

Paris, 18 September 2012

**Answers to the European Parliament questionnaire
Interparliamentary meeting on data protection
9 and 10 October 2012
Courtesy translation**

The work undertaken by the National Assembly on the reform of the EU data protection framework has mainly consisted in the following during the previous legislature:

- Information report by Messrs Patrick Bloche and Patrice Verchère, Deputies, adopted by the Joint information mission of the Constitutional Acts Committee and the Cultural Affairs Committee, on 22 June 2011, on *the rights of the individual in the digital revolution*. That report expressed several guidelines on the reform.
- National Assembly Resolution no. 888 of 23 March 2012 on the proposal for a regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
- Conclusions of the European Affairs Committee of 15 February 2012 on the proposal for a directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data.

SESSION I - The reform of the EU Data Protection framework - Building trust in a digital and global world

1. Do you see a necessity and added value in the proposed EU Data Protection reform (questions on subsidiarity and the chosen legal form - two instruments - regulation and directive)?

The National Assembly has not adopted a reasoned opinion on **subsidiarity** with regard to the proposal for a regulation and the proposal for a directive.

The choice of reforming the existing framework by **two instruments** has not been challenged by the National Assembly and, in his statement of 15 February 2012 on the

reform of the framework decision of 2008, Mr Guy Geoffroy, rapporteur of the European Affairs Committee at the National Assembly noted:

'Given the specific nature [of the police and criminal matters], it appears opportune to the rapporteur that a specific instrument should be proposed (although the European Data Protection Supervisor, in particular, desired a single instrument for all the personal data processing activities in the Union). The G29, grouping the national supervisory authorities, had given an opinion recalling that specific rules in police and criminal matters could prove necessary.

The choice made by the European Commission to propose, on the one hand, a directly applicable regulation reforming the 1995 directive and, on the other hand, a directive reforming the framework decision of 2008, therefore appears preferable.'

Referring to the **need** for the reform, in its resolution no. 888 of 23 March 2012, the National Assembly:

'1. Reaffirms its commitment in favour of a reinforced protection of citizens' privacy. This forms a democratic requirement in view of the appearance of new technologies and the emergence of global players whose economic model is based in particular on the commercial processing of personal data;

2. Supports the aims announced by the European Commission in its above-mentioned communication of 4 November 2010 on the revision of the European legal framework on the protection of privacy and personal data;

3. Considers that the modernisation, harmonisation and simplification of the applicable rules will promote a better recognition, by all the players, of the European requirements regarding these matters, thanks in particular to greater responsibility being taken by processors, who will have to take all the necessary measures to protect the personal data processed;

4. Welcomes in this respect the introduction, at European level, of new measures participating in a better protection of citizens' rights;

5. Recalls the guidelines appearing in the Franco-German parliamentary declaration of the National Assembly information mission on the rights of the individual in the digital revolution and of the Bundestag inquiry committee on the Internet and the digital society, dated 19 January 2011'.

2. How do you see the relation between Union and national legislation (questions on subsidiarity and the chosen legal form - two instruments - regulation and directive)? Should there be more flexibility for Member States to regulate data processing in special situations? How would this affect the harmonisation of the internal market?

See the answer to question 1.

Difficulties related to the adoption of a regulation were emphasised during the debate on 7 February 2012 in the European Affairs Committee meeting on the proposal for a regulation.

3. What are in your opinion the main missing elements, if any, of the current EU system of data protection based on Directive 95/46/EC and Framework Decision 2008/977/JHA?

The need for a revision of the European data protection framework was underscored in the National Assembly work.

Report on the rights of the individual in the digital revolution (22 June 2011):

The guidelines of the information report by Messrs Patrick Bloche and Patrice Verchère, Deputies, of 22 June 2011, on *the rights of the individual in the digital revolution* are, with reference to the shortcomings of the current European rules, mainly the following:

- Guidleline no. 20: Allow the Internet user, better informed, to supervise his personal data;
- Guidleline no. 21: Introduce a right to be forgotten on social networks;
- Guidleline no. 22: Reinforce the information of Internet users regarding targeted advertising;
- Guidleline no. 24: Ensure and preserve a high level of data protection in Europe:
'As part of the revision of the directive of 24 October 1995, guarantee a high and equivalent level of protection of personal data across the European Union, by introducing new Community legislation, where applicable, through regulation';
- Guidleline no. 25: Oblige any data processor to notify security breaches;
- Guidleline no. 26: Reinforce the information of persons whose personal data are collected;
- Guidleline no. 27: Exclude so-called 'sensitive' personal data from cloud computing conducted outside Europe;
- Guidleline no. 28: Subject cloud computing players to regular security audits;
- Guidleline no. 29: Strengthen the independence of the G29 working group;
- Guidleline no. 30: Make privacy by design a major asset for Europe;
- Guidleline no. 31: Stop the difficulties related to the extraterritoriality of the applicable law with regard to data protection:
*'As part of the revision the directive of 24 October 1995, ensure the same level of protection of privacy and personal data for all the residents of the European Union, regardless of the place of establishment of the data processor.
For this purpose, subject all data processors, wherever they are located and even if they are established outside the European Union, to the courts and law of the Member States whenever they target the public residing there.'*

National Assembly resolution no. 888 of 23 March 2012 on the proposal for a regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data: see the answer to question 1.

Reform of the framework decision of 2008:

In its conclusions adopted on 15 February 2012, the European Affairs Committee at the National Assembly: *'supports the extension of the scope of the proposal for a directive to the processing of data at the national level in the Member States'*.

Moreover, exceptions in the application of the rules on transfers to third States were emphasised. It was also deemed necessary to reinforce the rights of the persons concerned.

4. How to ensure that the envisaged legislation will keep up with technological developments? Are, in your opinion, the principles of “privacy by design” and “privacy by default” an adequate approach?

The Franco-German parliamentary declaration of the National Assembly information mission on the rights of the individual in the digital revolution and of the Bundestag inquiry committee on the Internet and the digital society, dated 19 January 2011, states that: *'in addition to the regulatory provisions, voluntary commitments on the part of the stakeholders can contribute to raising the level of data protection. Furthermore, preventive protection technologies are becoming increasingly important. Straightaway at their development stage, new technologies, products and economic models must be designed with data protection in mind. The statutory requirements regarding protection technologies must be drafted in accordance with the principle of technological neutrality in order to ensure data protection in keeping with the evolution of technology – including without the legislator having to intervene. The definition of protection aims makes perfect sense in this respect. Procedures like the award of quality labels can provide an effective impetus and guide the market towards a better data protection.'*

Guideline 30 of the information report on the rights of the individual in the digital revolution should also be highlighted: making 'privacy by design' a major asset for Europe: *'Encouraging and strengthening, within the European Union, research, innovation and development in the sector of technologies respectful of privacy right from the time of their design, in other words respectful of the privacy by design principle, in order to provide Europe with a genuine industrial policy in the digital sector and thus allow it to benefit from an undeniable comparative advantage in global competition.'*

In its resolution no. 888 of 23 March 2012, the National Assembly:

'5. Recalls the guidelines appearing in the Franco-German parliamentary declaration of the National Assembly information mission on the rights of the individual in the digital revolution and of the Bundestag inquiry committee on the Internet and the digital society, dated 19 January 2011.'

SESSION II - Data protection rights and principles - Harmonised rights for a clear and better protection, easier enforcement and building more trust

- 5. What is your opinion about the provisions regarding the rights of data subjects and their applicability in practice, such as portability, right to be forgotten, deadlines to address requests for access, rectification?**
- 6. What is your opinion about the principles underlying these rights, such as the need for a legal basis for data processing, the conditions for consent, or the notions of “public security” or “legitimate interest” as a basis for data processing?**

See the guidelines of the National Assembly information mission on *the rights of the individual in the digital revolution* (question 3).

In its resolution no. 888 of 23 March 2012, the National Assembly:

'6. Emphasises therefore the inclusion in the text proposed by the European Commission of a right to be forgotten for citizens, which should, with a view to being realistic, be applicable to social networks and which will allow people to obtain more easily the suppression of their personal data by processors. It will however be necessary to ensure that this right allows the persons concerned to obtain the suppression of data placed on-line by a third party;

7. Pronounces itself also in favour of the introduction of a new right to the portability of personal data for citizens. They can now obtain, on request, the return of the data processed, and in particular that published on social networks. The data shall be returned in an electronic format allowing re-use on other media;

8. Defends the European Commission's proposal to considerably change the rules for getting the consent of citizens for the processing of their personal data. This provision shall be far more protective since the expression of consent will now require positive action on the part of the citizen. His silence or inaction cannot be assimilated to implicit consent.'

SESSION III - Data protection and law enforcement/SESSION VI - Police data sharing and access to private data bases

- 7. Should such a new framework also apply to purely domestic processing activities by law enforcement or should it be limited to cross-border cases only (question of reversed discrimination, data protection as a common fundamental right from the Charter, subsidiarity, etc.)?**
- 8. There is a growing tendency by law enforcement to have access to data held by private companies for commercial purposes; how to ensure a proper balance between law enforcement needs and fundamental rights?**

See the answer to question 3.

In its conclusions of 15 February 2012, the European Affairs Committee at the National Assembly:

'1. Recalls that the European personal data protection framework must lead to a real harmonisation of national legislations at a high level of protection as well as a fair balance between the protection of personal data and the implementation of measures to prevent offences, conduct investigations and carry out criminal procedures;

2. Supports the extension of the scope of the proposal for a directive to data processing performed at the national level in the Member States.'

SESSION IV - Data controllers and processors in the private sector and free flow of information in the internal market

9. Is the proposal reducing regulatory/administrative burden for data controllers, especially as regards small and medium enterprises (SMEs)?
 10. How will the "one-stop shop" mechanism impact on the laws of the Member States and on the rights of the data subject (legal and linguistic obstacles, etc.)? How to guarantee that decisions are lawfully enforceable in the Member State of residence of the data subject?
 11. How to ensure that the envisaged legislation will keep up with technological developments? Are, in your opinion, the principles of "privacy by design" and "privacy by default" an adequate approach?
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Guideline 31 of the National Assembly information mission on *the rights of the individual in the digital revolution* states the following:

Stop the difficulties related to the extraterritoriality of the applicable law with regard to data protection:

'As part of the revision of the directive of 24 October 1995, ensure the same level of protection of protection of privacy and personal data for all the residents of the European Union, regardless of the place of establishment of the data processor.

For this purpose, subject all data processors, wherever they are located and even if they are established outside the European Union, to the courts and law of the Member States whenever they target the public residing there.'

In its resolution no. 888 of 23 March 2012, the National Assembly:

'9. Supports the appointment of data protection delegates in public administrations and companies of over 250 employees. This provision, particularly awaited by some European protection authorities, will indeed participate in a better recognition of the rules applying in this field and in greater awareness of these matters on the part of public and private structures. However, the mandatory nature of the appointment could be counter-productive. Special attention shall be paid to the situation of the employees appointed as data protection delegates;

10. Expresses its clear opposition to the inclusion, in the text proposed by the European Commission, of the criterion of the processor's main establishment, which would bear extremely harmful political and economic consequences for France and for the European territory as a whole;

11. Considers that this solution would distance Europeans from the competent authorities and would run counter to the construction of a political and concrete Europe, close to the concerns of its citizens. It would also promote the practice of forum shopping and the establishment of companies in Member States whose protection authorities favour a more flexible approach. It would also reduce considerably the attractiveness of the French and European territories;

12. Defends an alternative solution based on maintenance of the competence of a State's protection authority over any data processing specifically targeting the population of said State, whatever Member State the processor is established in'.

SESSION V - Implementation, DPAs and ensuring consistency

- 12. How do you evaluate the proposed sanction mechanism (level of sanctions, proportionality, discretion, legal remedies, etc.)? How would this affect provisions in your Member State, and what are the experiences with the current model?**
- 13. How do you evaluate the proposed consistency mechanism (the fact that national DPAs will be required to abide by the decision taken within the consistency mechanism, and the questions of their independence and the risk to act in breach of national law)? How do you perceive the proposed role of the Commission in that regard, especially as regards the question of independence of the European Data Protection Board?**
- 14. How do you evaluate the resources of the data protection authority/authorities in your Member State? How to ensure they are sufficient in a world of ever more data processing?**
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In its resolution no. 888 of 23 March 2012, the National Assembly:

'13. Expresses its gravest concerns regarding the cooperation mechanism proposed by the European Commission, which would not ensure sufficient information for the protection authorities, especially where particularly sensitive data are processed, such as genetic, biometric or health data, considerably reducing subsequent controls over the processing of this sensitive processing. It supports the introduction of new provisions allowing strengthened cooperation between the protection authorities in order in particular to ensure strict control over this sensitive processing;

14. Regrets the concentration of considerable powers in the hands of the European Commission, at the expense of the protection authorities, regarding the elaboration of guidelines as to the protection of personal data and regarding the definition of the implementation mechanisms of the new provisions. It defends a re-balancing of these powers for the benefit of the protection authorities which have the essential technical expertise for this task.'

And see the answer to question 10.

SESSION VII - Data Protection in the global context- Protecting rights in the global world

- 15. How do you evaluate the proposed international transfer mechanism in both proposals taking into account that the EU and third states frameworks are not always based on same principles and do not offer the same protections for individuals?**
- 16. The Commission has indicated that its proposal aims at simplifying international transfers and overcome burden for controllers. Does this mean that data subjects' rights will be less protected?**
- 17. Do you have any other remarks as regards the proposed reform package?**
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The transfer conditions to third States are deemed insufficient.

Referring to the recast of the 1995 directive, in its resolution no. 888 of 23 March 2012, the National Assembly:

'15. Calls for a better framing of international data transfers, which must necessarily preserve the control and authorisation powers over these exchanges by the national protection authorities. The assessment of transfer conditions by processors themselves would lead to a considerable fall in the level of protection of citizens' rights;

[...]

17. Calls for the adoption, by the EU Member States and third States, of an international convention to harmonise personal data privacy laws, as supported by the Madrid Resolution adopted by the 31st international conference of data protection and privacy commissioners.'

Referring to the reform of the framework decision of 2008, in its conclusions of 15 February 2012, the European Affairs Committee at the National Assembly: *'deems that the framing of transfers to third States or international organisations is incomplete, with regard in particular to the possibilities of transfers in return for appropriate guarantees, the latter being insufficiently defined at this stage. It will also be necessary to compensate for the absence of specific protections for the transfer of data coming from another Member State.'*