

FOREWORD TO THE 2007-2008 ANNUAL ACTIVITY REPORT OF THE WORKING PARTY ON POLICE AND JUSTICE

The WPPJ started its activities in June 2007 under Italian chairmanship to fulfil the mandate committed by the Spring Conference of European data protection authorities held in May 2007 in Cyprus – namely, monitoring the developments in data protection as for the so-called “Third Pillar”.

This report will take stock of the work done by the WPPJ until July 2008, although reference will also be made to additional initiatives that reached up to the second half of 2008. Indeed, the WPPJ met three times in 2007 and 4 times in 2008; the working method relied from the start on mutual co-ordination and proactivity by seeking close relationships with European data protection authorities. The mutual collaboration between the WPPJ and the WP29 was also especially fruitful and led to the adoption of a joint opinion on the draft framework decision on the so-called “European PNR”.

Major efforts were made by the WPPJ to have its voice heard in the appropriate forums, starting from the European Parliament - let me only recall the hearing before the “LIBE” Committee addressing the draft framework decision mentioned above -, the EU Council and the Commission.

On several occasions the WPPJ put forward proposals and solutions and did not limit itself to statements of principle. Several letters were sent to European institutions over the past year, five of them being signed jointly by the WP29, to request clarification and provide our views on the individual initiatives undertaken at European level – often without any co-ordinated approach – with particular regard to judicial and police co-operation.

Special importance should be attached to the work carried out in respect of the draft framework decision on data protection in the III pillar, which was recently adopted by the EU Council. In order to call attention to the need for complying with some fundamental data protection requirements, we adopted a Declaration that was sent to the President of the Council, the EU Parliament and the Commission as well as to the competent ministers of the individual EU Member States. Though acknowledging the significance of the instrument in question, which is expected to enhance data protection in an area where data are increasingly exchanged, we stressed that a major shortcoming of the draft decision consisted in its failure to envisage the co-ordination between national data protection authorities and joint supervisory authorities.

Another subject matter that called for much of our attention had to do with the implementing measures of the Prüm Treaty, which led the WPPJ to develop two position papers.

In some cases we urged the Commission to consider specific issues and asked for clarification and information. I refer, in particular, to the issues related to the so-called “Frattini package” as well as to the proposal for enabling entities not in charge of asylum policies to access the Eurodac database.

I think it can be safely stated that the work carried out in this initial period was remarkable. The experience we gathered confirms that data protection is playing an increasingly leading role in third pillar issues as well as being a key factor to uphold democracy both within and outside the EU. It is increasingly necessary for all national data protection authorities whether national or European to speak with a single voice and work jointly in a single policy- and decision-making forum that should be capable to provide guidance so as to ensure data protection in this area.

Taking account of the work done so far, I think the WPPJ proved a helpful tool and managed to be equal to both the expectations and the mandate by the Cyprus Spring Conference. This was

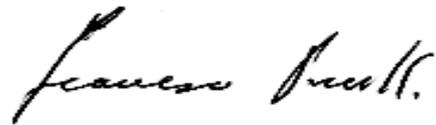
confirmed by the favourable judgment given on the initial report submitted by the WPPJ on the occasion of the Spring Conference held in Rome in April 2008.

However, there is as yet one shortcoming to do away with – namely, the fact that the WPPJ has remained an entity set up on a voluntary basis, whilst it is not adequately supported by European institutions.

We need to work on this in the coming year. Additionally, we should make a major effort also in order to contribute significantly to the work Member States and European institutions are expected to carry out especially in view of the much desirable coming into force of the Lisbon Treaty.

We do hope that our efforts will be increasingly fruitful and capable to safeguard European citizens in a tangible, effective manner.

Brussels, 16 December 2008

A handwritten signature in black ink, appearing to read 'Francesco Pizzetti'.

Francesco Pizzetti
Chair

WORKING PARTY ON POLICE AND JUSTICE

ACTIVITY REPORT 2007-2008

1. Genesis

During its session in Cyprus in May 2007, the Conference of the European Data Protection Authorities decided to mandate the then existing Police Working Party to monitor the developments in the area of law enforcement, noticing the growing challenges in the protection of individuals with regard to the processing of their personal data in this area. This decision consolidated the institutional character of the working party and offered the way towards increased and more efficient cooperation between the data protection authorities accredited at the Conference.

Already in the early 90's, a Police Working Party (PWP) was set up at the invitation of the French CNIL. The PWP had a major task of preparing for the introduction of the Europol, Schengen and Customs conventions and the operationalization of the joint supervisory bodies attached to them. In 1994, the Spring Conference of the European Data Protection Authorities formalized the presence of the PWP in its structure. Focus of its activities gradually moved towards the monitoring of third pillar developments, in an advisory role towards the Conference. If in the early years, chair and secretariat benefited from the dynamics of the Dutch DPA it was later on decided that the DPA organizing the Spring Conference would be the responsible chair and secretariat of the PWP during that year.

The increasing developments in the third pillar and the necessity to react adequately, and often timely, to the numerous EU initiatives, and the respective drafts attached to it, called for a strengthened working group with a more permanent organizational structure and a quick response capacity.

In view of this, the Presidency of the Dutch and French DPA proposed to the Cyprus Spring Conference to re-orient the PWP so as to assure greater continuity, through a permanent secretariat and a chair person appointed for a longer period, and a capacity to act broader than the yearly reporting to the European Conference.

2. Tasks

The European Conference mandated the WPPJ to monitor and examine the developments in the area of police and law enforcement so as to allow the data protections authorities to face the challenges for protecting the individuals with regard to the processing of this personal data. In essence, the working party proposes the actions to be taken by the conference. However, considering the annual character of the Conference gathering, it has also received the mandate to act on behalf of the Conference, in case a quick reaction is urgently needed on an issue related to its competence. This provision enhances the efficiency and the impact of its recommendations or opinions greatly and allows a much closer and immediate presence of data protection views throughout the different phases of law-making in the field of police and justice.

3. Procedural rules

Officially installed at the Cyprus Spring Conference of May 2007, the WPPJ adopted provisionally its Rules of Procedure on 17 October 2007. They were formally submitted to the Spring Conference in Rome, on 17-18 April 2008 and subsequently unanimously adopted. Based on precedents such as those of the supervisory authorities of the Schengen Information System and Europol, they are tailored so as to permit a maximum of output not only of high qualitative nature, but also of timely character. All data protection authorities accredited at the Conference are members of the WPPJ, with two representatives but a single vote, while non-accredited authorities can be invited as observers, as well as other experts or representatives of institutions. The Chair and Vice-Chair are elected for two years period, once renewable, by the Conference. Mr F. Pizzetti (Italian DPA) was elected as first Chairman (2007-2009), while Mr B. De Schutter (Belgian DPA) became Vice-Chairman for the same term. Awaiting a more formalized status, providing means for secretarial support, the WPPJ luckily can avail itself of the Data Protection Secretariat of the Council of the European Union and the appreciated goodwill of secretarial services of national DPA's.

The working party can be convened whenever developments in the area of police and law enforcement so require, or at the request of one-third of its members and, in any case, at least twice a year. Absent any budget, practice shows that meetings are convened back to back with the ones of the supervisory authorities of Schengen or Europol as most of the representatives are the same. To assure efficient preparation of the meetings and to bridge the time gap in between meetings, a mechanism of subgroups, some permanent, some ad hoc, is instituted together with the possibility

to appoint rapporteurs on specific issues. This has already proven to be workable, particularly in situations where an early response necessity is present. Coupled with the possibility of a written procedure for decision making, the WPPJ is equipped to act promptly when necessary. Three subgroups were set up immediately: one on issues related to technological developments, one on the implementation of the Prüm Treaty and a third on supervisory policies.

4. Actions

4.1. On the Council Decision stepping up of cross border cooperation (implementation of the Prüm Treaty in the EU), it was decided in the May meeting to reiterate in a letter to the Chair of the Civil Liberties, Justice and Home Affairs Committee of the EU Parliament essential points raised in the Spring Conference Resolution (Common Position 2008-01, 27 March 2008). Emphasis was put upon the absolute pre-condition of a general framework for data protection in the third pillar, as foreseen in the proposal for a Council Framework Decision, to be in place first. The many references to the application of the national law, without any indication towards harmonization, urges the WPPJ to ask the EU to address the issue of independent supervision, a necessity in the balance between the public interest in law enforcement and citizen's fundamental rights. The lack of clear rules in third countries transfers was also highlighted. A position paper on the annex covering rules and standards equally pointed out the lack of the overarching framework decision, the unclear wording and the need for clear purpose limitation principles (WPPJ statement 17 October 2007).

4.2. As to the Draft Framework Decision on Third Pillar Data Protection, the WPPJ took immediate action by addressing letters to the EU Presidency and the LIBE Committee, setting out its concerns, particularly in the limited field of application (only for data transferred to other Member States under the availability principle, thus creating different levels of protection for data of the same nature) and on the gradual weakening and ultimate deletion of a joint supervisory mechanism. These points were already formulated in the Declaration of Larnaca of 17 May 2007.

4.3. The passenger name record (PNR) issue was dealt with in conjunction with the WP29. Both working parties informed the Presidency of the EU about their readiness to collaborate once definite proposals would be put forward.

4.4. On Eurodac, attention went to the proposal for access by law enforcement agencies to Eurodac data. An ad-hoc subgroup prepared a WPPJ's position, which was transmitted to Commissioner Frattini and others in December 2007. The WPPJ urges therein the Commission to

first assess the necessity of such new item of legislation. Eurodac is, to the WPPJ, set up in the frame of evaluating asylum applications and cannot be seen as an ordinary fingerprint database, which can be used for other purposes. Opening up the database for law enforcement purposes may discourage and harm vulnerable people seeking a safe heaven. The WPPJ estimates that there is no pressing need to take the risk of turning the Eurodac data base into a criminal law investigation tool. Reference was made to the European DP Conference's Common Position on the use of the availability principle (Cyprus, 10-11 May 2007), providing a checklist for assessing such proposal as to necessity and proportionality.

In light of the assurances given by the Commission and the Council at the time of the establishment of Eurodac about the limited use of the data, the WPPJ regretted to notice that the developments justified the questioning of the reliability of such assurances. Once more, the absence of provisions on joint supervision was pointed out, while no forms of compliance evaluation was foreseen either.

4.5. The subgroup on supervisory policies in the law enforcement area received as its mission to develop harmonised instruments for control and inspection methods. Following the work already set in motion at the Budapest Conference of the European DP authorities in 2006, the WPPJ decided in September 2007 to explore the possibility to increase the effectiveness of supervision and to develop a common policy. Linked to it is the increasing trend to provide cross-border exchange of law enforcement data under the availability principle, which undoubtedly creates an extra burden for the data subject in the exercise of his fundamental rights. The search for enhanced cooperation between national data protection authorities is, therefore, on the WPPJ's agenda. A questionnaire was developed to collect information concerning the competences of data protection authorities in their Member States concerning the supervision of law enforcement entities. Based on the answers similarities and differences will be mapped and a common ground will be sought to arrive at a policy on supervising as a logical data protection answer to the increasing exchange of information within the EU. The answers will also help the WPPJ to develop rules for cooperation between authorities, helping data subjects to use their rights in case their data are processed in another European State.

4.6. On the topic of border management (creation of a European Border Surveillance System and Frontex), the Spring Conference made, in its 2008 session in Rome, a declaration in which serious reservations were made as to the necessity and the proportionality of the proposals. The WPPJ, together with the Article 29 Working Party, regrets that it is not evaluated first whether existing

legal measures are properly implemented and proved to be inefficient or insufficient which is needed to motivate the need for new systems. The latter may tend towards a general surveillance scheme, which poses unacceptable risks to the freedom of individuals. The inclusion of biometric data increases those risks. The WPPJ strongly underlines that not everything that is technically feasible is also ethically acceptable or legally permissible. The declaration was addressed to the Commission, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions in a joint letter of the WPPJ and the WP29.

5. Concluding Remarks

During its first year of operation under the new mandate, the WPPJ has certainly fulfilled its mission. Thanks to the permanent vigilance of the subgroups in place, the efficient support of the secretariat and the dynamic input of the Chair and its collaborators, high level reactions to initiatives in the field of law enforcement involving data protection issues were possible. Close collaboration with the WP29 and the EDPS adds value and voice to our common concerns.

If the issue of data protection is only generally addressed by the EU-law makers, content and methodology of it does not always match the high level standards the WPPJ stands for.

To find the balance between optimal police and judicial cooperation on the one hand and the legitimate claim of respect for the fundamental right to privacy of the citizen therefore remains a permanent challenge for the coming years.