

Article 29 group welcomes feedback from industry

Those following international data protection developments have long recognised the need to keep informed about recommendations at EU level. But, says **Laura Linkomies**, what about taking an active role in influencing future policies?

The Data Protection Working Party, created by Article 29 of the EU Data Protection Directive, functions as an advisory body to the European Commission. While not taking legally binding decisions, the group's opinions and recommendations form a basis for the Commission's actions.

The group is actively looking at issues such as the application of the national data protection laws in order to detect any differences in the interpretations of the directive. Therefore, if the level of protection granted fails to meet the required standard, or if there is a data protection matter that needs addressing, the group may give an opinion or recommendation to the Commission. It also evaluates the need for changes in the directive, assesses European codes of conduct and gives an opinion on the level of protection in non-EEA countries.

The group is completely independent from the Commission, which only provides for the Secretariat. It is formed from the national data protection authorities of EU member states, which elect a chairman among themselves for a renewable period of two years. The current chairman, Professor Stefano Rodota, is Italy's Data Protection Commissioner, and the previous chairman, Peter Hustinx, who chaired the group for four years, is Commissioner for the Dutch Data Protection Authority.

In its early days, the group discussed and compared national legislative proposals transposing the directive. Then it was already evident that there would be a lack of harmonisation. These differences, together with practical problems in complying with the national laws, have made sure that the group is still active and has, in fact, produced 70 documents to date. Some of these are position papers that take a general approach while others are more detailed recommendations.

HOW TO GET INVOLVED?

Although the group's meetings are open only to national data protection authorities and their representatives, in addition to Commission representatives, there are ways for organisations and interested parties to influence the thinking of the group and set issues on its agenda.

In most fields of industry, it is the interest groups on a national or European level that are in the best position to influence the group's opinion. Apart from direct contact with national data protection authorities, business representatives often put their views to the Working Party's secretariat.

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The secretariat is made up of European Commission representatives, who, as all Commission civil servants, have an obligation to reply to written enquiries. While most issues for the agenda are initiated by the secretariat or the president of the Working Party, business views play a role as well.

The UK Assistant Commissioner, Jonathan Bamford, who attends the meetings, explained to *PL&B International* that national authorities can suggest items for the agenda if they see them being relevant for all EU countries. "We do not necessarily bring forward issues of any particular company, but if there is a wide concern over a particular problem, it can be addressed. In the UK, trade associations are tradi-

tionally very active in talking to the regulators and we get a lot of feedback through them. On the other hand, as the group has limited resources, we have to think carefully which issues should be discussed at this level."

BENEFICIAL COOPERATION

Business views have been particularly important in the field of trans-border data flows, as well as in initiating codes of conduct. No European codes of conduct have yet been approved, but the Federation of European Direct Marketing (FEDMA) should have its code adopted by June.

Axel Tandberg, FEDMA's government affairs director, who has been involved in the negotiations, told *PL&B International* that the Working Party will make its final comments soon. "The work actually started over six years ago, so it has been a long process. Progress has been slow due to both parties – there has to be give and take from both sides. It has also been hard to be the forerunner, rules have been made as we have gone along."

Tandberg said that the working party has taken small steps towards increased transparency. "At least we are now able to access the work programme for the year ahead. However, it would be useful to see the agenda of each meeting before it takes place, and attend the meetings when the FEDMA code is being discussed."

Business and industry were also very active in voicing their opinion about trans-border data flows at the time when discussions were being conducted about the US Safe Harbor scheme. The Working Party played an important role as one of its functions is to make recommendations to the European Commission on which countries outside of the EU have an adequate level of data protection.

WHY SHOULD THE GROUP'S VIEWS COUNT?

Lately, the Data Protection Working Party has been increasingly active in focusing on data protection issues that arise from the use of new technologies. Its recent opinion, adopted on January 29th (Working Party document 68), regarding online authentication systems has a direct impact on anyone providing these systems, and especially on Microsoft. The company had introduced the Microsoft .Net Passport system, which, in the group's view, ought to provide better protection of personal data for its users (see *PL&B Int*, Feb 2003, p.4). The group's dialogue with Microsoft resulted in the company making a commitment to substantially modify the .Net Passport system. The Working Party will continue to monitor developments in this field, and will be looking at how, for example, Microsoft's Hotmail service uses electronic advertisement communications.

Another example of a company being pressured to take action as a result of the group's recommendation is the case of the launch of Intel's Pentium processor. The recommendation on *Invisible and Automatic Processing of Personal Data on the Internet Performed by Software and Hardware* was adopted in February 1999. Diana Alonso-Blas, who currently provides the secretariat service for the EU Data Protection Working Party, noted the following: "It is not by chance that this recommendation was adopted at the moment in which Intel had announced the launching of its Pentium processor number three, containing an embedded Pentium Serial Number that would identify the user of the computer in the context of electronic transactions" (*Privacy and Informatie*, nr 1, Feb 2001). The company eventually decided to modify its future processors in such a way that took into account the recommendation of the Working Party.

ULTIMATELY THE COMMISSION DECIDES

As the Working Party is only an advisory body, its recommendations and opinions are forwarded to the European Commission and to the committee that consists of government representatives from EU member states (a committee formed under Article 31 of the directive). The Commission in

turn informs the Working Party of the action it has taken in response to these recommendations. This document is communicated in a report that is also forwarded to the European Parliament and the Council, and made public.

Even if the group's position papers have no legal force, it speaks with an authoritative voice. Recently the group's work was given positive attention when it was referred to in a UK privacy litigation case. The case dealt with supermodel Naomi Campbell's claim against the *Daily Mirror* for breach of privacy and breach of confidence (*PL&B UK*, Dec 2002, p.5).

TOWARDS GREATER TRANSPARENCY

In a data protection conference organised by the EU Commission in Brussels last October, some business representatives called for more transparency in the work of the Data Protection Working Party. The group has since taken steps to consult business and other interested parties more than has previously been the case. For example, the group is now seeking interest groups' views by May 31st 2003 on video surveillance. The results will be made available to the public.

The Working Party has published its work programme for 2003, as well as its annual report that covers year 2000 (Working Party document 54).

The Working Party has also discussed the possibility of having business representatives attend the meetings. In theory, this would be possible as the rules of procedure enable the Working Party to invite observers or experts. It was thought, however, that in practice it would be difficult to include outsiders as some of the issues under consideration are of a sensitive nature and not intended for a wider audience.



AUTHOR: Laura Linkomies is a contributing editor to *PL&B International*.

WEBSITE: For additional information and position papers on the Article 29 Data Protection Working Party: http://europa.eu.int/comm/internal_market/privacy/workinggroup_en.htm

Article 29 Working Party agenda - 2003

1. Binding corporate rules (see p.1)
2. Standard contractual clauses submitted by business associations
3. The Internet Task Force (a subcommittee of the main working party) will discuss technology-related issues including copyright enforcement, P3P and software-related issues
4. Community codes of conduct, including FEDMA's code
5. First report on the implementation of the EU Data Protection Directive. Discussions include notification, privacy policies, and data transfers
6. Adequacy in non-EU countries, focusing on Guernsey (and possibly the Isle of Man), Australia, and the transfer of personal data from airlines to public authorities in the US
7. The US Safe Harbor scheme
8. Discussion of the European Commission's proposals on publicly available data, consumer credit and privacy in the workplace
9. Annual reports for 2001 and 2002
10. E-government
11. The E-communications Privacy Directive
12. Genetic data
13. Biometrics
14. The US Total Information Awareness project
15. Examination of data protection in Justice and Home affairs issues.

A full copy of the agenda is available via the European Commission's data protection website.