

E-ALERT | Global Privacy & Data Security

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UPDATE ON THE REFORM OF THE EUROPEAN DATA PROTECTION FRAMEWORK

This eAlert provides an update on recent developments regarding the proposed Data Protection Regulation in both the European Parliament and Council.

As we previously [reported](#), on January 25, 2012, the European Commission proposed comprehensive measures to reform the European data protection framework. Among other things, the proposal for a [General Data Protection Regulation](#) would:

- clarifies and potentially expands the concept of “personal data”;
- introduce tighter controls on consent as a ground for lawfully processing personal data;
- create a “one-stop” shop, whereby EU data controllers would be supervised by the data protection authority of the Member State where the controller’s “main establishment” is based;
- enhance rights for individuals, e.g., by creating a “right to be forgotten”;
- codify principles of data protection “by design” and “by default”;
- create a general breach notification requirement in the EU;
- require organizations employing 250 or more persons to designate a data protection officer; and
- increase sanctions for data protection violations to up to 2% of an organization’s worldwide revenue.

In recent weeks, MEPs and Member States have started to work on the Commission’s proposals.

PARLIAMENT

In the Parliament, the most significant news to date is that Jan Albrecht, member of the Green Group, will be the rapporteur, i.e., the lead draftsman in the Civil Liberties, Justice and Home Affairs committee (LIBE). We understand that the shadow rapporteurs from LIBE, with whom Albrecht will work most closely, are likely to include Axel Voss (member of the EPP Group, center-right) and Alexander Alvaro (member of the Alliance of Liberals and Democrats). The fact that German MEPs - in particular from the Greens and the Liberals - hold key positions in the process may be significant, considering that they are likely to favor the robust data protection framework in the Regulation.

In addition to LIBE, we understand that two other committees - the Industry, Research and Energy (ITRE) led by Sean Kelly (EPP) and the Internal Market and Consumer Protection (IMCO) led by Lara Comi (EPP) - will submit an opinion.

One important procedural issue that will impact any lobbying strategy is whether proceedings in the Parliament will follow the “normal” legislative procedure or the associated Committees procedure. This remains to be decided. In short, under the “normal” procedure, the lead committee (in this instance, LIBE) has no obligation to take the amendments of opinion committees on board. Under the associated committees procedure, however, all committees are on equal footing; if an associated committee adopts amendments on matters falling within its exclusive competence, the other associated committee must accept them. In practice, lobbying strategy in relation to this procedure differs significantly from the “normal” procedure - while it creates greater opportunities to put views across, it also creates risk as more players are involved.

The decision on the procedure is expected to be taken by mid-April the latest. We are able to help clients navigate this complex environment.

COUNCIL

The first round of discussions among Member States about the proposed reforms took place in the Council Working Group on Data Protection and information exchange (DAPIX) on February 23 and 24. The delegations focused on (a) the need for a new Data Protection regime; (b) the form of the legislative instruments; (c) the scope of the proposals; and (d) certain aspects of the content.

(a) The need for a new Data Protection regime:

- Many delegations had serious concerns that instead of simplifying the data protection rules as it intended, the newly proposed Data Protection regime would result in an increased administrative burden on both the private and public sectors.
- Several delegations thought that the proposed Regulation did not distinguish sufficiently between SME's, large enterprises and the public sector.
- As regards the private sector, several delegations argued that the number of employees a company employed should not be the decisive criterion regarding the applicability of some of the data protection rules, but that this should instead hinge on the data protection risk inherent in specific types of data processing operations. Some delegations strongly advocated a more risk-based approach for the future regime.

(b) The form of the legislative instruments

- A significant number of delegations stated that they would have preferred a Directive for the general law as a Regulation is too prescriptive. Belgium, Germany and Sweden entered formally a "scrutiny reservation" on this. Only a few Member States shared the view of the Commission that a Regulation would bring a major advantage to companies active in several Member States.
- Many delegations repeated their usual criticism of the (extensive) use of Delegated Acts as giving too much power to the Commission to flesh out the rules, noting also that this was contrary to the stated objective of simplification of these rules.

(c) The scope of the proposals

- Criticism was expressed about the demarcation between the proposed Regulation (i.e., the general law) and the proposed Directive (i.e., the specific law that would apply to processing in the law enforcement and judicial context), some arguing that the same data are being handled by the same National Authorities in the context of criminal offences and for purposes covered by the Regulation.
- Some considered that the Directive should not apply to purely internal data protection operations in the area of justice and judicial activities.
- The possible conflict with the freedom of the press and some constitutional rules on access to public documents was, according to some, not addressed properly.
- One delegation expressed strong reservations concerning the choice of criteria for determining the competence of the data protection authorities (DPAs) and thought that the option of making one DPA competent for all data processing operations carried out throughout the European Union by a particular data controller could lead to forum shopping and might distance the data subject from the competent DPA.

(d) The content of the proposals

A few general comments were made regarding the content:

- While welcoming the concept of privacy by design and the attention to privacy-enhancing technologies, some delegations queried whether the proposed Regulation was sufficiently technology-neutral.

- Some delegations expressed concerns as to the technical feasibility of concepts such as the right to be forgotten and the right to data portability.
- Several delegations said the sanctions provided by the draft Regulation were too heavy, especially for SMEs. In this regard, the double jeopardy (ne bis in idem) risk of having the same conduct sanctioned twice, was also raised.

The Danish Presidency is continuing to work on the dossier at the Working Group level (i.e., within DAPIX), and further meetings are expected to take place in May/June.

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