ARTICLE 29 DATA PROTECTION WORKING PARTY

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WP 166

Opinion 7/2009 on the level of protection of personal data in the Principality of Andorra

Adopted on 1 December 2009

The Working Party on the protection of individuals with regard to the processing of personal data

Having regard to Directive 95/46/EC of the European Parliament and of the Council, of 24 October 1995, on the protection of individuals with regard to the processing of personal data and the free movement of such data, and in particular Articles 29 and 30 paragraph 1 (b) thereof,

Having regard to the Rules of Procedure of the Working Party, and in particular Articles 12 and 14 thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. INTRODUCTION

On 21 May 2008 the Ambassador of Andorra to the European Union requested the Commission to handle the procedure for the declaration of Andorra as a country that offers an adequate level of protection within the meaning of article 25(6) of Directive 95/46/EC, on Personal Data Protection.

In order to proceed with the study of the adequacy of Andorra the Commission requested the issue of a report from the Centre de Recherches Informatique et Droit (CRID) of the University of Namur, which issued an extensive report that analysed the fulfilment by the Andorran regulatory system of the requisites for substantive legislation and the implementation of mechanisms applicable to the personal data protection regulations established in the Working Document "Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive", adopted by the Working Party created by article 29 of the Directive on 24 July 1998 (document WP12).

The said report was discussed in the meeting of the Safe Harbour Subgroup during a meeting held on 18 March 2009.

In the said meeting, the Subgroup submitted to the opinion of the Working Party the sending by its Chairman to the Andorran authorities of a letter in which, after positively assessing the existing data protection regime in Andorra, the said authorities were informed of those matters that may require further clarification.

On 31 July 2009 the Andorran authorities, via the Andorran Data Protection Agency (APDA) sent to the Article 29 Working Party an extensive report in which they responded to the questions posed in the said letter.

The said report has been analysed by the Subgroup, and was also the subject of an audience with the said authorities, held on 16 September 2009, during which the members of the Subgroup requested from the Andorran authorities, represented by the Director of the APDA, its Inspection Manager and the Manager of Legal Consultancy, the clarification of those matters which, after the previous discussion of the report sent by the same to the Subgroup, were still considered to require clarification.

The Subgroup informed the Working Party, during the meeting of the same held on 12 and 13 October 2009, regarding the conclusions reached in the said meeting and proposed to the same the adoption of this Opinion, under the terms contained herein, the said proposal being approved by the Working Party during the said meeting.

2. DATA PROTECTION LEGISLATION IN THE PRINCIPALITY OF ANDORRA

Andorra is a small State situated in the Pyrenees, between France and Spain, and is the sixth smallest country in the world in terms of area. Its population is around 80,000 inhabitants. Its economic activity is concentrated in the tertiary sector (to which 89% of the companies located in the country belong) and in particular tourism. Moreover, only a third of its population has Andorran nationality.

These peculiarities are especially relevant with regard to the protection of personal data, in that they necessarily affect data flows proceeding from or transferred to Andorra and, particularly, the visibility of the decisions adopted by the supervisory body on the subject of data protection.

Since the approval of the Constitution by popular referendum on 14 March 1993, the political system of Andorra is that of a Parliamentary Co-Principality, the condition of Co-Princes being held by the President of the French Republic and the Archbishop of Urgell.

Article 14 of the Constitution of the Principality of Andorra confirms the protection of the right to privacy, honour and freedom from injury to reputation, and declares that all individuals have the right to be protected by the law against illegitimate intromissions into private or family life.

The protection of personal data is regulated by the Qualified Law 15/2003, of 18 December on the protection of personal data (LQPDP), regulated via various regulatory rules, including two Decrees of 1 July 2004, the first of these approving the Regulations of the Andorran Data Protection Agency, and the second the Regulations of the Public Register for the Inscription of Personal Data Files. Likewise, during the procedure referred to in section 1, the Andorran authorities have made known to the Working Party the future approval of general data protection Regulations that complement and clarify the provisions of the LQPDP, it being foreseeable that this will be approved in the final months of 2009 or the first months of 2010.

In the international sphere, Andorra has signed and ratified the European Convention for the Protection of Human Rights (in force since 22 January 1996) and its Protocol (in force since 6 May 2008), as well as the Covenant on Civil and Political Rights (which came into force in Andorra on 19 July 2006).

On the subject of data protection, Andorra has signed and ratified the Council of Europe Convention 108 for the protection of individuals with regard to the automatic processing of personal data and its additional Protocol, both coming into force on 1 September 2008.

Lastly, it must be pointed out that in accordance with article 3 of the Constitution of Andorra, international treaties and agreements are effective in the Andorran legal system from their publication in the Official Gazette of the Principality of Andorra and they cannot be repealed by national legislation. That is to say that the said agreements, from the moment of their ratification, form part of Andorran law and are of direct application therein.

3. ASSESSMENT OF THE DATA PROTECTION LAW OF THE PRINCIPALITY OF ANDORRA AS PROVIDING ADEQUATE PROTECTION OF PERSONAL DATA

The Working Party points out that its assessment of the adequacy of the data protection legislation in force in Andorra refers essentially to the Qualified Law on the Protection of Personal Data of 2003.

The provisions of this Law have been compared with the main provisions of the Directive, taking into account the Working Party's opinion WP12. This opinion lists a number of principles which constitute *a "core" of data protection "content" principles and "procedural/enforcement" requirements, compliance with which could be seen as a minimum requirement for protection to be considered adequate*.

3.1. Content principles

a) Basic principles

> **1) The purpose limitation principle:** Data should be processed for a specific purpose and subsequently used or further communicated only insofar as this is not incompatible with the purpose of the transfer. The only exceptions to this rule would be those necessary in a democratic society on one of the grounds listed in Article 13 of the Directive.

The Working Party considers that the legislation of Andorra respects this principle. In particular article 11 a) of the LQPD provides that "*processing of personal data may only be carried out by the data controllers if it meets the following requirements: a) that the processing is carried out for the purposes contemplated in the creation or decision rule of the personal data files*".

With regard to this principle, article 27 of the LQPDP imposes on all the controllers of files of a private nature the obligation to inscribe them in the Register managed by the Andorran Data Protection Agency where, according to article 28 c), "the purpose of the processing of the data" should be expressly indicated.

Likewise, article 30 imposes as a prior requirement for the creation of files of a public nature the adoption of a creation rule, which "must be approved by the public body responsible for processing and which must be published in the Official Gazette of the Principality of Andorra". The said rule must specify, according to article 31 a) the "purpose of the processing of the file".

The prohibition of the processing of data for purposes incompatible with that mentioned derives from the direct application of Convention 108, whose article 5 b) provides that "personal data undergoing automatic processing (...) shall be stored for specified and legitimate purposes and not used in a way incompatible with those purposes". As has been stated, this precept is of direct application in Andorran law through the application of article 3 of the Constitution.

> **2) The data quality and proportionality principle:** Data should be accurate and, where necessary, kept up to date. The data should be adequate, relevant and not excessive in relation to the purposes for which they are transferred or further processed.

The Working Party considers that the quality principle is expressly included in article 11 b) of the LQPDP, according to which "*personal data processing may only be carried out by data controllers if it meets the following requirements: b) that the data undergoing processing correspond with the real personal data of the data subjects and that, for this purpose, measures are adopted to update or erase them"*.

Regarding the proportionality principle, the Working Party again takes into consideration the direct applicability in Andorra of Convention 108, whose article 5 c) prohibits the processing of data which are excessive in relation to the purposes for which they were stored.

Therefore, the Working Party considers that the legislation of Andorra complies with this principle.

> **3) The transparency principle:** Individuals should be provided with information as to the purpose of the processing and the identity of the data controller in the third country, and other information insofar as this is necessary to ensure fairness. The only exemptions permitted should be in line with Articles 11.2 and 13 of the directive.

The Working Party understands that the right of information of the data subject is regulated in articles 13 and 15 of the LQPDP, referring, respectively, to cases where the data have been collected from the data subject or where they have not been obtained from him/her.

Article 13 of the LQPDP requires that at the time of collection of the data the data subject be informed by the data controller, in similar terms to those contemplated in the Directive, regarding:

a) The identity of the data controller.
b) The purpose of the processing of the personal data.
c) The recipients or types of recipients of the data.
d) The rights of access, rectification and erasure of the data and how they can be exercised.
e) His/her rights not to grant consent for the processing of the data and the consequences of not doing so.

The Working Party considers, with regard to the last of the said cases, that the reference to consent refers to cases in which the said consent must be granted in accordance with the provisions of the LQPDP that regulate legitimacy for processing, included in the Second Section of the Andorran Law itself.

On this point, the Group considers that the observations made by the Andorran authorities during the audience held with the Subgroup regarding the definition of consent established in the LQPDP are sufficient to consider that this consent complies with the requirements of the Directive.

If the data are not collected directly from the data subject, article 15 of the LQPDP obliges any recipient of the data as a consequence of a communication of these to inform the data subject in a maximum period of fifteen days counting from the moment in which he received the data of the points contained in letters a) to d) of article 13, as well as the identity of the natural or corporate person from whom the controller has received the data, the data subjects being able, when the Law so allows, to object to the processing and request the erasure of their data during the month following the said communication.

Therefore the Working Party considers that this principle is fulfilled by Andorran legislation.

> **4) The security principle:** Technical and organisational security measures should be taken by the data controller that are appropriate to the risks presented by the processing. Any person acting under the authority of the data controller, including a processor, must not process data except on instructions from the controller.

The Working Party considers that Andorran legislation complies with this principle. Article 12 of the LQPDP expressly states the following:

> *"Data controllers must establish the necessary technical and organisational measures to safeguard the confidentiality and security of the personal data undergoing processing.*
>
> *If all or part of the processing is entrusted to personal data service providers the data controller is responsible for ensuring that the providers have established sufficient technical and organisational measures to ensure the confidentiality and security of the data forming the object of the service."*

The concept of "personal data service provider" corresponds to that of the data processor referred to by the Directive, since article 3.5 of the LQPD defines this as "the natural or corporate person, of a public or private nature, who processes the data on behalf of the data controller or who accesses the personal data for the provision of a service in favour of and subject to the control of the data controller, provided he does not use the data to which he has access for his own purposes or that he does not make use of the same beyond the instructions received or for purposes other than the service to be provided in favour of the controller".

5) The rights of access, rectification and opposition: The data subject should have a right to obtain a copy of all data relating to him/her that are processed, and a right to rectification of those data where they are shown to be inaccurate. In certain situations he/she should also be able to object to the processing of the data relating to him/her. The only exemptions to these rights should be in line with Article 13 of the Directive.

The LQPD refers to the right of access in its article 22 recognising that "any data subject has the right to be informed by the data controller of the data undergoing processing". The controller must grant the right in a period of five days, and may choose the means by which the information will be provided to the data subject. The Working Party observes that this procedure is congruent with the right that article 12 of the Directive grants to the data subject of "communication to him in an intelligible form of the data undergoing processing and of any available information as to their source".

The right of rectification is regulated by article 23 of the LQPD as the right of the data subject for the data undergoing processing to be corrected if they are erroneous, a right that must be granted in the period of one month from the request. The controller may only refuse this right, as well as in the cases that will be mentioned, if the data subject does not provide when necessary the documentation that proves the existence of an error in the processing. The Working Party considers that this right corresponds with that established by article 12 of the Directive.

The Working Party also observes that the legislation of the Principality of Andorra does not contain a regulation of the right to opposition in similar terms to that contemplated in article 14 of the Directive. However, it understands that this loophole is covered by the regulation of the rights of opposition and erasure contained in articles 15 and 24 of the LQPD.

According to the first of these rules, the data subject may object, with the restrictions established by article 15 itself, to the processing of his/her data resulting from a communication of the same to a third party within the month following the receipt of the information which must be sent obligatorily to the data subject.

Regarding the right to erasure, this is established in the LQPD as the right of the data subject to "request the data controller to erase the data undergoing processing". The controller must reply to this request in the period of one month from receipt. An exception will only be made to this right in cases where there is a legal or contractual basis for the controller to continue processing.

Regarding the exceptions to these rights, the LQPD contemplates two types of exceptions: those referring solely to the right of opposition and applicable to any processing (article 15) and others referring to all the rights, but which will only be applicable to files of a juridical-public nature (article 32).

The Working Party considers that the said exceptions may be interpreted in the meaning of article 13 of the Directive, also taking into account the explanations given to this effect by the Andorran authorities. Moreover, it observes that the rules referring to each one of the rights expressly establish that in the case of refusal of the right, the said refusal will be liable to appeal before the competent authority.

6) Restrictions on onward transfers: Further transfers of the personal data by the recipient of the original data transfer should be permitted only where the second recipient (i.e. the recipient of the onward transfer) is also subject to rules affording an adequate level of protection. The only exceptions permitted should be in line with Article 26(1) of the Directive.

The sixth chapter of the LQPDP refers to international data transfers, stating, in the first place, that "international data communications may not take place when the destination country of the data does not establish, in its regulations, a level of protection for personal data equivalent, at least, to that established by this Law".

The Working Party considers satisfactory the interpretation of the term "equivalent" used by the Andorran Law and the explanations given by the authorities of that country, in the sense of clarifying that the said term should be interpreted in the terms contained in article 25 of the Directive, in the sense that the limitation refers to countries that do not offer an "adequate" level of protection. Likewise, it takes into account the clarifications given by article 36 of the Law itself, which considers "equivalent" the level of protection established in the Member States and in those "declared by the Commission of the European Communities as countries with an equivalent level of protection".

Article 37 of the LQPDP establishes the exceptions to the general rule of adequacy to which reference has been made, indicating that it will be possible to make transfers that:

a) Are carried out with the unambiguous consent of the data subject.
b) Are made in accordance with international agreements to which the Principality of Andorra is a party.
c) Are carried out for the purposes of providing international aid or for the recognition, exercise and defence of a right in the framework of a legal process.
d) Are made for medical prevention or diagnosis, healthcare, social prevention or diagnosis or for vital interest of the data subject.
e) Are made on the occasion of money transfers or bank remittances.
f) Are necessary for the establishment, execution, fulfilment or control of legal relationships or contractual obligations between the data subject and the data controller.
g) Are necessary to protect the public interest.
h) Refer to data that originate in public registers or are carried out in fulfilment of the functions and purposes of public registers.

The Working Party considers that the explanations and clarifications given by the Andorran authorities on this point are sufficient to consider that the said exceptions correspond with those established by article 26.1 of the Directive.

Thus, and in addition to those referring to the characteristics of consent already referred to, the Working Party understands that the exception contemplated in section e) should be considered included in sections b) and c) of the said article 26.1.

Likewise, the Working Party receives satisfactorily the explanations of the Andorran authorities in the sense of explaining that the public interest referred to in letter g) must always be important, in that the Andorran legal system does not refer to the possible existence of "a" public interest, but to "the" public interest, so that the existence is not possible in that country of a public interest that is not important.

In the same way, the Working Party receives with satisfaction the explanations of the Andorran authorities referring to the concepts of "public registers" and "publicly accessible registers". In this way, the transfer referred to in letter h) can only take place in the cases and to the extent contemplated in the rules referring to each register, so that in no case would a mass transfer be possible of the data contained in a public register nor to an extent and under conditions other than those contemplated in its regulations which, in general, require the concurrence in the applicant of a legitimate interest for knowing the content of the Register.

Lastly, the Working Party likewise considers sufficient the statements relating to the exception contemplated in letter d), especially taking into account the geographical specialities and those of the population in Andorra, so that the said exception may be considered covered by letter e) of article 26.1 of the Directive.

b) Additional principles

Document WP12 refers to certain principles that should be applied to specific types of processing, concentrating on the following:

> **1) Sensitive data:** Where 'sensitive' categories of data are involved (those listed in article 8 of the directive), additional safeguards should be in place, such as a requirement that the data subject gives his/her explicit consent for the processing.

The Working Party considers that this principle is fulfilled in Andorran legislation, taking into account especially that which is contemplated in articles 19 to 21 of the LQPDP, as well as the definition of sensitive data in its article 3.11, which gives a list of these data that coincides with that contained in article 8 of the Directive.

In particular, the LQPDP provides that "sensitive data may only undergo processing or communication with the express consent of the data subject". Moreover, the creation of files for the exclusive purpose of collecting or processing sensitive data is expressly prohibited.

The Working Party receives satisfactorily the clarifications given by the Andorran authorities with regard to the sectoral regulations applicable to the processing of health data and, in particular, the existence of an obligation of secrecy expressly contemplated by the Andorran regulatory system, as well as those relative to the fact that epidemiological studies are carried out anonymously.

> **2) Direct marketing:** where data are transferred for the purposes of direct marketing, the data subject should be able to 'opt-out' from having his/her data used for such purposes at any stage.

Andorran legislation does not refer expressly to this principle. However, the Working Party observes that this is guaranteed by the said legislation via the application of various rules.

Thus, at the time of collection of the data the data controller must inform the data subject regarding the purposes for which his/her data will be processed and the need, if applicable, to obtain his/her consent (articles 13 and 17 of the LQPDP).

In the same way, if the data are not collected from the data subject, the latter must be informed regarding the purposes of the treatment in a period of fifteen days, and may state his/her refusal for this to be carried out in the following month (article 15).

Finally, the data subject may at any time exercise the right of erasure, which may only be refused in the legally contemplated cases, in which it would not be possible to include in any case the use of the data for direct marketing purposes (article 24 of the LQPDP). Thus, in the case of a request to cease processing for these purposes subsequent to the collection of the data or the exercise of the right referred to in article 15 of the LQPDP, the data controller should comply with this.

Therefore, the Working Party considers that this principle is guaranteed by Andorran law.

> **3) Automated individual decision:** Where the purpose of the transfer is the taking of an automated decision in the sense of Article 15 of the directive, the individual should have the right to know the logic involved in this decision, and other measures should be taken to safeguard the individual's legitimate interest.

As in the previous case, this principle is not expressly contemplated in Andorran legislation.

The Working Party takes into consideration the clarifications given by the Andorran authorities with regard to the protection of the right of the data subject regarding automated individual decisions, especially insofar as it is stated that the data subject may always exercise the rights of access and erasure contemplated in the LQPDP, which will allow the individual to know the logic of the processing carried out and object to it.

However, the Working Party considers, without prejudice to the fact that this does not affect the positive assessment of the Andorran regulations, that it would be highly satisfactory if Andorran legislation expressly included this principle, avoiding any doubt regarding its possible application in future.

To this effect, the Working Party receives satisfactorily the fact the LQPDP is to be the object of forthcoming implementation regulations and requests the authorities of the Principality of Andorra that these regulations should make clearly explicit the principle to which reference is currently made in similar terms to those contemplated in article 15 of the Directive.

3.2. Procedural/enforcement mechanisms

The Working Party's opinion WP12 "Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive" points out that to assess the adequacy of a third country's legal system it is necessary to identify the underlying objectives of a data protection procedural system, and on this basis to judge the variety of different judicial and non-judicial procedural mechanisms used in third countries.

In this respect, the objectives of a data protection system are essentially threefold:

- To deliver a good level of compliance with the rules,
- To provide support and help to individual data subjects in the exercise of their rights,
- To provide appropriate redress to the injured party where rules are not complied with.

  a) To deliver of a good level of compliance with the rules: A good system is generally characterised by a high degree of awareness among data controllers of their obligations, and among data subjects of their rights and the means of exercising them. The existence of effective and dissuasive sanctions can play an important part in ensuring respect for rules, as of course can systems of direct verification by authorities, auditors, or independent data protection officials.

The Working Party considers that this objective is complied with, taking into consideration different provisions contained in Andorran legislation, and in particular the following:

The Andorran Data Protection Agency (APDA)

The Seventh Chapter of the LQPDP creates the Andorran Data Protection Agency, as "a public organisation with its own legal personality, independent of the Public Administrations and with full capacity to act".

The Regulations of the Agency configure it as "an independent authority that acts with objectivity and full independence of the Andorran public administrations in the exercise of its functions and is related to the Government via the Ministry responsible for the Economy". The Working Party considers that this relationship does not imply, according to Andorran public law, any type of hierarchical dependence.

Likewise, the Working Party notes that the rules contained in the LQPDP and in the Regulations of the APDA show the independence of the latter both with regard to the appointment and dismissal of its Director and the two Inspectors that comprise it and with regard to its budgetary independence, given that both the appointment and dismissal of the said persons and the budget of the Agency are approved by the legislative Power (*Consell General*), requiring in the first two cases a specially qualified majority. Likewise, it takes into consideration in order to appreciate this independence that the resolutions of the APDA may only be appealed against before the courts.

The LQPDP provides the APDA with adequate competences in order to safeguard the fulfilment of the data protection rules. It corresponds to the APDA, in general, to ensure the fulfilment of this legislation. In particular, the Working Party observes that the LQPDP attributes to the APDA the competence to "exercise the power of inspection and the imposition of sanctions for the infractions defined in the fifth Chapter of this Law".

Means of execution and sanction

The Fifth Chapter of the LQPDP refers to the imposition of sanctions as a consequence of a breach of its provisions, establishing as a general principle that "breach of this Law by individuals or corporate persons of a private nature is subject to administrative sanction. The first breach by the controller of a file is sanctioned with a fine for a maximum amount of 50,000 euros and subsequent breaches in which the same controller may incur are sanctioned with a fine for a maximum amount of 100,000 euros" (Article 33).

In cases in which the controller is a public body, article 34 contemplates that "the regulatory provisions of the disciplinary regimes" will be applicable. The Working Party takes note of the clarifications given by the Andorran authorities, in the sense that the reference made by the LQPD to the "disciplinary" regime in the sphere of Public Administration should be correctly translated as specific "sanctioning" regime and that article 14 of the Regulations of the Agency grants sanctioning powers to the latter with regard to the files of the Public Administrations, referring in this point to the specific sanctioning rules. Likewise, the Working Party takes into account the competences for the blocking of the databases as a precautionary measure.

The competence of inspection and sanction will correspond, as has been stated, to the APDA. The Working Party takes note of the broad scope of the said powers in view of that established in the LQPDP and in the Regulations of the Agency.

Pursuant to the above, the Working Party considers that the legislation of Andorra contains the necessary elements to guarantee a good level of compliance with the rules.

> **b) To provide support and help to individual data subjects in the exercise of their rights:** The individual must be able to enforce his/her rights rapidly and effectively, and without prohibitive cost. To do so there must be some sort of institutional mechanism allowing independent investigation of complaints.

The Working Party observes that the Legislation of Andorra has introduced various mechanisms designed to comply with this objective.

On the one hand, article 25 of the Law provides that the exercise of the rights of access, rectification, erasure and opposition "cannot be subjected by the controller of the file to any formality or payment by the data subject of the expenses that this may cause". In the case of refusal of the said rights, the LQPD contemplates that this may be appealed against before the competent jurisdiction.

Moreover, article 41, third paragraph of the LQPD contemplates that the inspection action of the APDA may be commenced upon the initiative of the Agency itself or upon the request of any data subject who considers that his/her rights are affected or that a data controller has breached the obligations contemplated in the Law. Moreover, article 20.2 of the Regulations of the Agency refers expressly to the inspections carried out upon the request of data subjects, imposing upon the APDA the obligation to carry out the inspections requested by data subjects.

Pursuant to the above, the Working Party considers that the legislation of Andorra contains the necessary elements to provide support and help to individual data subjects in the exercise of their rights.

> **c) To provide appropriate redress to the injured party where rules are not complied with:** This is a key element which must involve a system of independent adjudication or arbitration which allows compensation to be paid and sanctions imposed where appropriate.

Article 26 of the LQPD expressly recognises the right of data subjects to obtain the compensations that may correspond to them as a consequence of the civil liability in which a data controller may incur in the case of breach of the Law, this right to compensation being independent of the sanctions that may be imposed by the APDA.

For this reason, the Working Party considers that the legislation of Andorra includes the necessary elements to offer adequate redress to the injured party where rules are not complied with.

4. RESULT OF THE ASSESSMENT

In conclusion, pursuant to all the above, the Working Party considers that **the Principality of Andorra ensures an adequate level of protection** within the meaning of Article 25(6) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

At the same time, the Working Party requests that, in the implementation regulations of the Qualified Law on Data Protection, the authorities of Andorra take into account the clarifications contained in this opinion, particularly those regarding the regulation of automated individual decisions.

Done at Brussels, on 1 December 2009

For the Working Party
The Chairman
Alex TÜRK