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The Concept of Personal Data in the European Union

On 27 June 2007, the Article 29 Working Party released a long-awaited opinion on the concept of personal data. The opinion explores the concept of personal data by analyzing four different elements of the definition appearing in Framework Data Protection Directive 95/46/EC. The opinion is available at: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2007/wp136_en.pdf

Background

It is well understood that the definition of "personal data" is vital in determining the appropriate scope of the EU's Framework Data Protection Directive (95/46/EC). This Directive imposes strict obligations on entities processing personal data and offers certain rights to individuals whose personal data is processed (data subjects). Article 2(a) of the Directive defines personal data as follows:

> *'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;*

WP Opinion 136

The WP 29 uses its opinion paper to assess the concept of "personal data" by reference to the four main elements of the definition in the Directive: (1) any information; (2) relating to; (3) identified or identifiable; and (4) natural person.

1. Any information

The WP29 distinguishes two particular elements: content and format.

In terms of content, it points out that both objective and subjective information are covered by the definition. Data does not have to be correct to be personal data - it can also express a judgment about an individual, such as in the context of employee evaluations. Also, the information can relate not only to the individual's private life, but also to any other activities in which the individual engages (e.g., at work, in relation to public authorities, or as a patient).

In terms of format, the information can be in any form, such as numerical, alphabetical, graphical, or acoustic. Thus videotapes of CCTV camera images, audio recordings from call centers, and electronic mail will most likely contain "personal data". Biometric data and DNA are also considered personal data, with the added complication that they are unique identifiers. Tissue samples from which DNA can be derived, however, are qualified as "sources" of personal data, but not as personal data themselves.

2. Relating to

The WP29 indicates that often data may not relate to an individual, but to an object (e.g., the price of a house or the IP address of a computer). Where such information can be linked to an individual, it should be considered personal data. In making this determination, the WP29 considers that the relationship of data to an individual can be assessed on three levels: content, purpose and result.

Data can be related to an individual by way of its content, for example, any data "about" a person (name, age, medical record, employee file, etc.). The WP29 argues that data can also relate to an individual because of the purpose for which the data is used, e.g., data collected for the purpose of evaluating or influencing the behavior of an individual. Finally, data may be considered personal data (even without the content or purpose elements being in place) if its processing is likely to have an impact (not necessarily an important impact) on an individual. A single element may suffice to ensure that data "relate to" an individual.

3. Identified or identifiable individual

This is perhaps the most complex and controversial element of the definition of personal data. According to the WP 29:

- a person can be identifiable even if he/she cannot be named; a profile can be sufficiently detailed (on the basis of socio-economic or other criteria) to categorize a person and attribute certain decisions to him or her;
- the possibility of identifying an individual must be seen in light of "all the means likely reasonably to the used" (Directive Recital 26); this is a dynamic test that may change over time and that should take account of costs, the purpose of the processing, and risks to the individual;
- in assessing "all the means likely reasonably to the used," the purpose of the processing will play an important role; data processing operations that envision the identification of a person at some point in time will most likely make the processed data "personal data"; and
- pseudonomized data is personal data, however, the data protection rules can be applied in a more relaxed way because of the low risk to the relevant individuals (provided the data is properly pseudonomized).

4. Natural person

The WP29 considers that data on deceased persons or unborn children will generally not be considered personal data, unless national law provides otherwise or the data reveals information about living individuals. Member States are allowed to broaden the scope of the law to legal persons, and some have done so.

Conclusion

The WP29 opinion offers some very useful insights regarding the definition of personal data, although the discussion of when data can be said to relate to an "identifiable" person may prove controversial. There are other issues, however. In particular, the WP 29 stresses the need for the Directive to be flexibly applied and, on this basis, calls for a broad interpretation of the definition of personal data. This approach could prove challenging to apply in practice. While the Directive may offer Member

States some flexibility in its application, the benefits of flexibility are often lost because of diverging national implementations and interpretations of key provisions by national regulators.

In fact, two recent decisions by an appellate court in France demonstrate some of the challenges ahead in arriving at a uniform understanding of personal data within the EU and application of the "harmonization by interpretation" approach currently promoted by the Article 29 WP and the European Commission. In both cases, the Paris Court of Appeals concluded, in contrast with most EU data privacy regulators, that IP addresses collected in the context of anti-piracy campaigns (thus with the intention of identifying the perpetrator), do not constitute personal data.

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