



EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE, FREEDOM AND SECURITY

COMPARATIVE STUDY
ON
DIFFERENT APPROACHES TO NEW PRIVACY CHALLENGES,
IN PARTICULAR IN THE LIGHT OF TECHNOLOGICAL DEVELOPMENTS

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COMPARATIVE CHART:

Divergencies between data protection laws in the EU:

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Submitted by:



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EXPLANATION:

The charts on the following pages reflect the findings of Working Paper No. 2: Data Protection Laws in the EU: The difficulties in meeting the challenges posed by global social and technical developments, by the same author (the Team Leader for the current project). The global social and technical developments in question are described in Working Paper No. 1: Challenges to European Data Protection Laws, by the author's fellow core expert, Dr Ian Brown of the Oxford Internet Institute (OII) of the University of Oxford.

Charts cannot replace serious discussions or descriptions; and the charts provided here are no exception. The reader is therefore strongly encouraged to read the Final Report on the present study, and these two Working Papers (and, if possible, the full, detailed Country Reports that support them). However, charts do have the advantage of providing a simple (although really over-simplified) overview of the many complex issues.

We feel that the main aim of the charts should be to allow policy-makers, politicians and critical outsiders to spot the main issues, and to have some idea of the other ones. We have therefore tried to indicate in these charts:

- ✓ First, what the issues and sub-issues were that arose in the implementation of the main EC data protection directive (Directive 95/46/EC; “the Directive”);
- ✓ Next, how convergent or divergent the issues or sub-issues were dealt with in the national laws (supposedly) giving effect to the Directive (or at least in the laws of the countries studied in this report, and in a previous report for the Commission by the same author), or whether there is still significant lack of clarity in this respect (which is inherently likely to result in divergent application of the laws);
- ✓ Third, the extent to which the divergencies arose out of formally-permitted margins of discretion, or differences of interpretation and application, or (more or less manifest) breaches (failures to meet the requirements) of the Directive; and last but far from least:
- ✓ The importance of the issue in terms of:
 - (i) Privacy- and human rights protection; and
 - (ii) The Internal Market and international trade.

These matters are reflected in columns 1 – 5 of the charts, respectively. In column 6, we have deduced from them a ranking in terms of policy priority.

We start with a one-page overview of the main issues posing serious challenges, i.e., which have been rated as having “major policy implications”. This is followed by charts covering all issues covered in Working Paper No. 2. A Legenda indicating the relative ratings in these columns is provided overleaf.

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NEW CHALLENGES TO DATA PROTECTION
COMPARATIVE CHART: Divergencies between data protection laws in the EU
by Douwe Korff

LEGENDA:

The charts on the following pages use a coloured scoring mechanism to indicate how high or low on the relevant scale we judge the issue in question to be, as follows:

Column 1: **Section in Working Paper No. 2** [no scores]

Column 2: **Issue or sub-issue** [no scores]

Column 3: **Con- or divergence, or lack of clarity:**

Largely convergent laws	:	[green]
Minor divergencies	:	[blue]
Considerable divergencies	:	[yellow]
Very serious divergencies	:	[red]

Column 4: **Permitted/unlawful divergence:**

Little divergence	:	[green]
Permitted divergences	:	[blue]
Questionable divergences	:	[yellow]
Unlawful divergences	:	[red]

Note: The assessments in this column are by their nature disputable: some States will argue that some interpretations or applications of the law, which we rate as “questionable” or even “unlawful” (= in our view, clearly in breach of the Directive), are perfectly lawful and permitted. That is in the nature of simplified charts.

Column 5: **Importance in terms of data protection:**

No serious negative impact	:	[green]
Minor impact	:	[blue]
Considerable impact	:	[yellow]
Very serious impact	:	[red]

Note: The assessments in this column are based on our view of the impact of the divergencies noted in Column 2 on the level of data protection in the EU, in particular in view of the new socio-technical global developments described in Working Paper No. 1, irrespective of whether these divergencies are permitted/lawful under the data protection directive.

Column 6: **Importance in terms of the Internal Market and international trade:**

No serious negative impact	:	[green]
Minor impact	:	[blue]
Considerable impact	:	[yellow]
Very serious impact	:	[red]

Note: The assessments in this column are based on our view of the impact of the divergencies noted in Column 2 on the level of data protection in the EU, in particular in view of the new socio-technical global developments described in Working Paper No. 1, irrespective of whether these divergencies are permitted/lawful under the data protection directive.

Column 7: **Importance in terms of EU policy priorities:**

Not very important in policy terms	:	[green]
Minor policy importance	:	[blue]
Considerable policy importance	:	[yellow]
Major policy importance	:	[red]

CHART I: Overview of main issues

(= issues rated as having major policy implications)

Section in WP2	ISSUE:	Convergence/ Divergence	Permitted/ Unlawful	DP Importance	Trade Importance	Policy Importance
2.1	Extension of the national dp law to (former) Third Pillar matters	Yellow	Blue	Red	Green	Red
2.3	Scope of the exemption in relation to freedom of expression	Yellow	Yellow	Yellow	Blue	Red
3.1	Applicable law rule for EU/EEA-based controllers	Yellow	Red	Red	Red	Red
3.2	Applicable law rule for non-EU/EEA-based controllers	Yellow	Red	Red	Red	Red
3.3	Application of the law to the Internet	Yellow	Yellow	Red	Red	Red
4.1	The question of anonymisation, pseudonymisation and re-identifiability	Yellow	Yellow	Red	Red	Red
4.1	The question of “profiling”	Yellow	Yellow	Red	Blue	Red
4.2	Use of non-sensitive data for secondary research purposes	Yellow	Yellow	Red	Red	Red
4.4	Rules on the processing of sensitive data (and on what constitutes such data)	Red	Yellow	Red	Red	Red
4.5	Rights of data subjects (iv) – right not to be subjected to a fully-automated decision	Yellow	Yellow	Red	Yellow	Red
4.7	Rules on transborder data flows	Red	Yellow	Red	Red	Red
5.1	Applicable law in the context of a judicial remedy / constitutional problems	Yellow	Yellow	Red	Blue	Red
5.1	Effectiveness of complaints procedure	Red	Yellow	Yellow	Blue	Red
5.2	Consistency and effectiveness of enforcement by the national DPA	Yellow	Yellow	Red	Red	Red

CHART II: Overview of all issues

Section in WP2	ISSUE:	Con-/divergence/ Lack of clarity	Permitted/ Unlawful	DP Importance	Trade Importance	Policy Importance
2.1	Extension of the national dp law to (former) Third Pillar matters					
2.2	Scope of the exemption for purely personal and household activities					
2.3	Scope of the exemption in relation to freedom of expression					
3.1	Applicable law rule for EU/EEA-based controllers					
3.2	Applicable law rule for non-EU/EEA-based controllers					
3.3	Application of the law to the Internet					
4.1	Definition of “personal data” and “data subject” (<i>but see the next two rows:</i>)					
4.1	The question of anonymisation, pseudonymisation and re-identifiability					
4.1	The question of “profiling”					
4.1	Definition of “processing”					
4.1	Definitions of “controller” and “processor”					
4.2	Application of the dp principles (<i>see also next row:</i>)					
4.2	Use of non-sensitive data for secondary research purposes					
4.3	Application of the criteria for lawful processing – general (<i>see also next rows:</i>)					
4.3	Processing on the basis of statutory authorisation					
4.3	Processing on the basis of consent					

Continued overleaf

CHART II: Overview of all issues (*continued*)

Section in WP2	ISSUE:	Convergence/ Divergence	Permitted/ Unlawful	DP Importance	Trade Importance	Policy Importance
4.3	Processing on the basis of the “balance” criterion					
4.4	Rules on the processing of sensitive data (and on what constitutes such data)					
4.5	Rights of data subjects (i) – right of access to / a copy of the data					
4.5	Rights of data subjects (ii) – right to object generally					
4.5	Rights of data subjects (iii) – right to object to direct marketing					
4.5	Rights of data subjects (iv) – right not to be subjected to a fully-automated decision					
4.6	Rules on data security and confidentiality					
4.7	Rules on transborder data flows					
5.1	The right to a judicial remedy under the national law (<i>but see the next row:</i>)					
5.1	Applicable law in the context of a judicial remedy / constitutional problems					
5.1	The right to complain to the DPA under the national law (<i>but see the next row:</i>)					
5.1	Effectiveness of complaints procedure					
5.2	The status of the national DPA					
5.2	The powers of the national DPA					
5.2	Consistency and effectiveness of enforcement by the national DPA					

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