

The Article 29 Working Party and its future post-GDPR

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Information Law analysis: What will be the status of the Article 29 Working Party after the General Data Protection Regulation (GDPR) becomes directly applicable and enforceable? Jon Baines, data protection advisor at Mishcon de Reya, explains the role of the Article 29 Working Party, the guidance it produces and the introduction of the European Data Protection Board by the GDPR.

What is the Article 29 Working Party?

'Article 29' means Article 29 of the Data Protection [Directive 95/46/EC](#), which provided that there would be a working party composed of representatives of the supervisory data protection authorities of each Member State, as well as a representative of the European Data Protection Supervisor and a representative of the European Commission (the Commission).

The UK's supervisory authority is the Information Commissioner's Office (ICO), and, therefore, the Commissioner herself (Elisabeth Denham) has a place on the Working Party.

What guidance on the GDPR has the Working Party published to date, and what is still in the pipeline?

The Working Party has been producing opinions, working documents and recommendations since 1997—more than 200 in total. These are, by virtue of Article 29(1) of the Data Protection Directive, advisory only (and thus not legally enforceable) but, given the Working Party's membership, they naturally carry substantial weight.

Examples of key documents produced have been:

- the 2010 opinion on the concepts in data protection law of 'data controller' and 'data processor' ([Opinion 1/2010 on the concepts of 'controller' and 'processor', WP 169](#)), and
- the [2011 opinion on 'consent'](#)

At the same time, the Working Party has had responsibility for providing the Commission with opinions on the adequacy of data protection in third countries, in which capacity it has advised on the appropriateness of data transfers between the EU and US companies under, first, the Safe Harbor principles, and, after Safe Harbor was struck down by the Court of Justice, the Privacy Shield.

As the GDPR, [Regulation \(EU\) 2016/679](#), has approached, the Working Party has produced various guidance, for instance on data protection impact assessments, consent, transparency, automated individual decision-making and profiling and breach notification (some of which remains in draft). Despite this, there has been frustration expressed in some quarters for its delay in bringing forward further advice, with—for example—the ICO noting in July 2017 that it would not be issuing its guidance on consent until the Working Party had finalised its own.

How has the Working Party's guidance on the GDPR generally been received by practitioners?

The guidance—both final and draft—which has been produced has generally been gratefully and appreciatively received, although there is potentially an argument that at times the Working Party has overreached itself. For instance, the Working Party's guidance on breach notification suggests

that the ‘loss of availability’ of personal data can constitute a qualifying breach, but, in the context of data breaches, this is not a concept appearing in the text of the GDPR itself.

Similarly, the Working Party’s guidance on consent proposes that ‘a processing activity for one specific purpose cannot be based on multiple lawful bases’, which appears to be a normative statement not directly based on the statutory language.

That said, over the years the Working Party has tended to adopt a bold and rights-based interpretation of the respective laws within its remit, and Member States would do well to consider whether its approach in these matters represents the direction of travel that regulators and courts will take.

What will be the status of the Working Party and their guidance under the GDPR?

When GDPR becomes directly applicable on 25 May 2018, the Working Party will cease to exist in its current iteration, and will be replaced by the European Data Protection Board (EDPB), which will be, in contrast to the Working Party, a body of the EU.

The EDPB will be of a similar structure to the Working Party except that in Member States where more than one supervisory authority has been appointed, that Member State must appoint only one supervisory authority as an EDPB representative.

It is understood that existing Working Party guidance is currently being treated as draft guidance of the EDPB, but it will be for the EDPB itself to make a firm decision on this, when it comes into existence on 25 May 2018.

The EDPB must, as one of its tasks, ensure the consistent application of GDPR (Article 68(1)), whereas under the Data Protection Directive the Working Party only had the task of informing the Commission if it found there were material divergences between Member States in the law’s implementation. Furthermore, the EDPB will, along with Member States, supervisory authorities and the Commission itself, be required to encourage the establishment of certification mechanisms to enhance transparency and compliance with the GDPR.

The EDPB will, like the Working Party before it, issue guidelines, recommendations and best practices, as well as opinions on the data protection adequacy of third countries. However—unlike the Working Party—it will be able to adjudicate disputes between national supervisory authorities over certain specific matters, and will issue independent and binding decisions on them. Additionally, a disagreement between supervisory authorities over how to deal with a particular matter will be able to be resolved through a legally binding majority vote.

The UK—and the ICO itself—have expressed the view that, after the UK has left the EU, it would be beneficial for the Commissioner to have, at least, some form of ‘observer status’ on the EDPB (the wording of the GDPR does not appear to allow for a non-Member State to have a formal representative on it). Given the importance of the free flow of data for the facilitation of international trade, the issue of the relationship between the ICO and the EDPB is likely to play a significant part in the Brexit negotiations.

Interviewed by Alex Heshmaty.

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