

A decorative graphic consisting of multiple parallel, wavy lines in various colors including purple, blue, orange, and green. The lines start on the left, curve downwards, and then flow towards the right, creating a sense of movement and depth.

Reforming EU Data Protections... No Ordinary Sequel

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Reforming EU Data Protections...No Ordinary Sequel

After reviewing the diverging data protection legislation in the EU member states, the European Commission (EC) decided that this situation would impede the free flow of data within the EU zone. The EC response was to undertake an effort to "harmonize" the data protection regulations and it started the process by proposing a new data protection framework. This proposal includes some significant changes like defining a data breach to include data destruction, adding the right to be forgotten, adopting the U.S. practice of breach notifications, and many other new elements. Another major change is a shift from a directive to a rule, which means the protections are the same for all 27 countries and includes significant financial penalties for infractions.

This session explores the new EU data protection legislation and highlights the elements that could have significant impacts on data handling practices.

Privacy Versus Data Protection

➤ Privacy

The appropriate use of personal information under the circumstances. What is appropriate will depend on context, law, and the individual's expectations; also, the right of an individual to control the collection, use and disclosure of information.

- ◆ Source: International Association of Privacy Professionals (IAPP) Glossary

➤ Data Protection

The management of personal information. In the United States, "privacy" is the term that is used in policies, laws and regulation. However, in the European Union and other countries, the term "data protection" often identifies privacy-related laws and regulations.

- ◆ Source: International Association of Privacy Professionals (IAPP) Glossary

Personal Data: The Current EU Definition

*Personal data shall mean **any information relating to an identified or identifiable natural person** (“data subject”); an identifiable person is one who can be identified directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.*

◆ Source: EU Directive 95/46/EC – Article 2(a)

- ◆ **Any information**
 - ◆ **Nature** – both objective (fact) and subjective (opinion),
 - ◆ **Content** – concept of private and family life must be widely interpreted,
 - ◆ **Format** – information in an form. Paper, electronic records, CCTV, telephone calls, etc.
- ◆ **Relating to** – information must be about an individual. Information that relates to objects, process or event may also constitute personal information. For example an individual owns a car.
- ◆ **An identified or identifiable** – a natural person is identifiable when, although the person has not been identified, it is possible to identify him/her.
- ◆ **Natural person** – all natural persons regardless of their country of residence. Typically relates to living people.

EU Directive Versus Regulation

➤ *Directive*

- ◆ Specific objectives that must be reached and Member States need to adopt national implementation legislation
- ◆ Member States left with the choice of form and method of implementation
- ◆ Language in Directives tend to be more general to allow Member States to adapt in their legislation

➤ *Regulation*

- ◆ Directly applicable to all Member States
- ◆ Do not require any additional implementation in national legislation
- ◆ Apply in all Member States in the same wording and scope
- ◆ Law across ***all*** Member States as written



Proposed Reform of the EU Data Protection Directive

The Need for Reform

- In 2009, the European Commission (EC) began a process of reviewing the general EU legal framework on the protection of personal data
- The main policy objectives:
 - ◆ **Modernize the EU Legal System** for the protection of personal data, in particular to meet the challenges resulting from globalization and the use of new technologies
 - ◆ **Strengthen Individuals' Rights**, and at the same time reduce administrative formalities to ensure a free flow of personal data within the EU and beyond
 - ◆ **Improve the Clarity and Coherence** of the EU rules for personal data protection and achieve a consistent and effective implementation and application of the fundamental right to the protection of personal data in all areas of the Union's activities

Proposed Changes

- ◆ January 25, 2012 – the EC proposed “***a comprehensive reform of the EU’s 1995 data protection rules to strength online privacy rights and boost Europe’s digital economy***”
 - ◆ ***Regulation*** (replacing Directive 95/46/EC) “*General Data Protection Regulation*” – to set out a general EU framework for data protection. This regulation would make limited technical adjustments to the e-Privacy Directive (2002/58/EC). Total of 91 Articles in the Proposed Regulation.
 - ◆ ***Directive*** (replacing Framework Decision 2008/977/JHA) to set out rules on the protection of personal data processed for the purposes of prevention, detention, investigation, or prosecution of criminal offences and related judicial activities.

Single Set of Rules

- ◆ Will replace the existing 27 country specific laws with a single set of EU rules on data protection.
- ◆ Companies will only have to deal with a single national Data Protection Authority (DPA) – in the EU country where they have their main establishment
- ◆ Individuals will have the right to refer cases to their home national DPA, **even when their personal data is processed outside their home country**
- ◆ EU rules will apply to companies not established in the EU, if they offer goods or services in the EU or monitor the online behavior of citizens.
- ◆ Abandons the presumption that personal data may not be transferred absent an “*adequate level of protection*” in the recipient country, and sets for general principles that must be fulfilled when data are transferred outside the EU
- ◆ ***Implement privacy by design/privacy by default.***



Potential Impacts on non-EU Companies (that would be subject to the Regulation)

“Personal Data” Redefined

- ◆ Expansion of “*Personal Data*” Definition
 - ◆ *Any information relating to a data subject*
 - ◆ It is independent of whether it relates to ones private, professional or public life
 - ◆ It can be anything from a name, a photo, an email address, your bank details, your posts on social networking websites, your medical information, or your computer’s IP address
- ◆ “*Data subject*” definition broadened
 - ◆ Identified by means reasonably likely to be used by the data controller or by any other natural or legal person,
 - ◆ By reference to not just an identification number but also to location data and online identifiers, or
 - ◆ To additional factors like genetic and mental identity, among other factors.

Express Consent

- ◆ Covered businesses are required to obtain (and not assume) the ***express consent*** of the data subject
 - ◆ to the processing of his/her personal data for one or more **specific purposes**
 - ◆ unless processing is required for certain limited purposes such as compliance with a legal obligation of the business or to protect the vital interests of the data subject
 - ◆ ***The data controller bears the burden of proof for the data subject's consent to the processing of their personal data***
- ◆ The data subject may withdraw the consent at anytime; ***the right to be forgotten.***
- ◆ Consent is essentially not valid where there is an “*imbalance*” between the position of the data subject and the business.

NOTE: Amendments have been proposed, so some of this may change.

Breach Notification Requirement

- **Personal data breach** – a breach of security leading to the accidental or unlawful **destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed**
- Businesses must notify the **supervisory authority** (i.e., the public authority established by each Member State) of a personal data breach “**without undue delay and, where feasible, not later than 24 hours**” after becoming aware of the breach.
- Companies must also notify the **affected data subject** of a personal security breach “**without undue delay**” if the personal security breach “*is likely to adversely affect the protection of the personal data or privacy of the data subject.*”

NOTE: Amendments have been proposed, so some of this may change.

Policies and Measures

- ◆ Businesses must adopt policies and implement appropriate measures to ensure and be able to demonstrate that the processing of personal data is performed in compliance with the Regulation
- ◆ Businesses must have transparent and easily accessible policies regarding the processing of personal data that are clearly presented to data subjects that:
 - ◆ provide the identity and contact information of the business,
 - ◆ identify the purpose of processing the personal data,
 - ◆ set forth the data subject's right to access, correct or have the personal data deleted,
 - ◆ set forth the right of the data subject to complain to supervisory authority,
 - ◆ specify the period during which the personal data will be stored by the business,
 - ◆ and specify whether the personal data will be disclosed to third parties and/or transferred to third countries

Binding Corporate Rules (BCRs)

- ◆ BCRs are the tool used by companies with global operations to transfer personal data of EU residents within their corporate group to entities located in countries which do not have an adequate level of data protection.
 - ◆ Typically form a stringent, intra-corporate global privacy policy that satisfies EU standards
 - ◆ Should be seen as a framework having different elements (Internal legal agreement, Policies, training, audit, etc.) providing compliance
- ◆ BCRs will no longer need to be approved by each Data Protection Authority in each applicable EU Member State.
 - ◆ Only need to be approved by one authority
 - ◆ The BCRs will be recognized by the rest of the authorities in each applicable Member State.
- ◆ The approved BCRs would also cover third parties that process personal data of EU residents on behalf of the business, such as cloud service providers, for example.

Data Security Obligations

- ◆ Businesses are required to **implement appropriate technical and organizational measures** “to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected, having regard to the state of the art and the costs of their implementation.”
- ◆ **Privacy by design** (and **privacy by default**) principle – data protection safeguards are factored into the planning stage of procedures and systems
- ◆ **Right to data access, correction, and erasure**
- ◆ **Right to transfer data** from one electronic systems to another and to obtain a copy of data where it is processed electronically and in a commonly used format
- ◆ Companies will be **obligated to strengthen their security** measures to prevent and avoid breaches
- ◆ **Special protections for children** and their personal data (e.g., verifiable parental consent, right to be forgotten)

Data Protection Impact Assessment

- Required for businesses with processing operations that “***present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes***”
- Must describe the processing foreseen, risks to data subject rights and freedoms, means of addressing these and those designed to protect personal data, and demonstrate compliance with the Rules.
- The views of data subjects on the processing must also be sought.
- Accomplished by or on behalf of the data controller (i.e., at its expense).
- Examples of these activities include (not limited to):
 - ◆ monitoring publicly accessible areas
 - ◆ use of the personal data of children
 - ◆ use of genetic data or biometric data
 - ◆ processing information on an individual’s sex life
 - ◆ the use of information regarding health or race
 - ◆ an evaluation having the effect of profiling or predicting behaviors

Data Protection Officer (DPO)

- Requirement for all companies with over 250 employees (and certain other organizations) to ***appoint a DPO with expertise in privacy regulations***
- Responsible for monitoring data processing activities
- As currently described by the proposed legislation, the DPO role would require a seasoned professional with credentials/experience in the security, reporting directly to the board of directors.
- **Significant shortages are anticipated for these privacy experts**

NOTE: Amendments have been proposed, so some of this may change.

Significant Penalties

- Introduces the ability of each supervisory authority to impose fines
- Penalties for violations of the Regulation range from a written warning to fines for intentional or negligent conduct of anywhere from **€250,000** or **0.5%** of the annual worldwide turnover of a company up to **€1,000,000** or **2%** of the annual worldwide turnover of a company.
- **Severe Offenses include** (among others):
 - ◆ Not adopting internal policies or does not implement appropriate measures for ensuring and demonstrating compliance
 - ◆ Not alerting on or notify a data breach timely
 - ◆ Not carrying out a data protection impact assessment
 - ◆ Not designating a Data Protection Officer (DPO)
 - ◆ Carrying out a data transfer to a third country not allowed by an adequacy decision
- The administrative sanction “*shall be in each individual case **effective, proportionate and dissuasive.***”

NOTE: Amendments have been proposed, so some of this may change.

Transfers of Data to Third Countries

- Restrictions on the transfer of personal data to third countries that do not offer an adequate level of protection remain in place
- International data transfers are possible if one of the following mechanisms are in place:
 - ◆ Binding Corporate Rules (BCRs)
 - ◆ “*Standard data protection clauses*” approved by the EC (the counterpart of the present “*standard contractual clauses*”).
 - ◆ Standard data protection clauses adopted by a DPA in accordance with the consistency mechanism
 - ◆ “*Ad hoc*” contractual clauses authorized by a DPA
 - ◆ Other appropriate safeguards “*not provided for in a legally finding instrument.*”



Wrap Up

The Amendment Front

- ◆ As the process moves from the European Commission into the European Parliament and European Council, compromise are often necessary
- ◆ Thousands of amendments have been proposed to the draft rules; some will strengthen and others will weaken them
- ◆ At least nine member states, including the UK, are opposed to several proposed measures that could place heavy burdens on data-related companies
- ◆ EC will probably have to compromise because there are enough member states to block the entire data protection reform process
- ◆ The “level of prescriptiveness” of a number of the proposed obligations is a serious source of concern
 - ◆ proposals to require explicit consent from individuals to process their data
 - ◆ give online users the “right to be forgotten”
 - ◆ require businesses to notify of personal data breaches within 24 hours
- ◆ Other concerns include provisions that require all companies to appoint a Data Protection Officer and the difficulties caused by the tough rules for public institutions such as tax authorities

Summary

- ◆ ***The protection of personal data is a fundamental right for all Europeans*** (Article 8 of the EU's Charter of Fundamental Rights and by the Lisbon Treaty)
- ◆ Approval of the rules must be dealt with before the June 2014, European Parliament and Commission elections
- ◆ Recent and upcoming approvals
 - ◆ European Parliament's Industry, Research and Energy (ITRE) Committee voted to back the Rules in February 2013
 - ◆ Employment (EMPL) Committee voted to back the Rules (with amendments) in February 2013
 - ◆ The LIBE Committee (which is the lead Committee) will vote on its own report at the end of April 2013.
 - ◆ European Parliament is set to vote on the Rules by June 2013

Conclusions

- ◆ Likely (but not guaranteed) softening of the Rules will be met with relief by many US-based technology companies that operate in Europe
- ◆ Assuming the rules are approved, there will be a transition period (12-24 months)
- ◆ Existing **U.S.-EU Safe Harbor** is likely to be rendered irrelevant in its current form

- ◆ According to the ABA Business Law Section, don't wait until the Rules are approved:
 - ◆ *Put the General Data Protection Rules on Your Radar*
 - ◆ *Audit Risks for Potential Data Protection Violations*
 - ◆ *Incorporate Data Protection into Compliance Programs*
 - ◆ *Make Sure Proper Consent is Obtained*
 - ◆ *Prepare for Data Breaches*

Attribution & Feedback

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