

Purpose limitation — clarity at last?

Bridget Treacy, Partner and Anita Bapat, Associate, Hunton & Williams, examine the Working party Opinion on the subject of 'purpose limitation' and comment on the Working Party's suggested revisions to the Data Protection Regulation

On 2nd April 2013, the Article 29 Working Party published Opinion 03/2013 (WP 203) on the 'purpose limitation' principle in the Data Protection Directive (95/46/EC) ('the Opinion'). In one of its most important pieces of work, the Working Party analyses the two main components of the purpose limitation principle, namely purpose specification and compatible use.

As the Working Party itself acknowledges, the purpose limitation principle goes to the heart of data protection law and is relevant to all data controllers processing personal data in the EU. It sets the limits of fair processing of data that may be conducted by data controllers and seems to provide transparency and certainty about the nature of processing.

Purpose specification

The first aspect of the purpose limitation principle provides that personal data must only be collected for 'specified, explicit and legitimate purposes' (Article 6 (1)(b) of the Data Protection Directive (95/46/EC)). This lies at the core of the legal framework and is a pre-requisite condition for the processing of personal data, leading to all the other processing requirements — adequacy, relevancy and proportionality of data (Article 6(1)(c)), accuracy and completeness (Article 6(1)(d)) and data retention (Article 6(1)). Focusing on purpose specification in further detail, the Working Party offers the following guidance as to the meaning of 'specified, explicit and legitimate purposes'.

Specified purpose: The purpose of any processing must be sufficiently and clearly defined to determine its scope and to enable appropriate safeguards to be implemented. Such specification must occur prior to, and in any event no later than, the time of data collection. The appropriate level of detail will depend on the particular context in which data are collected and the nature of the personal data.

The Working Party warns that generic and broad descriptions are not sufficient. In particular, it criticises the terms 'improving user's experience', 'marketing purposes', 'IT-security

purposes' or 'future research', which many data controllers include in their privacy policies. It is also clear that the Working Party supports the use of layered privacy notices. It encourages their use in the context of online data collection as they provide key information in a 'very concise and user-friendly manner', with additional information easily available to those individuals who may seek further clarification.

Explicit purpose: According to the Opinion, the specified purpose must be unambiguous and expressed clearly, in an intelligible form, so that there is no doubt as to the meaning or intent of the processing purpose. Such transparency enables data subjects, as well as data protection authorities and other stakeholders, to know with certainty what the data will be used for.

There is no requirement for this information to be provided in writing but, in practice, documentation is helpful to demonstrate compliance and may also allow data subjects to exercise their rights more effectively.

Legitimate purpose: The Working Party considers the requirement for the processing purpose to be legitimate to include not only the need to satisfy a legal ground to process personal data (as contained in Article 7 of the Directive) but also to extend to the need to comply with other applicable laws, such as employment law, contract law and consumer protection law. The Working Party acknowledges that the legitimacy of a given purpose may change over time, as society and cultural attitudes change and with scientific and technological developments.

Compatible use

The second aspect of the purpose limitation principle is the requirement that personal data must not be further processed in a way that is incompatible with the original purposes for which data are collected (Article 6(1)(b) of the Directive). This prohibition on incompatible use means that a compatibility assessment must be undertaken by the data controller where personal data are collected for one purpose and a data controller wishes to utilise those

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data for another purpose. The Working Party acknowledges that the Directive provides data controllers with some flexibility with regard to further use, but its analysis of the relevant factors that must be considered suggests that companies are limited in seeking to re-use existing data for another purpose.

To assist data controllers in making an assessment of the compatibility of further uses of personal data, the Working Party has outlined a set of non-exhaustive criteria:

The relationship between the purposes for data collection and the purposes for further processing:

Generally, the greater the gap between the purposes of collection and the further use, the more problematic this is from a compatibility perspective.

The context in which the data have been collected and the reasonable expectations of the data subjects regarding further use of the data:

The Working Party emphasises the need to look at the nature of the relationship between the data controller and the data subject and the balance of power, which includes not only the information provided to the data subject, but also a consideration of 'what would be customary and generally expected practice in the given (commercial or otherwise) relationship'.

This comment is interesting as, in the usual commercial relationship, the data controller will have the power to decide how to utilise data, and most consumers expect some further uses of data. For example, data analytics for marketing or advertising purposes is expected

by most consumers when purchasing products.

The nature of the data and the impact of the further processing on data subjects:

The Working Party confirms that, generally, 'the more sensitive the information involved, the narrower the scope for compatible use', whether this be the special categories of data under Article 6 of the Directive (also known as sensitive personal data under section 4 of the UK

Data Protection Act 1998) or biometric data, genetic information, communication data, location data, etc. Data controllers are urged to consider the impact of the further processing and to take into account both the positive and negative effects of any proposed further processing, such as the possibility of discrimination against individuals.

The safeguards put in place by the data controller to ensure fair processing and prevent undue harm to data

subjects: The Working Party views this factor as providing data controllers with an opportunity to compensate for any deficiencies that might be highlighted in the other criteria listed above. It points to the implementation of technical and organisational measures as one possible remediation tool to ensure compatibility and suggests the use of anonymisation, pseudonymisation, aggregation and other privacy enhancing technologies. Interestingly, the role of consent in enabling a change in processing purpose is acknowledged, but the Working Party notes that this, on its own, 'cannot legitimise an otherwise incompatible

use'. The Working Party considers the requirement of compatibility under Article 6(1)(b) and the need for an appropriate legal basis for processing under Article 7, to be cumulative in nature. This may cause concern as controllers frequently seek consent to enable subsequent uses of personal data.

The Opinion contains 22 comprehensive examples of how a compatibility assessment will be undertaken in practice. Among other issues, these examples address further processing in the context of marketing, automatic price discrimination, predicting purchasing habits by using algorithms, CCTV, health data, smart metering and location tracking via mobile phones.

Big and Open Data

The Working Party also considers the purpose limitation principle in the context of Big Data and Open Data. The Opinion acknowledges the significance of Big Data, where vast amounts of data are analysed extensively using complex algorithms, in today's world. It differentiates between two scenarios: (1) where Big Data is utilised to detect general trends and correlations; and (2) where Big Data is utilised in a manner that directly affects individuals. For example, in the marketing context, Big Data can be used to analyse and predict personal preferences and subsequently inform decisions about customers such as discounts, special offers or targeted advertisements based on a customer's profile.

Central to the lawfulness of the first scenario is the functional separation of processing of personal data for existing purposes from Big Data purposes. Technical and organisational measures to guarantee the confidentiality and security of the data are also important.

In contrast, the Opinion offers a more conservative view of the second scenario, with specific opt-in consent required wherever Big Data impacts individuals. The Working Party is clear that opt-in consent is required for tracking and profiling activities for direct marketing, behavioural advertis-

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ing, location-based advertising and tracking-based digital market research. In addition, it recommends that data controllers provide consumers with easy access to their profiles in order to facilitate consumers' use of their 'own' data.

The Working Party also provides views on Open Data government projects, where entire databases are made available in a standardised format under an open license. Whilst noting the significant impact such projects have had in encouraging the release of huge swathes of public sector information, the Working Party expresses concern over the wrongly held belief that data protection law no longer applies to information that has been published. The Working Party highlights the importance of ensuring that datasets that are released are 'sufficiently aggregated or put in another effectively anonymised form' before release and, if they cannot be, encourages public sector data controllers to undertake a compatibility assessment of the further use.

Proposed amendments to the Regulation

The Working Party recommends two amendments to the proposed Regulation in relation to the purpose limitation principle. It recommends that:

- the compatibility assessment criteria outlined in its Opinion should be added to Article 5 of the proposed Regulation to ensure the compatibility test is more specific; and
- Article 6(4) of the proposed Regulation is deleted to remove the broad exception to the compatibility requirement.

In respect of the latter, such a provision, if not removed, would mean that it would always be possible to remedy any lack of compatibility by identifying a new legal ground (except for the legitimate interests legal ground) regardless of compatibility. This would erode the purpose limitation principle.

Conclusion

Whilst the Opinion has been eagerly

anticipated by data controllers seeking clarification on the limits of further use of data, the Opinion may not be welcomed. The Working Party takes a conservative stance on the purpose limitation principle, criticising the generic descriptions that most data controllers provide in relation to their processing purposes. Its comments on further use of data for compatible purposes also urges caution, reminding data controllers that each subsequent form of processing after collection (considered by the Working Party to be the original purpose for processing) requires a compatibility assessment.

However, such views may not be practical against the backdrop of Big Data which is premised on the further and apparently unlimited use of data. Whilst this Opinion may be seen as a response to the surge in Big Data processing, it remains to be seen whether it alters data controllers' practices. This will very much depend on the further developments in the proposed Regulation, and on the approach individual data protection authorities take to enforcement under existing law.

Bridget Treacy is chairing the 12th Annual Data Protection Compliance Conference, taking place in London on 11th and 12th of September 2013. Visit www.pdpconference.com for further details.

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