can read the blog. It might be better to amend the wording to say ‘in pursuit of a professional or commercial objective’, rather than ‘in connection’ with it. Thought should also be given as to whether non-commercial, non-personal activity – such as running a political campaign – also needs to be addressed. We also need to consider



whether a natural person's keeping of professional contacts – ones that will not be shared or used by anyone else - is an activity that should fall outside the exemption.

### **Personal processing and dissemination to the world at large**

It has been suggested that, in line with the rulings of the Court of Justice in *Lindquist* and *Satamedia*, a criterion should be inserted to differentiate personal from non-personal processing based on whether the data is disseminated to a finite or indefinite number of individuals.

It is worth noting that in drafting the Regulation, there is no obligation on legislators to give effect to the Lindquist judgement, or indeed any other judgements made in relation to the current Directive. However, it would clearly be prudent to take such judgements into consideration when drafting the new law.

However WP29 finds it difficult to accept that the fact that an individual makes his blog or her social networking profile available to the world at large is – in itself – a factor that means that any processing of personal data done in connection with necessarily falls outside the scope of personal or household processing. However, WP29 recognises that making information available to the world at large should be an important consideration when assessing whether or not processing is being done for personal purposes. However, this should not in itself be considered determinative. Again, there is a need to think through the many consequences – in terms of competing rights as well as logistics – of the possibility of bringing hundreds of millions of social network users – many of whom will have part of their profile open to anyone – and bloggers for example - within the scope of data protection law. The relevant Recital in the Regulation should make it clear, though, that given that no individual has an unlimited number of friends, family members or personal acquaintances, the publication of personal data to an unlimited number of people may indicate that the processing has ceased to be 'personal' and if so will fall outside the scope of the exemption. However, other factors also need to be taken into account.

### **Correspondence and the keeping of addresses**

WP29 reiterates its comment above about the reference to correspondence and the keeping of addresses presenting an out of date and too narrow picture of modern day individuals' personal or household data processing activities. It presents an unrealistically limited picture of the personal data processing activity that 'ordinary' citizens now engage in. References to blogging and social networking, for example - as well as correspondence and keeping addresses – would help update the Regulation to accommodate personal data processing activity that those who drafted the current Directive could not have anticipated.

## Concrete proposals

Recital 15 of the proposed Data protection Regulation currently says that:

*This Regulation should not apply to processing of personal data by a natural person, which are exclusively personal or domestic, such as correspondence and the holding of addresses, and without any gainful interest and thus without any connection with a professional or commercial activity. The exemption should also not apply to controllers or processors which provide the means for processing personal data for such personal or domestic activities.*

This should be reworded to say that:

*This Regulation should not apply to processing of personal data by a natural person, which is exclusively personal or domestic, such as correspondence, the holding of addresses of personal contacts or the use of social network sites that is outside the pursuit of a commercial or professional objective. In determining whether the processing falls within the exemption, consideration should be given to whether the personal data is disseminated to an indefinite number of persons, rather than to a limited community of friends, family members or acquaintances; whether the personal data is about individuals who have no personal or household relationship with the person posting it; whether the scale and frequency of the processing of personal data suggests professional or full-time activity; and whether there is evidence of a number of individuals acting together in a collective and organised manner. The application of the exemption is constrained by the need to guarantee the rights of third parties, particularly with regard to sensitive personal data. In this connection, account should be taken of the extent to which a natural person might be liable according to the provisions of other, relevant national civil or criminal laws, e.g. defamation. The exemption should not apply to controllers or processors which provide the means for processing personal data for such personal or domestic activities. The supervisory authorities shall in all cases have the power to investigate whether particular processing falls within the scope of the exemption.*

Article 2.2(d) of the proposed Data protection Regulation says that:

*This Regulation does not apply to the processing of personal data... by a natural person without any gainful interest in the course of its own exclusively personal or household activity.*

This should be reworded to say that:

*This Regulation does not apply to the processing of personal data... by a natural person in the course of its own exclusively personal or household activity.*