

**Article 29 Data Protection Working Party  
Working Party on Police and Justice**

Brussels, 29 April 2008  
D6763 (2008)

Mr. Jacques Barrot  
Commissioner for Justice Freedom  
and Security  
European Commission  
Rue de la Loi 200  
B - 1049 Brussels

Dear Mr. Barrot,

At the last plenary meeting of the Article 29 Working Party, your services gave a presentation of the Communications of the Commission of the 13<sup>th</sup> February providing the possible future scenario for border surveillance and controls.

This is a matter of great interest for all EU national data protection authorities, given the major impact on the free movement of persons, including EU nationals and persons legally residing in the EU territory, their fundamental rights and, in particular, their right to privacy and data protection. The reason for this is that most of the measures mentioned in the communications are based on the growing, massive collection and exchange of personal details of the individuals who intend to cross EU borders – and particularly on physical features which are unique to each individual..

At its meeting of the 27<sup>th</sup> March, the Working Party on Police and Justice (WPPJ) also brought these documents to the attention of the members in order to consider their possible impact in the field of law enforcement activities.

The attached comments are an initial reaction to the above mentioned documents, and are without prejudice to more detailed opinions and specific interventions to be defined and adopted if and when concrete proposals follow.

The European Data Protection Supervisor sent his preliminary comments on the communications on the 3<sup>rd</sup> March. The Spring Conference of European Data Protection Authorities, held in Rome on the 17<sup>th</sup> and 18<sup>th</sup> April also adopted a declaration on the communications.

The Article 29 Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Civil Justice, Rights and Citizenship) of the European Commission, Directorate General Justice, Freedom and Security, B-1049 Brussels, Belgium, Office No LX-46 01/43.

Website: [http://ec.europa.eu/justice\\_home/fsj/privacy/index\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm)

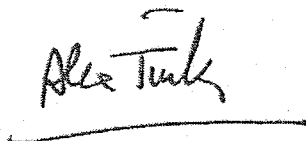
The Working Party on Police and Justice was set up as a working group of the Conference of the European Data Protection Authorities. It is mandated to monitor and examine the developments in the area of police and law enforcement to face the growing challenges for the protection of individuals with regard to the processing of their personal data.

As always, we confirm our readiness to provide our expert contribution, as national supervisory authorities and within the range of our competence, to all future work on these issues.

Yours Sincerely

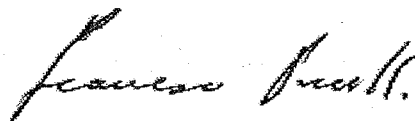
*For the Art 29 Working Party*

The Chairman  
Alex TÜRK

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*For the Working Party  
on Police and Justice*

The Chairman  
Francesco PIZZETTI

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Cc: Mr. Janis Jansa, President of the Council  
Mr. Hans-Gert Pöttering, President of the European Parliament,  
Mr. Gérard Deprez, President of the LIBE Committee  
Mr. Dimitris Dimitriadis, President of the Economic and Social Committee  
Mr. Luc Van den Brande, President of the Committee of the Regions

**Article 29 Data Protection Working Party  
Working Party on Police and Justice**

**Art 29 WP ref: WP 149  
WPPJ ref: 02/2008**

**Joint Comments of the Article 29 Working Party and the Working Party on Police and Justice on the Communications from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, namely:**

**"Preparing the next steps in border management in the European Union", COM (2008) 69 final,**

**"Examining the creation of a European Border Surveillance System (EUROSUR)" COM (2008) 68 final, and**

**"Report on the evaluation and future development of the Frontex Agency" COM (2008) 67 final.**

**Adopted on 29 April by the Art. 29 Working Party**

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**"Examining the creation of a European Border Surveillance System (EUROSUR)" COM (2008) 68 final, and**  
**"Report on the evaluation and future development of the Frontex Agency" COM (2008) 67 final.**

The three communications issued by the European Commission on 13 February 2008 are aimed at setting out a comprehensive strategy to provide Europe with the tools required for making the management of the European borders equal to the challenges of globalisation.

The communication "Preparing the Next Step in Border Management in the EU" is broader in scope than the others, and is accompanied by an impact assessment, while the other two are focused more specifically on the creation of a border surveillance system for the European southern border<sup>1</sup> and on the development of the Frontex agency<sup>2</sup> by taking full advantage of the considerable resources apportioned to the initiatives in this sector by Community programmes – including the 7th Framework Programme.

The three instruments are meant to build upon and go beyond the measures either already in place or under discussion, leading ultimately to a synergic, complete control system for the EU's external borders – on land, air, and sea – and the areas nearby, based on the massive use of surveillance apparatus and the systematic implementation of biometric technologies.

Most of the planned measures – whether aimed at the surveillance of locations or controlling individuals prior to and/or at the time of crossing borders – consist in collecting and using personal data, and also ascribing to individuals a "score" on the basis of a preventive risk assessment or profiling.

However, the impact assessment mentioned above does not appear to have paid specific attention to the protection of personal data.

In fact, it appears – and this is considerably important in evaluating the need for the measures to be proposed – that no assessment was made of the functioning of either the existing instruments, the instruments that are about to be implemented, or measures still under discussion, including (but not necessarily limited to) SIS II, VIS, API Directive, an EU PNR system, the Schengen Border Code and the new amendments proposed to this instrument, proposals for allowing law enforcement authorities to access the VIS-Eurodac and other databases and information systems by changing the purpose for which they were established as well as the respective legal basis, the new Europol decision, and the measures concerning passports, visas, and residence permits.

In addition, the impact assessment indicates a lack of reliable statistics to quantify the phenomena to be tackled, as well as of adequate co-operation mechanisms between the competent authorities of the Member States.

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<sup>1</sup> "Preparing the next step in border management in the European Union" COM (2008) 69 final)

<sup>2</sup> "Report on the evaluation and future development of the Frontex Agency" COM (2008) 67 final)

The Article 29 Working Party and the Working Party on Police and Justice consider it crucial that the process of drafting any implementing instruments be based on an assessment of the concrete need for any further specific intervention, and also an assessment of the effectiveness of the existing or planned measures. Due account should be taken of the results obtained or expected via such instruments and their impact on fundamental human rights, in particular, on the right to personal data protection – which is actually upheld by the case law of the European Human Rights Courts as well as being provided for by the EU Charter of Fundamental Rights.

It is fundamental to establish whether new measures and instruments are necessary at all and, if so, to assess precisely which measures and instruments should be implemented. Furthermore, it is necessary to ensure that steps are taken to make use of less invasive technologies, which can minimize the processing of personal data and afford better security in accordance with the "privacy by design approach". It is worth bearing in mind that not everything that is technically feasible is also ethically acceptable and legally permissible.

The Communication COM 2008/69, under the chapter "Data Protection Issues", points out that any need for a new instruments must be clearly stated (and assessed), and that conditions should be prescribed for the processing of personal data in compliance with the relevant principles – which make up, as is known, a harmonised European framework, and are binding, first and foremost, on European lawmakers whenever the issues to be regulated are covered by European law.

This is all the more important if public authorities discharging public functions are also involved. The measures contemplated in the Communication might be relevant to law enforcement as well.

Unfortunately, the current allocation of competences under the Treaty is such that the principles applying to the processing of personal data in connection with the so-called Third Pillar issues are not safeguarded to the same extent at EU level as those under the First Pillar, since they fall outside the scope of application of Directive 95/46/EC, and a common, specific set of rules has not yet been developed and adopted in full – although Convention 108/1981 of the Council of Europe applies to this subject matter.

Moreover, the Communications mention ongoing initiatives that envisage biometric applications (such as Biopass, or the biometric matching system). However, no information has been provided so far on such initiatives, nor is their legal basis known as yet.

Considering the considerable impact on the privacy rights of individuals, the Article 29 Working Group and the Working Party on Police and Justice regret that – once again – the EU data protection authorities, and in particular the Article 29 Working Party (which is entrusted with a consultative role to the Commission under Article 30 of Directive 95/46/EC), were not contacted prior to the adoption of the three Communications in question, nor were they informed about the follow-up to the opinions already issued, in particular by the WP 29, which concern most of the ongoing initiatives mentioned in the communications, and which the Commission intends to develop (EPassports, API Directive and EU PNR system, VIS, SIS II, biometric in travel documents, access to Eurodac just to mention a few).

The Art 29 WP and the WPPJ call for the need to ensure transparency and adequate information, and reiterate their willingness to contribute to the law-making process and the relevant discussions with their experience and skills.

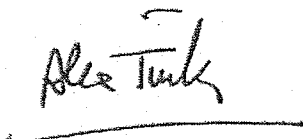
They therefore invite the Commission to provide them with the list of all measures and initiatives relating to the establishment of border management in order to have a clear-cut, complete picture of the legal framework envisaged, and properly assess its impact on the protection of personal data of individuals.

The Art 29 WP and the WPPJ trust that co-operation will be enhanced, also, in connection with the forthcoming entry into force of the Lisbon Treaty, so as to fully enforce the substantive safeguards made available by the European legal system to protect individuals, and so contribute to the ever-improving quality of European legislation.

Done at Brussels,  
on 29 April 2008

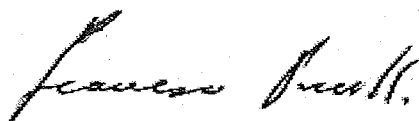
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