

NEWSLETTER

IT and Data Protection

May 2010

Privacy and Data Protection Updates

We have selected three current topics for the CRA May Newsletter.

1. Opinion 1/2010 on the concepts of "controller" and "processor" adopted by the Article 29 Data Protection Working Party

The Article 29 Data Protection Working Party ("Working Party") has recently adopted an opinion on the concepts of "controller" and "processor" (Opinion 1/2010 adopted on February 16 2010), contributing to a clear and uniform interpretation of these key concepts. The distinction made has a number of practical implications, such as, determining who is liable to comply with data protection law, how data subjects can exercise their rights and which national law applies.

For the Working Party, the essential aspect, which distinguishes a controller from a processor, is the legal or actual capacity to determine the purposes of and how personal data is processed (type of personal data, storage period, access to data, etc.).

The Working Party also provides some criteria and examples to help to determine the qualifications of the parties involved, (i) level of prior instructions given by the data controller (ii) monitoring by the data controller of the execution of the service (iii) visibility/image given by the controller to the data subjects and their expectations (iv) expertise of the parties involved.

The latest technological developments and the globalization of data processing have increased the complexity of the way in which personal data is processed and has decreased the borderline between these two concepts.

In addition, pluralistic control may take many forms. Controllers should therefore clarify the allocation of their respective responsibilities, while ensuring full compliance with the data protection rules.

However, this may not be sufficient as far as liability is concerned. Despite the fact that the various controllers may be liable for the processing of personal data at different stages and to varying extents, joint and several liability of all controllers could also be an alternative to the allocation of obligations and responsibilities whenever they are not properly and clearly agreed between the controllers involved.

So far as the identity of the controller is concerned, the Working Party Opinion considers that preference should be given to the controller being a company, or body, rather than a natural person within the company, or the body.

So far as the concept of processor is concerned, it is defined as, (i) a legal entity separate from the controller and (ii) as processing personal data on its own behalf.

Despite these two basic conditions, the Working Party states that the specific activities in a specific context (such as the relations between the alleged controller and the processor and the way in which, the purposes for which and means used to process the data are determined) have also to be considered in order to ascertain whether we are dealing with a processor or a (joint) controller.

As with controllers, a plurality of processors is a reality that is increasing in frequency and is creating additional difficulties in distinguishing between processors and controllers.

The written contract between all the subjects (which is mandatory) in these complex multi-level or diffused personal data processing structures, is a great tool with which to clearly establish the responsibilities of the various parties in the chain and to foresee the necessity of the controller being aware of the main aspects of the processing structure.

2. A Decision of the Portuguese Supreme Administrative Court regarding CCTV (February 2010)

In February 2010, the Portuguese Supreme Administrative Court ("STA") upheld the DPA's view (cf. Decision no. 470/2008) with regard to the right to privacy in the context of video surveillance, when considering the lawfulness of a video surveillance system in a nursing home, in the light of the constitutional right to private life. The STA held that the use of electronic surveillance devices to monitor citizens is a limitation, or restriction, of the right to private life, as provided in article 26 of the Constitution.

The STA held that according to the proportionality principle it must be questioned whether less far-going (less privacy-intrusive) measures are available and would be sufficiently effective to serve the same purpose. Thus, crime prevention cannot, except in exceptional situations of imminent threats to security or risks of serious crimes, justify a selective surveillance system that involves far-going limitations of privacy and movement of employees and residents, as it can be assumed that other less intrusive solutions are available and sufficiently effective. In this context, video surveillance should be viewed as an exceptional step, only to be taken in the absence of a less privacy-invasive alternative.

Both the DPA and the STA held that, in this particular situation, the surveillance cameras monitoring the corridors to the bedrooms and to the garden, the dining room and the lounge were not legitimate, proportionate and necessary and therefore could not be authorized.

So far as the nursing home employees are concerned, the use of the cameras in certain places could seriously compromise their privacy, as both the Portuguese Labour Code and Data Protection Law prohibit employers from using remote surveillance technology in the workplace to monitor their employees' occupational performance. Although the use of cameras could be viewed as an efficient solution to assist residents, particularly with regard to health issues, the CCTV was considered to be excessive with regard to purpose of the processing.

3. EDPS Opinion on the Proposal to recast WEEE Directive

Recently, on April 14, the European Data Protection Supervisor (EDPS) adopted an opinion ("Opinion") on the European Commission's proposal to recast the WEEE Directive (Directive on waste electrical and electronic equipment). This proposal is currently being discussed in the European Parliament and Council.

EDPS highlights the potentially damaging effects of the disposal, reuse or recycling of WEEE on the protection of personal data stored in "used" equipment.

Moreover, EDPS recommends that the Council and the European Parliament include specific provisions in the current Proposal, (i) not to disregard Directive 95/46/EC, (ii) to prohibit the marketing of used devices, which have not previously undergone appropriate security measures, in compliance with state-of-art technical standards, in order to erase any personal data that they may contain, (iii) to integrate privacy and data protection into the design of EEE "by default" (the "Privacy by design" or "Security by design" principle), in order to allow users to delete personal data that may be stored on devices in the event of their disposal, using simple means and free of charge.

The present Newsletter was elaborated by Coelho Ribeiro's IP, IT and DP Group. It contains general information which must not be relied upon for any decision without professional or other advice being sought for the specific case.

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