

Briefing note supporting the presentation of Peter Hustinx at the Working Seminar on the Proposal for a Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector, European Parliament 10 January 2001

An integrated EU Approach to On-line Data Protection

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Objective and history of the document

This document of the Working Party aims at offering an integrated EU approach regarding the issue of on-line data protection. The word "integrated" underlines the fact that this analysis mainly departs from the texts of both the general data protection directive (Directive 95/46/EC) and the privacy and telecommunications directive (Directive 97/66/EC) but also takes into account and brings together all opinions and documents adopted by the Working Party up to now on certain critical issues which are related to this issue.

The main objective of this document is to offer a first approach to the issue of on-line privacy that can serve to raise awareness concerning the privacy risks related to the use of the Internet and that can at the same time offer guidance in the interpretation of both directives in this field.

This document has been prepared by the Internet Task Force of the Working Party. The ITF was created in 1999 within the Working Party in order to deal with the data protection issues related to the use of Internet in a systematic and efficient way. The main purpose of the ITF is to bring together resources and interdisciplinary expertise from different national Data Protection Authorities with the aim of contributing to the uniform interpretation and application of the existing legal framework in this field. It can be seen as a joint investment in e-privacy at European level.

The work of the Internet Task Force has been co-ordinated by Peter HUSTINX, chairman of the Dutch Data Protection Authority. Delegates from the Data Protection Authorities of six countries (Belgium, Denmark, France, Germany, Spain and The Netherlands) have been involved in the work of the Internet Task Force at different stages of its work. The consolidated version of the document has been prepared by a Drafting Group appointed within the ITF and composed of Diana ALONSO BLAS (from the Dutch Data Protection Authority) and Anne-Christine LACOSTE (from the Belgian Data Protection Authority).

Methodology

The Internet Task Force has carried out its work according to a work programme approved by the Working Party. This work programme worked in two steps: first, the study of the most common services available in the Net separately and then a synthesis paper covering all of them.

Each chapter of the working document has been prepared by one member of the ITF following an agreed structure and co-read by a second member from a different country. All available chapters have been discussed twice at the occasion of the meetings of the ITF in 2000.

A consolidated version of the complete document has been prepared by the Drafting Group. The work done by the Drafting Group included in particular the structuration and the checking of the coherence of the whole document, the integration and further development of additional legal issues and technical information as well as comments received from other delegations, the development of the glossary of technical terms and the conclusions of the paper.

Content and structure of the document

In order to facilitate the reading, the working document deals first with the basic technical description of the Internet. As the intention of this document is to be understood by all kind of readers that are not necessarily familiar with the technical aspects of the Internet, this description is written in clear language and aims at offering readers the basic tools to be able to understand the issues at stake. Special attention is paid to the actors involved in the Internet, the most commonly used services, the importance of the protocols used and the economic aspects of the Internet as a business. Where necessary, more detailed technical explanations are included in the footnotes and in the glossary of terms.

A second chapter deals with the general legal issues. In particular, attention is paid to the increasingly big amount of personal data processed on the Internet and to the role of all the different actors involved play in these processing operations. A general explanation is given concerning the main rules applicable in the data protection field (both European directives) as well as other instruments such as the e-commerce directive.

The core of this document deals with the Internet services that are commonly used by an average Internet user; primarily e-mail, surfing and searching, newsgroups and chat-rooms and electronic transactions. Each of these services is addressed in a separate chapter.

In addition to this, another chapter is dedicated to the study of the so-called cybermarketing, a phenomenon with which all Internet users are confronted when using the Net.

All chapters follow a similar structure, starting with a basic technical description of the service and containing a legal analysis of the issues at stake. The role of the different actors and the privacy risks involved in the use of these services are dealt with in detail.

Where relevant, the privacy-enhancing measures that can be used in the context of the specific service have also been spelled out.

Furthermore, a specific chapter of this document is dedicated to privacy-enhancing measures and technologies that can be used to increase the privacy of the Internet users and prevent any unlawful forms of processing. A last chapter deals with the conclusions.

A glossary of technical terms has been included at the end of the document to enable the readers to understand the technical concepts used all through the text of the document.

Relevant aspects of the review of Directive 97/66 in the Internet field

The ITF document pays in different chapters special attention to the revision of the Directive 97/66/EC. In general, the ITF consider that the envisaged review, as materialised in the draft proposal of 12 of July 20002, brings with it a number of considerable improvements in this field.

The following points are especially important:

- The terminology used in Directive 97/66/EC left some room for doubts concerning its application to the Internet as most of its provisions use terms such as "calls", which allude to traditional and ISDN telephony. The review has made clear that new services and technologies are covered by this Directive, avoiding possible ambiguities and facilitating the consistent application of data protection principles on the Internet.
- The proposal no longer refers to "telecommunications services", but to "electronic communications services", as defined in the proposed directive establishing a common framework for electronic communications services and networks. This new definition offers the advantage of a clear separation between regulation of content and transmission, bringing light into a matter that has been a subject of discussion up to now.
- Article 5 of Directive 97/66/EC on confidentiality referred to the content of the communication. The distinction between traffic data and content is not, however, easy to apply in the context of the Internet, and certainly not when referring to surfing. The surfing behaviour of an Internet user (navigation data) visiting different websites can in itself reveal a lot about the communication taking place. By knowing the names of the websites visited, one can in most cases gain a fairly accurate picture of the communication that has taken

place. The revision of this Directive has brought major improvements by extending the scope of Article 5 to cover not just the content of the communication but also the related traffic data. By giving equal protection to content and related traffic data the (sometimes difficult) distinction between these concepts becomes less important.

The Working Party welcomes the fact that new issues have been taken into account in the draft Directive but has however made some proposals on specific points that could still be better addressed³. Further than the two opinions already issued concerning this review, the Working Party wishes to be involved and contribute to the ongoing process.

Conclusions

The conclusions of this document are built in two steps: firstly, a summary of the trends and privacy risks observed through all the different aspects of the Internet use is provided; secondly, some guidelines and recommendations are brought forward, considering actions that could be taken at various levels

As far as the trends and risks are concerned, the following points deserve being mentioned:

- Exponential grow of the Internet.
- Growing amount of services available to the users, bringing enlarged complexity with. It is difficult for the user to have an overview of the services available and the differences between them.
- Companies try to attract users and distinguish themselves by offering personalised services. This personalisation is dependent upon utilisation of personal data of the users, which companies obtain through different sources.
- The development of new technologies (often using statistic IP addresses) and the new generation of software and hardware products offer new capabilities that make easier to monitor users in real time without his/her knowledge. Anonymity becomes more and more difficult on the Internet.
- The combination of these new capabilities brings with it new risks for the privacy of the Internet user, especially when data are concentrated in the hands of one or a limited number of controllers. Such risks also arise from the fact that some data are preserved on-line for a very long period of time; this availability of personal data enables unexpected secondary use of those data, which is often incompatible with the purpose for which the data were originally collected.

The guidelines and recommendations formulated in the conclusions of this document propose four policy lines for the future:

1. Raising the awareness of the Internet user

Given the increasing risks for the privacy of the Internet user, it is especially relevant to ensure that adequate means are put into place in order to ensure that the user gets all the information he/she needs to make an informed choice. Several actors have a role to play in the provision of this information to the user:

- In the first place, any controller (disregarding the fact of the controller is a public authority or a private company) collecting personal data on-line has to give all necessary information to the data subject. This information, mentioned in article 10 of Directive 95/46/EC, shall be given in all cases at the occasion of the collection of data. Although having a privacy policy posted on the website is a good way of providing general information to the public, it is necessary to provide information to the data subject from which the data are being collected, in a simple and accessible way each time that data are collected, e.g. in the same screen where he/she has to fill in his/her data or through a box prompt.
- Also privacy association and advocates have traditionally been performing such public awareness activities
- Consumers associations are also increasingly getting involved and interested in the privacy aspects of consumers activities.

- Professional associations can also have a positive influence, informing new actors about their legal obligations.
- It is then up to the individual to make use of the means that are available to him/her to ensure the respect of his/her rights, and possibly to make clear that he/she will not accept services or products that are not in compliance with the existing legal framework

2. Applying existing legislation in a coherent and co-ordinated way

On-line data protection can only be sufficiently guaranteed if the existent legal framework is complied with. Considering the international character of the network, it is essential that data controllers can rely on a coherent and co-ordinated interpretation and application of the European data protection rules. The Working Party has an important role to play in this context. As it has already been mentioned, the revision of the Directive 97/66/EC is especially important in this context.

It should be emphasised that interpretation and application of the legislation is not only the task of public authorities but that the private sector can provide fruitful contribution by investing in the development of self regulation or codes of conduct addressing more specific issues raised in a particular sector.

3. Developing and using privacy compliant, privacy friendly and privacy enhancing technologies

The processing of personal data on the Internet very much depends on the technical configuration of the hardware and software as well as on the protocols and technical standards used for the transmission of information. It is therefore especially important to take into account privacy requirements at the earliest stage of developing all these tools.

Taking into account that the average user is not necessarily familiar with the technical aspects of using the Internet, and is not always in the situation of deciding himself on or even changing the configuration of the hardware and software used, it is crucial that the default settings of the products offer the highest level of privacy protection.

Moreover, while new technologies are traditionally considered as a threat to privacy, it should be stressed that they also represent a useful tool in terms of safeguarding privacy. A number of additional tools, better known as "privacy enhancing technologies", has been developed in order to help users safeguarding their privacy, notably by minimising or eliminating the collection or further processing of identifiable data and technically hindering any unlawful forms of processing. Examples of these technologies are proxy servers, cookie killers, anonymisation software, pseudonymisation tools, e-mail filters, etc.

4. Building trusted mechanisms for control and feedback

On-line data protection can only be effective if adequate means are in place to monitor and evaluate the compliance with the legal framework and technical requirements explained above. For that purpose, even if data protection authorities are in charge of the control of enforcement in the first place, other actors are taking steps in the direction of self monitoring, as they have realised the impact of their privacy policy on the behaviour of the consumers towards them.

Furthermore, labels could be granted with a view of helping the consumer getting a trustworthy indication of the compliance of a data processing with EU Data protection legislation. The Working Party intends to take action in this field in order to ensure in particular that privacy labels are granted to web sites that are in line with European data protection legislation.

1 The complete text of the document is available at:

http://www.europa.eu.int/comm/internal_market/en/media/dataprot/wpdocs/index.htm

2 Document COM (2000) 385.

3 Opinion 2/2000 concerning the general review of the telecommunications legal framework, presented by the Internet Task Force, adopted on 3rd February 2000, WP 29, 5009/00/EN/final and Opinion 7/2000 on the European Commission Proposal for a Directive of the European Parliament and the Council concerning the processing of personal data and the protection of privacy in the telecommunications sector of 12 July 2000 COM (2000) 385, adopted on 2 November 2000, WP 36