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Discussion Paper – Session III (Justice)

Data Protection – certain key issues

Household exemption

A minority of EU citizens had access to personal computers, mobile phones and Internet when the Data Protection Directive was adopted in 1995. The opposite is now the case. In 1995, individuals were, by and large, passive subjects of the processing of their data in data bases. Today, they voluntarily supply large amounts of personal data when purchasing goods and services on the Internet and using other online services. And many of them, especially young people, actively publish and share personal data about themselves and, frequently, about other family members and friends on social networking sites.

These developments call into question the traditional concepts of data subject, data controller and data processor and blur the dividing lines between these traditional roles. The data protection implications of these developments pose a challenge for policy makers and regulatory authorities.

Under the 1995 Directive, the processing of personal data "by a natural person in the course of a purely personal or household activity" is excluded from its scope. The European Commission has recognised the need to continue to exempt certain types of domestic data processing from the proposed Regulation: article 2.2(d) provides that the Regulation will not apply to the processing of personal data by a natural person "without any gainful interest" in the course of his or her own "exclusively personal or household activity".

This provision seeks to draw a line between those processing activities which are personal and those which are commercial in nature. The exemption will not apply, therefore, if an individual has a "gainful interest" or if the activity is not "exclusively" of a personal or household nature. For example, if an individual decided to sell a

musical instrument or rare book online, he or she would fall outside the scope of the household exemption and the provisions of the Regulation would apply.

Therefore the Presidency invites Ministers to discuss—

- whether the scope of the proposed household exemption is correctly or too narrowly defined in article 2.2(d);

    - if too narrowly defined, in what way the scope should be extended; for example, by replacing "gainful interest" with "professional gainful interest" and by taking into account the frequency or occasional nature of the activity.

Right to be forgotten

Building on the data subject's existing right to erasure of personal data, article 17 of the Regulation provides for a new "right to be forgotten". The objective is to ensure that individuals have the power to require controllers that store their personal data to erase them once they are no longer needed for any legitimate purpose. It will mean that if an individual no longer wants his or her personal data to be processed – especially data supplied while he or she was a child – and there is no legitimate reason for keeping them, the data must be erased from the controller's system.
This new right takes account, in particular, of evolving technologies and practices and addresses the risks of possible financial, reputational or psychological detriment to data subjects in the context of social networking sites.

Where the data have been made public, the Regulation requires the controller to take "all reasonable steps, including technical measures" to inform third parties that may be processing the data of the data subject's request to erase any link to, or copy of, the data concerned. This limited obligation takes account of the fact that in many cases the initial controller may have no power or influence over the third parties to whom the data have been disclosed or, in the online world and in particular in the context of social networking, may not know the identity of those to whom the data have been disclosed.

As recognised in article 17(3)(a), issues may also arise in relation to balancing this right against other rights, such as freedom of expression. And it is not entirely clear how this right is intended to apply where more than one data subject is involved, e.g. in the case of a photograph featuring several individuals.

Therefore the Presidency invites Ministers to discuss—

- whether they support a strengthening of the existing right to erasure in the form of the new "right to be forgotten";

    - if so, whether the obligations imposed on data controllers arising from the "right to be forgotten" are reasonable and feasible.

Administrative sanctions

Apart from their liability to pay compensation to data subjects, article 79 contains detailed proposals for the imposition of fines on individuals and legal persons for intentional or negligent infringements of the Regulation. The intention is to ensure that the Regulation's safeguards are implemented in an effective manner.

Three categories of fine, with progressively higher upper limits, are proposed:
- up to €250,000 or, in the case of an enterprise, up to 0.5% of its annual worldwide turnover;
- up to €500,000 or, in the case of an enterprise, up to 1% of its annual worldwide turnover;
- up to €1 million or, in the case of an enterprise, up to 2% of its annual worldwide turnover.

It appears, subject to limited exceptions, that the imposition of fines is intended to be mandatory and in each individual case "effective, proportionate and dissuasive". Fines are to be determined by the supervisory authority on a case-by-case basis with due regard to "the nature, gravity and duration of the breach". The factors to be taken into account when determining the level of fine also include:
- the intentional or negligent character of the infringement;
- the degree of responsibility of the individual or legal person and previous breaches; and
- the level of cooperation with the supervisory authority in order to remedy the breach.

Therefore the Presidency invites Ministers to discuss—

- whether the framework of fines set out in article 79 is appropriate;

    - if wider provision should be made for warnings or reprimands, thereby making fines optional or at least conditional upon a prior warning or reprimand;

    - if supervisory authorities should be permitted to take other mitigating factors, such as adherence to an approved code of conduct or a privacy seal or mark, into account when determining sanctions.