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The Council of the European Union's Draft of the General Data Protection Regulation: Stakeholders' Comments on Key Issues

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On June 15, 2015, the Council of the European Union approved its consolidated draft of the General Data Protection Regulation, which is intended to replace the 20-year-old EU Data Protection Directive (95/46/EC) (*see WDPR, June 2015, page 25*). The legislative process has since moved to the trilogue stage, during which the Council, the European Parliament and the European Commission meet monthly to discuss their respective drafts, with the aim of agreeing a single draft of the General Data Protection Regulation by the end of the year.

Following the first trilogue meetings, reports have been positive, with the Parliament's rapporteur on the General Data Protection Regulation, Jan Philipp Albrecht, noting that the three proposed texts were more similar than had initially been expected. Mr. Albrecht indicated that the Parliament was willing to be flexible in order to reach a compromise, such as on the level of fines. However, differences are expected on issues such as explicit purpose limitation, consent and the rights of the data subject.

Since publication of the Council's draft, stakeholders, including EU member state national data protection authorities, consumer groups and industry bodies, have been reviewing the text and providing comments on the issues they see as critical for consideration in the trilogue process. Comments published by the German Conference of the Data Protection Commissioners of the Federation and of the States ("German Commissioners"), the U.K. Information Commissioner's Office ("ICO") and the European Consumer Organisation ("BEUC") are all broadly aligned, and make the point that political compromises at this point should not be made if they weaken the current level of data protection afforded to individuals.

This article examines the comments received on three key issues: purpose limitation, consent and the data subject's rights.

Purpose Limitation

Purpose limitation is one of the pillars of the EU data protection regime.

The growth of business models based on the collection and sharing of data over the last 20 years has only increased the importance of individuals knowing for what purposes their data are being collected. In practice, companies are circumventing data protection rules by claiming "legitimate interests" as their basis for unrestricted processing of personal data.

BEUC claims that, unless narrowly defined and used only exceptionally, processing on the basis of "legiti-

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mate interests" will become a loophole in the new Regulation. Therefore, any change in the purpose of the processing should be allowed only in very specific circumstances, and further processing of data for purposes different to the original purpose must be allowed only if the new purposes are compatible with the original ones.

Comments by key stakeholders are all broadly aligned, and make the point that political compromises at this point should not be made if they weaken the current level of data protection afforded to individuals.

It is fundamental to a strong data protection regime that it ensure individuals have transparency and predictability with regard to the processing of their personal information. Knowing the purposes for which data will be processed supports the rights of the individual.

The stakeholders that have commented on the Council draft have raised concerns about the proposed amendments to Article 6, regarding lawfulness of processing. The amendments are seen as confusing and as weakening current rights.

The German Commissioners' position is that the legal basis for processing personal data and purpose limitation must be kept separate. The common ground is that personal data processing must always have a legal basis, and any incompatible processing that is allowed should be done only if it is possible within the terms of a lawful exemption.

BEUC goes further, noting that the Council's position broadens what can be done under the principle of purpose limitation to the extent that it undermines the protections given in the EU Charter of Fundamental Rights, and the "legitimate interests" justification should be permitted only as a last resort when no other legal grounds are available. In addition, where "legitimate interests" are claimed, the data controller should also be obligated to give the grounds for determining that its interests override those of the data subject.

The ICO adds a valuable perspective, noting that there is a real practical difficulty in handing the data controller the discretion to determine whether or not its legitimate interests override those of the individual, which would then result in incompatible processing being lawful. It is the ICO's position that data controllers would struggle with this evaluation, as would any supervisory authorities. Therefore, to avoid future conflict, it would be a missed opportunity if the final draft did not include clear language setting out a well-scoped purpose limitation principle, which removes data controller discretion.

On the issue of purpose limitation, the message appears clear and unified: Transparency and predictability of data processing require that the standards and principles of purpose limitation be strengthened, not weakened. Clear and definitive drafting will protect the rights of the individual and, at the same time, provide data controllers with a clear framework within which to work.

Consent

Another pillar of the EU data protection regime is the ability of the individual to determine how his or her personal data are processed by way of giving consent.

The Data Protection Directive defines consent as "any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed".

However, with regard to certain processing, such as that for sensitive personal data, explicit consent must be obtained; but, unhelpfully, the Directive does not define explicit consent. This has created an area of confusion under the current law, requiring case-by-case assessment and subjective determination of what is required to meet the legal obligation.

In the Commission's original text, put forward in January 2012 (*see analysis at WDPR, February 2012, page 4*), the distinction between "consent" and "explicit consent" was deleted.

The Council has included references to "explicit" or "unambiguous" consent in its version of the General Data Protection Regulation. The inclusion of these qualifiers does not add any clarity. On the contrary, organisations now have to both determine what type of consent they need to obtain to legitimise their processing of personal data in particular contexts and then determine how to achieve that consent.

The ICO's position is that there should be a single standard of consent. The standard may be either explicit or unambiguous, but it should not be defined by context.

The German Commissioners are broadly aligned with the ICO, but add that the Council's position on consent undermines its purpose by allowing global service providers a wide scope in which to claim consent has been given by a user for far-reaching powers of data processing, when in fact no explicit consent has been given. The German Commissioners think that any such position creates a path for an opt-out regime to take hold as a general term of consent. This will not protect individuals to the same extent as the current regime.

Data Subject's Rights

For the new regime to be successful, the rights of the individual must be clearly set out and easy to enforce.

The Council's draft goes some way to achieving this by requiring information on processing to be more detailed than currently required and to be given to individuals in clear and plain language, as many privacy notices already do.

However, the ICO questions whether the Council draft goes far enough, as it does not encourage data controllers to find innovative ways of communicating increasingly complex systems and procedures to the public.

Subject access remains a thorny issue. Under the current

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regime, a number of cases have been heard in different EU member states regarding what information individuals are entitled to under a subject access request. There have also been concerns over the time limit for granting access and how much can be charged for a subject access request.

To assist both supervisory authorities and data controllers, the legislation could provide for national regulators to set the level of a modest subject access request fee.

The German Commissioners are more aggressive than the ICO, arguing that the importance of the ability for an individual to exercise his or her rights is so great that any such measures must be free of charge.

With regard to what information has to be provided under a subject access request, a prohibition on the data controllers having to provide a copy of someone's personal data where this would involve the disclosure of another data subject's personal data may not work.

The ICO gives the example of a hospital not providing a copy of a patient's health record because it contains the personal data of the patient's doctor. The ICO's solution, as is currently the case under U.K. law, would be that a third party's personal data should be withheld only if the third party's right to privacy exceeds the data subject's right to access the information.

Focusing on the rights of the individual, BEUC stresses the importance of a mechanism for effective redress and compensation for individuals whose rights are infringed and who suffer damage. As infringements, such as a data breach or misuse of personal data, often affect more than one individual, consumer organisations and other associations defending the rights of data subjects should be able to act on their behalf. Allowing collective legal actions would make it easier for individuals to enforce their rights. Moreover, consumer organisations should be allowed to bring actions to court independently of any individual's subject access request where the organisation considers the rights of a data subject have been violated.

Conclusion

It is clear that the trilogue process has started well, but it appears from the comments received from those involved in the daily operation of the current regime that there are a number of critical areas that need to be considered carefully during the trilogue and agreed with clarity of thought and drafting.

The legislative process is not over, and there are still changes ahead for the General Data Protection Regulation, but it is hoped that, if the trilogue timetable is kept to, we will know the form of the Regulation by the end of the year. After that, there will still be plenty to get through before final adoption, meaning that an optimistic forecast is that the Regulation could be in force by June 2018, although the end of 2018 might be more realistic.

It is clear from the comments received that stakeholders in the European Union have concerns that the advances made in data protection in the last 20 years will not be fully realised in the General Data Protection Regulation, and that the opportunity that now presents itself to make changes for the good in creating a new regime should not be lost or overly compromised at this point, whether for political reasons or even the pressure of a relentlessly ticking clock.

The text of the Council's draft of the General Data Protection Regulation is available at http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf.

The text of the German Commissioners' comments is available at http://www.datenschutz-berlin.de/attachments/1139/DSK-PE.EN.pdf?1440579197.

The text of the U.K. ICO's comments is available at https://ico.org.uk/media/1432420/ico-analysis-of-the-council-of-the-european-union-text.pdf.

The text of the BEUC's comments is available at http://www.beuc.eu/publications/beuc-x-2015-085_dma_key_consumer_demands_for_gdpr_trilogue_negotiations.pdf.

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