



SPRING CONFERENCE OF EUROPEAN DATA PROTECTION COMMISSIONERS

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"The requirement for fairness and coherence in data transfers"

Directive 95/46 was the first international instrument which courageously dealt with the issue of the transfers of personal data to third countries. At the dawn of an unprecedented acceleration of international trade, the European legislator showed a remarkable clear-sightedness. In the absence of such provisions, there could have been a large risk that the protection provided in Europe was diluted and weakened by the backfire of globalisation.

The detailed provisions envisaged in chapter IV of the directive aim at ensuring to data subjects that the transfers of their data do not imply giving up their protection, but rather its extension. For this purpose the European legislator envisaged **a battery of legal tools** which allow the implementation of a policy characterized by **firmness** in the aim in view, **flexibility and pragmatism in the implementation** while ensuring **harmonization within the Community**.

Thereby the European legislator has shown a wide knowledge of the characteristics of the global evolution, marked in our field over the last ten years by:

- a progressive global awakening of the main necessity to take data protection into account. More than twenty countries have adopted over the last 10 years partial or general legislations or significantly extended the protection to new branches of industry, but many countries still have not adopted such legislation;

- the increasingly marked concern of the multinational corporations to ensure protection in hundreds of subsidiaries, including to the benefit of employees living in countries that have no protection system.

The efforts of colleagues, from both national and European authorities in charge of data protection, to expand European culture in this field, in all the continents, must be stressed.

Nevertheless we have to keep in mind that most authorities, recourse to these multiple tools is very recent. Furthermore, no other significant experiment of this kind has been made in the rest of the world. Therefore we must be aware that recourse to this tool involves a double risk: firstly to lose the objective of protection on the way and secondly the inconsistency in the decision-making.

Taking into account the very substantial and methodical work in progress or already completed by the article 29 Working Party and by the European Commission relative to international transfers of personal data, this presentation will be limited in a first contribution to two particular issues, so as to contribute to a coherent implementation of the policy underlain by the directive, but on which no common reflection has yet been made, while practice shows us their importance :

- firstly, the impact of the exemptions mentioned by article 26 of directive 95/46/CE,
- the implementation of the procedure of “communautarization” of decisions taken at the national level when the recipient of data in a third country presents sufficient guarantees.

I - For a wise use of the possibilities offered by article 26-1 and 2 of directive 95/46/CE

A - The provisions of article 26-1 and article 26-2 belong to different logics

The situations under consideration in article 26-1 constitute true "exemptions" from data protection. Indeed, in these cases, in particular when one considers the consent of the person concerned or the performance of a contract between the person concerned and the "importer" of his/her data, the result of the authorized transfer is that the person does not benefit from adequate protection anymore, and he/she can even benefit from no protection at all, with all the risks which this situation can involve.

On the other hand, the situations under consideration in article 26-2 do not have the effect of depriving the persons concerned of a reasonable protection: but, instead of rules of protection immediately stemming from the directive, one will refer to a specific system of protection, which yet offers “sufficient guarantees as regards the protection of private life as well as fundamental rights and freedoms of the persons”.

As we can see, the situation is thus certainly much more delicate within the framework of the application of article 26-1 than within the framework of the application of article 26-2.

B - Dangers and limits of article 26-1

This is where the effects of the request for fairness appear. That is all the more true when one considers the ground of the "consent" of the person concerned, even if it was unambiguously given.

More and more frequently, we are solicited by companies or their legal advisors, planning to legitimate data transfers by asking for the consent of the people concerned. It means that they plan to transfer data with no protection guaranteed, neither in the third country where the recipient is established nor by the recipient himself.

Without taking over again all the questions raised by the issue of consent in the field of data protection, which was an issue on the agenda of the Athens Spring Conference in 2001, and more particularly at the time of president GENTOT's presentation, it appears useful to point out here two elements which one must take into account in this circumstance and which correspond to a concern for fairness.

- Consent must be enlightened. This point consists in indicating to the person from whom consent will be requested, the purpose of the transfer as well as the identity of its recipient but also, to indicate this person that no rule of protection exists in the country of destination, and also that he/she will be entitled to no guarantee against an improper use of his/her personal data once it is transferred.
- The fairness of the information given in order to obtain the person's consent also implies to take into account the reality of the possibility that the person refuses to grant his/her consent. Are we allowed to accept consent as a valid ground in all the situations where freedom of consent does not exist for real, when the refusal to consent, for example, implies a denial of service, or when the person is in a situation of dependence facing the other party that collects the consent (case of employees whom data would be transferred towards the company head office)? Answer to this question necessarily leads to not retaining consent as a valid ground in these cases.

We may note that in all the cases examined recently, many European data protection authorities have discouraged recourse to consent, upon the consideration, depending on the case, either that consent could not be considered as valid (relation of subordination between employees and employer), or that the transfers envisaged being organised in a structural way, the data importer should be induced to bring guarantees, for example contractual guarantees.

Another example can be given: a company wishing, in a usual and permanent way, to transfer commercial data relating to contracts concluded with its customers towards a third country not offering adequate protection, can choose or be requested by national data protection authorities to retain one of these three options:

- ask for its customers' consent (without having to ensure the slightest protection at the foreign recipient thanks to the exemption envisaged), or

- avoid the requirement of consent by relying on the exemption aimed at commercial contracts, without having to ensure the slightest protection on the side of the recipient, or
- ensure protection to its customers by signing a "data protection" contract with the recipient, based on specific contractual clauses (article 26-2) or on those adopted by the European Commission (article 26-4).

It is undoubtedly the third solution which must be preferred.

C - The search for a judicious orientation

In the light of the general objective of the directive and of the so-called "third countries" provisions, one or more criteria should be established that would make it possible to distinguish cases concerning real exemptions from the principle of the extension of the protection (article 26-1) from those which fall within ad hoc protection, in accordance with the possibility offered by article 26-2.

The experience gained since several years by data protection authorities in this respect leads to suggest that the joint examination of some simple criteria should be taken further.

Massive, repetitive or structural transfers should concern the principle of protection ensured either by the State of destination (for example through the recognition of sectoral adequacy, as allowed by article 25-6 the directive), or by the recipient himself, within the framework of articles 26- 2 and 26-4.

On the contrary, real exemptions from the principle of protection such as those envisaged in article 26-1, should be reserved for transfers that are occasional only, quantitatively limited or economically particularly pressing (safeguard of the vital interests of the person concerned).

II - For a coherent use of the diversity of the possibilities offered by article 26 of directive 95/46/CE.

A- Distinct action fields were attributed by the directive to the Member States and the European Commission.

When one is concerned with the recognition of the adequate level of general rules of protection offered in a third country at the national level, whether at the general or sectoral level in accordance with article 25-6 of the directive, this article grants the European Commission the responsibility to lead the procedure and the final decision.

When one is concerned with the implementation of the provisions of article 26-1 and 26-2, the Member States have to deal with the corresponding responsibilities.

But it is necessary to ensure simultaneously coherence, legal security and harmonization of the decisions which all the competent authorities in the European Union may take in this field. This is why article 26-3 lays down a procedure of settlement of a possible disagreement between Member States on the appropriateness of a decision taken by one of them to authorise a transfer upon the consideration that "sufficient guarantees" have been put into place, in application of article 26-2.

B - It matters not to misunderstand the meaning and the impact of article 26-3 of the directive

Article 26-2 of the directive opens to Member States a very wide field of possibilities to authorise transfers towards third countries. Thus, it would be irresponsible to intend slowing or cutting down the potentialities involved by this provision. There lies here a mine of initiatives likely to push the development of trade and economic exchanges in Europe and in the world. It is not necessary thus to fear the diversity of the possible ways to be taken.

But upon two fundamental conditions:

- first that effective compliance with an essential and unavoidable basis of personal data protection is guaranteed,
- second that coherence among national situations should be guaranteed so as not to open the door to the creation of weak zones in the European Union, which traditionally give rise to ill-contained leaks.

It is this task only that the Commission must fulfil. It must seek not to standardise, i.e. reduce and even remove diversity, but to harmonise, coordinate and reconcile.

And, of course, this does not imply replacing the Member States but consolidating them while identifying the orientations to be used as help tools to carry out their responsibilities.

In this respect, it should be stressed that the best adapted place to carry out this exercise appears to be the article 29 Working Party.

We must be happy to see what seems to anticipate, beyond the vicissitudes of everyday life, the prospect in which the Commission, in close cooperation with the article 29 Working Party, endeavours to take things forward as regards international transfers of data.

Conclusion

The matter of transfers may appear complex, and it is undeniably so. This complexity is due to the characteristics of globalisation and to the very diverse and convenient possibilities that the directive offers to combine, by all means, data protection and data transfers towards third countries.

It is up to us to make a simple and encouraging presentation of it to our fellow-citizens.

It is especially up to us, considering the stakes into account, to award greater priority to these questions within our whole daily work at the national level, so as to acquire greater experience and to face certain challenges. Indeed, if up to now we received only few complaints in relation to international data processing, figures show that this situation is changing and that increasingly, our credibility for our fellow-citizens will also rely on our capacity to deal with such cases.