

## Expert comment

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**T**ension appears to be growing between the US and the EU over allegations of unauthorised access to data. Almost on a daily basis, claims and assertions are ensuring that cyber security and wider data protection issues receive widespread media coverage. It will take some time for facts to emerge and for the issues to be resolved but, in the interim, these cyber concerns are providing the backdrop for the ongoing debate surrounding EU data protection reform. There is a sense that the European Parliament is becoming more conservative in its approach, and that the risk based compromise text published by the Council of the European Union may not go far enough for many in the European Parliament.

As reported in the last edition of *Privacy & Data Protection*, the Justice and Home Affairs Council, led by Ireland as President of the Council of the European Union, released its proposed compromise text on Chapters I—IV of the Regulation at the end of May 2013. The proposal tempered many of the European Commission's original proposals that were the subject of the most robust debate.

Key amongst the proposed changes are: clarifying the territorial application of the Regulation by limiting the circumstances in which non-EU businesses would be subject to it; focusing on proportionality, context and likelihood of harm to permit additional processing where individuals might reasonably expect it, and to allow more flexibility in connection with record-keeping and other more prescriptive requirements; retaining the existing standard of 'explicit' (rather than 'unambiguous') consent for data processing, except where the data are sensitive, and allowing valid consent to be collected using a variety of means, including using browser settings; explicitly recognising the concept of anonymised data, which would be excluded from the data protection framework; and extending the legitimate interests basis for lawful processing to include: (i) fraud prevention; (ii) the anonymisation or pseudonymisation of data and, (iii) direct marketing purposes. On the latter, the first extension will be particularly welcomed by the financial services and retail sectors. The second extension reflects calls widely made, including by Commission Vice-President Viviane Reding, to incentivise the processing of anonymous and pseudonymous data in place of personal data. The third extension will likely cause the most surprise and may not be unanimously wel-

comed, although it could be said to reflect current practice in more permissive jurisdictions, such as the UK. Other proposals include introducing the 'establishment, exercise or defence of legal claims' as a further specific ground for the lawful processing of sensitive personal data (which may assist data controllers processing personal data in the context of discovery requests); extending the breach reporting period from 24 to 72 hours, and applying a harms based threshold to the reporting of breaches to supervisory authorities and individuals; encouraging codes of conduct and certification, in particular to demonstrate privacy by design and default, as a kite mark for processors, and in relation to data security measures; and encouraging certainty by deleting most of the Commission's reservations of the power to legislate further, in the form of delegated and implemented acts.

Significantly, the Presidency did not rule out the possibility of a change of instrument. Eight Member States (Belgium, the Czech Republic, Denmark, Estonia, Hungary, Sweden, Slovenia, and the UK) still do not support the Commission's choice of legislative instrument, and would prefer that the current EU Data Protection Directive is repealed and replaced by another directive. The Presidency's proposed amendments leave flexibility for the proposed Regulation to be transformed into a directive in future.

Within the European Parliament, the LIBE Committee is currently considering in excess of 3,000 tabled amendments and preparing a compromise text for the European Parliament to vote on. This vote has now been delayed until September 2013. The European Parliament and the Council of the European Union will then seek to negotiate the finalised text. There is growing speculation that there will not be enough time to reach agreement on the text ahead of the European elections in 2014. The current debate on cyber security may further complicate the negotiations. Even if agreement is not reached before the elections, the data protection genie seems well and truly out of the bottle. Reform, at some stage, seems inevitable. The timing is less certain.

Bridget Treacy is chairing the 12th Annual Data Protection Compliance Conference, taking place in London on 11th and 12th of September 2013. Visit [www.pdpconference.com](http://www.pdpconference.com) for further details.

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