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Status of the Proposed EU Data Protection Regulation: Where Do We Stand?



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The years 2012 and 2013 have been particularly intense for legislators and privacy professionals globally. Many countries have enacted or are in the process of enacting/updating their data protection framework. In that context, the European Union has definitely been one of the most active regions worldwide and has been at the center of many privacy debates. A week has not gone by without news articles or developments related to the draft EU data protection regulation (“Regulation”).¹ This reform is being followed closely by multinational companies, nongovernmental organizations, academics, and foreign governments as this instrument will have global implications.

¹ Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), COM (2012) 11 final (Jan. 25, 2012), available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf (11 PVLR 178, 1/30/12). The Regulation consists of eleven chapters and 91 articles.

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It will likely serve as a model for other regions of the world and have extraterritorial effects on data controllers located outside of the European Union. Increased attention has also been given to privacy legislation globally and the reform of the EU data protection legal framework following the recent revelations of access to private data for law enforcement purposes.²

While much has already been written on the Regulation,³ this article is intended to provide an update on the status of the legislative process and describe at a high level the progress made by the European Parliament (“Parliament”) and Council of the European Union (“Council”) over the past year, a few points of controversy, and the possible next steps after the EU institutions resume their work in September 2013. We also discuss the possible impact on the Regulation of the upcoming 2014 Parliament elections.

I. Progress Made in the European Parliament

The Parliament has been particularly active over the past year. In particular, from fall 2012 to summer 2013, the LIBE Committee (i.e., the Parliament Committee on Civil Liberties, Justice and Home Affairs, which is the lead committee for the Regulation in the European Parliament—“LIBE”) discussed the Regulation in various public committee meetings.⁴ A few milestones of its work were:

- In November 2012, LIBE organized a two-day interparliamentary meeting to exchange views on

² See Christopher Kuner, *Government Data Surveillance Through a European PRISM*, Oxford University Press Blog (OUPblog) (June 15, 2013, 8:30 AM), <http://blog.oup.com/2013/06/government-data-surveillance-european-prism/>; Christopher Kuner, *Parallel Privacy Universes and PRISM*, IAPP Privacy Perspectives Blog (July 30, 2013), https://www.privacyassociation.org/privacy_perspectives/post/parallel_privacy_universes_and_prism.

³ For an extensive analysis of the Regulation see Christopher Kuner, *The European Commission’s Proposed Data Protection Regulation: A Copernican Revolution in European Data Protection Law*, 11 Privacy & Sec. Law Rep. (Bloomberg BNA) No. 6, at 215 (Feb. 6, 2012) (11 PVLR 215, 2/6/12).

⁴ There were approximately 8 meetings. For more information on the progress made by the European Parliament, including meetings, materials, and opinions, see Wilson Sonsini Goodrich & Rosati LLP, EU Legislative Process Updates, <http://www.wsgr.com/eudataregulation/process-updates.htm> (last visited Aug. 27, 2013).

the Regulation with a variety of stakeholders such as Members of the European Parliament (MEPs), national parliaments and data protection authorities, academics, and industry representatives.

- On Jan. 16, LIBE presented a draft report proposing 350 amendments to the initial Commission proposal (“Albrecht report”).⁵
- By the end of March 2013, the four other Parliament advisory committees had also issued opinions and proposed amendments.⁶ At the same time, MEPs of other political groups were invited to submit comments and to table amendments for LIBE to review before it finalizes its report. In total, 3,133 amendments were tabled, which far exceeded expectations. The amendments proved to be complex and thus difficult to manage in a short period of time. Consequently, the initial deadline of April 2013 became unrealistic for the final vote on the report, which was then postponed to end of May (12 PVLR 524, 3/25/13).
- From March to July 2013, LIBE continued holding meetings on the Regulation, but a large part of the work was completed without making it public. A new extension of deadline for the vote has been agreed on for fall 2013 (12 PVLR 1146, 7/1/13).
- During LIBE’s last meeting before the summer break, held July 9, MEP Jan Philipp Albrecht, who is the lead rapporteur for the Regulation within LIBE, confirmed the good progress made by LIBE and seemed confident that the fall 2013 deadline would be workable.⁷ LIBE is expected to resume work on the Regulation in September 2013 with some meetings being tentatively scheduled. It is however unclear whether the vote will actually occur this fall, and thus the timing for the vote remains uncertain.

II. Progress Made in the Council of the European Union

The other main institution involved in the review of the EU data protection framework is the Council and in particular its presidency, which has the lead role on the Regulation. The presidency is designated among the 28 EU member states and rotates among them every six months. From fall 2012 to summer 2013, the Cyprus

⁵ LIBE Draft Report, 2012/0011(COD) (Jan. 16, 2013), available at <http://op.bna.com/pl.nsf/r?Open=kjon-9axrwd> (12 PVLR 65, 1/14/13). For an analysis of the report see Cédric Burton et al., *The Proposed EU Data Protection Regulation One Year Later: The Albrecht Report*, 12 Privacy & Sec. Law Rep. (Bloomberg BNA) No. 3, at 99 (Jan. 21, 2013) (12 PVLR 99, 1/21/13).

⁶ Opinion of the Committee on the Internal Market and Consumer Protection (IMCO), 2012/0011(COD) (Jan. 28, 2013); Opinion of the Committee on Industry, Research and Energy (ITRE), 2012/0011(COD) (Feb. 2, 2013) (12 PVLR 296, 2/25/13); Opinion of the Committee on Employment and Social Affairs (EMPL), 2012/0011(COD) (Mar. 4, 2013); Opinion of the Committee on Legal Affairs (JURI), 2012/0011(COD) (Mar. 25, 2013).

⁷ See video broadcast of the July 9 LIBE Committee meeting at <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20130709-1500-COMMITTEE-LIBE>.

and Irish presidencies respectively led the discussions in the Council’s Working Party on Information Exchange and Data Protection (DAPIX) and held around 40 meetings on the Regulation.⁸

The Lithuanian presidency took office in July 2013 and announced that it will make the Regulation a priority. Each presidency is not bound by the work done by the former one, which means that everything can in theory be re-examined. In addition, even though it seems that the Council is speaking one voice through the presidency, there are actually important divergences among member states’ delegations.

To date, the Council has published several papers, reports, and proposed amendments. This does not, however, reveal the full spectrum of the actual work done, as several documents have been kept confidential or only partially published. Below are some of the highlights of the work achieved by the Council so far:

- Up to May/June 2013, the Council had been preparing article-by-article amendments to Chapters I–IV (“General Provisions,” “Principles,” “Rights of the Data Subject,” and “Controller and Processor”) and a report summarizing the key issues of those chapters.⁹ In July, amendments were drafted with regard to data processing for historical, statistical, and scientific purposes. However, all these amendments are likely not final and may be subject to change.
- In parallel to the article-by-article work, the Council has been examining a few other high-level issues, including: the insertion of a risk-based approach into the Regulation to reduce administrative burden and compliance costs for companies; the reduction of the number of delegated and implementing acts, which the Regulation empowers the Commission to adopt on several occasions; the impact of the Regulation on small and medium-size companies (SMEs); and, the notions of “main establishment” and the consistency mechanism.¹⁰
- Based on meeting agendas and other available information, DAPIX also seems to have made progress on other chapters such as Chapters V (“Transfers of Personal Data to Third Countries or International Organisations”), VI (“Independent Supervisory Authorities”), and VII (“Co-operation and Consistency”). The work of DAPIX is expected to resume in September, and the next DAPIX meeting on the Regulation is tentatively scheduled for Sept. 9–10.
- In addition, the Council discussed the Regulation at a high political level during the several Justice and Home Affairs (JHA) Council meetings with

⁸ Some of these were publicly announced, and some were not.

⁹ Council Report 10227/13, Note, Key Issues of Chapters I–IV, 2012/0011 (COD) (May 31, 2013); Council Report 10227/13 ADD 1, Addendum to Note, Key Issues of Chapters I–IV, 2012/0011 (COD) (May 31, 2013) (12 PVLR 1019, 6/10/13).

¹⁰ For more information on the progress made by the European Council, including materials, reports, and meeting agendas, see Wilson Sonsini Goodrich & Rosati LLP, EU Legislative Process Updates, <http://www.wsgr.com/eudataregulation/process-updates.htm> (last visited Aug. 27, 2013).

the participation of the Justice ministers of the EU member states. The last such meeting before the summer break took place at the end of the Irish presidency (June 6–7), where the amendments to Chapters I–IV were presented. The next official JHA Council meeting is tentatively scheduled for Oct. 7–8, but informal meetings are also organized.¹¹

III. Points of Controversy

Over the past year, both the Parliament and the Council have been working in parallel. However, when comparing their work, it appears that these two institutions often take a diverging, if not conflicting positions. Traditionally, the Parliament takes a strict position on privacy, while the Council tends to follow a more business-friendly approach. Below are some key topics of controversy between the Parliament and the Council.¹²

- **Scope of application:** Both the Parliament and the Council endorse the Commission's proposal regarding the application of the Regulation to non-EU data controllers; however, they have had difficulties finding the proper wording. The Parliament suggests that the Regulation should apply to non-EU data controllers when the processing activity is related to "monitoring data subjects" in general, while the Council seems to agree more with the Commission's wording of "monitoring . . . behavior" as long as this "behavior takes place within the European Union." Despite extensive discussions regarding the above terminology, its meaning and the implications for global online companies are currently unclear. No matter the wording, this will have extraterritorial effects on global companies located outside the European Union.
- **Pseudonymous data:** Although the Parliament and the Council seem to agree to cover the concept of pseudonymous data and regulate their use, they currently follow different approaches. The Parliament is willing to introduce a high-level definition of "pseudonym" and recognize that lighter protections should apply to the processing of pseudonyms; however, it does not touch further on the legal consequences. The Council suggests a more detailed definition of "pseudonymous data," clarifies that such data are still personal data but that they should not be subject to the full spectrum of legal requirements, and thus specifies the legal consequences. For example, the Council suggests

that a company can rely on its legitimate interest to anonymize or pseudonymize data (meaning that consent would not be required to anonymize or pseudonymize personal data) and that the use of pseudonymous data should be seen as a security measure and privacy by design. In addition, the Council provides that the data breach notification requirement should not apply if the breach affected pseudonymous data. In a recent document, the Council provides a lighter obligation when pseudonymous data are used for statistical and scientific purposes.¹³

- **Main establishment and one-stop shop:** Under the Regulation, there would be a one-stop shop regulator responsible for supervising all EU processing operations of a company. The competent authority would be the regulator of the country where the controller or processor has its "main establishment." The Parliament suggested changes to the one-stop shop approach (wanting it to be a mere contact point) but, despite criticism, it did not touch on the definition of "main establishment," which currently differentiates between cases where a company acts as a data controller or a data processor and generally triggers interrogations from commentators. The Council has not yet reached final positions with regard to the future of the one-stop-shop; however, it has suggested amendments to the definition of the "main establishment" with regard to data processors (i.e., the place of central administration in the European Union, if there is no such place, the place where the main processing activities take place)¹⁴ and has introduced such definition with regard to a group of undertakings (i.e., the main establishment of the controlling undertaking).¹⁵
- **Right to be forgotten:** While both the Parliament and the Council agree that there are cases where the enforcement of the right to be forgotten is not realistic, some of their amendments are inconsistent. For example, the Parliament puts more emphasis on whether this right should apply where data have been published legally, while the Council suggests concrete ways of how to restrict the data as an alternative to erasing them.¹⁶ With regard to informing third parties when individuals exercise the right to be forgotten, the Parliament suggests deleting this point while the Council suggests restricting it to specific cases.¹⁷ In addition, the Council suggests that the right to be forgotten

¹¹ The last informal meeting was held in the beginning of the Lithuanian presidency (July 18–19) where additional high-level topics were discussed such as the role of the proposed European Data Protection Board and the consistency mechanism.

¹² The above list is based on the Albrecht report of January 2013, the Council reports of May/June 2013, and other relevant documents. It is not intended to be exhaustive and does not include discussions that were not officially made public by the time this article was finalized. For a comparison of Chapters I–IV of the Regulation as proposed by the Commission, Parliament, and the Council, see Wilson Sonsini Goodrich & Rosati LLP, *Insight & Analysis*, <http://www.wsgr.com/eudataregulation/insight-analysis.htm> (last visited Aug. 27, 2013).

¹³ This may lighten the obligations for companies conducting profiling activities. See Council Document 12384/13, Note, Application of General Data Protection Regulation for Historical, Statistical and Scientific Purposes, 2012/0011 (COD) (July 17, 2013).

¹⁴ See Council Report 10227/13, *supra* note 9.

¹⁵ See Council Report 11013/13, Note, Revised Version of the Draft General Data Protection Regulation, 2012/0011 (COD) (June 21, 2013) (12 PVLR 1146, 7/1/13).

¹⁶ The Council suggests, for example, temporarily moving the data to another processing system or making them unavailable to users, or temporarily removing published data from a website. See Council Report 10227/13 ADD 1, *supra* note 9, at Recital 54a.

¹⁷ Such cases include situations where the third parties are controllers themselves and the restriction of data is performed

should not apply where the data are processed only for historical, statistical, and scientific purposes.

- **Data protection officer and exemptions for SMEs:** The obligation to appoint a data protection officer (“DPO”) has also caused substantial debate. The Commission introduced a threshold of 250 employees to determine where a company is subject to the obligation to appoint a DPO. However, the Parliament suggests that a company should appoint a DPO if it processes the data of more than 500 individuals per year, while the Council prefers a voluntarily regime where a company would appoint a DPO only if it wanted or was required to do so according to national law. A similar threshold approach is also followed with regard to other exemptions for SMEs, such as the obligation to appoint a representative and to maintain documentation about the processing (i.e., threshold of 250 employees according to the Commission, processing data of 500 individuals per year according to the Parliament, and a risk-based approach according to the Council).

So far little attention has been given to the data transfer restrictions. However, because of the recent revelations concerning access to company data by law enforcement agencies, it is expected that EU institutions will now look very carefully into these rules with the risks of creating an even more restrictive framework for data transfers outside of the European Union. In particular, some consensus is currently emerging in Brussels regarding the insertion of a clause that would prohibit the disclosure of personal data to foreign governments without the authorization of the competent data protection authority in the European Union.¹⁸

IV. Possible Next Steps and Impact of the Upcoming 2014 Parliament Elections

Once the work of the Parliament and of the Council is completed, the “trialogue” procedure will start between the Parliament, the Council, and the Commission in order to try to reach a political agreement on the text. This means that the three institutions will try to agree on a compromise text. If no compromise is reached in the “first reading,” the Commission will have to revise the proposed text and send a new proposal to the Parliament and Council for a “second reading.” Usually, this kind of “trialogue” negotiations may take up to one year; however, most stakeholders agree that this process should be completed faster.

Although the EU institutions are still officially optimistic about finalizing the amendments and entering into informal negotiations with the European Commission in fall 2013, a final adoption of the text before the Parliament elections in 2014 is more and more uncertain, and in any event difficult to predict for several reasons. First, although the Parliament has discussed the whole Regulation, the large number of proposed

amendments is raising substantial difficulties. Second, the Council is only halfway through with the Regulation, and its work is dependent on each of the six-month presidencies (the next presidency will be Greece as of Jan. 1, 2014), thus creating uncertainty every six months. Third, with the Parliament elections approaching, the staffing of the political groups within the Parliament will likely be reassessed, and it seems doubtful that all the persons in charge of the Regulation will remain assigned to this project.

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Predicting whether the Regulation will be adopted before the EU Parliament elections is already quite difficult, but predicting the timing of the adoption of the new data protection legal framework if the Regulation is not adopted before the elections is nearly impossible, since the new elected institutions will not be officially bound by the work done on the Regulation thus far.

In addition, the appointment of a new president of the European Commission and the relevant commissioners, which is expected in July 2014, would complicate things and cause additional delay.¹⁹ Although the president of the Commission should be nominated by the Council in July 2014, he/she and his/her team of 27 commissioners must still be approved by the Parliament. Adding to this, the several committees should be recreated in the new Parliament, and portfolios should be reallocated in the new Commission. Thus, it may take up to several months after the May 2014 elections until the EU institutions are able to resume the work on the Regulation (probably by Nov. 1, 2014, the date by which the new EU Commission will take office).²⁰

These considerations are putting pressure on the Commission, Parliament, and Council to reach an agreement on the text as soon as possible and by April 2014 at the latest, before the campaign for the Parliament elections intensifies. The timing is tight and commentators have been pessimistic about the chances of success of the Regulation. However, the EU data protection reform may receive new impetus from the recent

¹⁹ According to the Parliament rules, the newly elected Parliament cannot start its operation before it elects a new president. When the Parliament becomes operational is important in the context of the appointment of the new president of the European Commission and the commissioners.

²⁰ See EC, The European Commission, http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0006_en.htm (last updated Dec. 22, 2009); EC, About the European Commission, <http://ec.europa.eu/about/> (last updated July 11, 2013).

taking into account the “available technology and cost of implementation.”

¹⁸ See, e.g., Press Release, EPP Group, PRISM Scandal—EPP Group to Push Introduction of “Anti-Net Tapping Clause (June 19, 2013), available at <http://www.mariellegallo.eu/en/page/19-06-2013-press-release-prism-scandal-epp-group-to-push-introduction-of-anti-net-tapping-clause.html>.

revelations of government access to private data for law enforcement purposes to protect EU citizens.²¹

Another option that is being informally discussed in Brussels, and that would allow the EU institutions to politically claim that the reform of the data protection framework was not a failure, would be to conclude a “light version” of the Regulation that would contain only the core data protection principles and leave space

²¹ See Viviane Reding, EC Vice-President, Women and the Web—Why Data Protection and Diversity Belong Together, Speech at the DLD Women Conference in Munich (July 15, 2013), available at http://europa.eu/rapid/press-release_SPEECH-13-637_en.htm.

for future specific legislation, and to renegotiate the existing privacy landscape with the United States, such as the current U.S.-EU Safe Harbor Program agreement.²² The coming months will be crucial for determining the future of the EU data protection reform.

²² See Viviane Reding, EC Vice-President, Remarks at the Informal Justice Council in Vilnius (July 19, 2013), available at http://europa.eu/rapid/press-release_MEMO-13-710_en.htm (“The Safe Harbor agreement may not be so safe after all. It could be a loophole for data transfers because it allows data transfers from EU to US companies—although US data protection standards are lower than our European ones.”) (12 PVLR 1330, 7/29/13).