

DATA PROTECTION

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US lobbying waters down EU data protection reform

The reform of EU data protection rules is of particular interest to countries like the United States, whose companies may have to abide by stricter provisions to do business in Europe. But intense lobbying from the United States has in part watered down the draft legislation.

The overhaul of data protection rules proposed by Viviane Reding, the European Commission vice president in charge of fundamental rights, was substantially modified before it was published, following a heated debate within the EU executive.

Some of the planned provisions raised many objections by the most business-minded commissioners, including Neelie Kroes (Digital Agenda) and Karel de Gucht (Trade).

Many lobbies tried to soften the rules concerning the newly introduced 'right to be forgotten,' enabling users to delete personal information that they no longer want to share with banks, online booking websites or social media.

They also put their finger on the obligation to provide notification of data breaches and to obtain explicit consent to use personal data, as well as provisions related to the transfer of personal information to third countries.

As a consequence of this pressure, the text proposed by the Commission was significantly amended, before it even reached the European Parliament and the EU Council for consideration.

The US lobbying offensive

Foreign countries got involved in the negotiations at an unusually early stage. For example, the United

States has been particularly active in trying to amend the draft legislation to protect the interest of US companies operating in the EU, partly on security grounds.

"What has been unusual in this process was that a third country took a particular interest in the reform proposals from very early draft stages on," one EU diplomat told EurActiv, adding that EU officials were contacted by US authorities "and received briefing materials from the US government".

How easy will it be to transfer data?

One of the most contentious issues concerns transfers of data for security reasons. As a champion of citizens' rights, Reding wanted data transfers to be as difficult as possible. But the outcome of the negotiations does not really reflect her line.

"A transfer may take place where the Commission has decided that the third country, or a territory or a processing sector within that third country, or the

eventually published by the Commission.

"It is noteworthy that the US currently uses instruments such as the Foreign Intelligence Surveillance Act (FISA) and the Patriot Act to retrieve data on (e.g.) the political activities of foreign individuals, who may have no links whatsoever with the USA, via companies with US offices," reads a note of EDRI.

With the initial text proposed by the Commission, this activity would have been seriously hampered. But, after

role in securing controversial deals with Washington over transfers of flight passengers' data (Passenger Name Record) and bank data (through SWIFT).

The text eventually proposed by the Commission "provides strong data protection guarantees with respect to international data transfers, whilst giving some flexibility to address the specific context of the law enforcement area," argues an official close to Malmström. "Existing EU-US deals will not be challenged by the new proposals," the official adds.

Data protection in other countries

A review of data protection legislation is ongoing in different parts of the Western world. With the internet boom, data protection authorities are faced with ever-changing realities and are trying to adapt the often obsolete rules to govern the wide-ranging use of personal data.

Since personal information is mainly exchanged online through the worldwide web, the best solution should be to decide common rules at global level.

But it is not what is happening, as each country moves on its own to regulate the sector. Despite the intense lobbying against the EU's legislation, the US is also planning an overhaul of data protection rules, but the touch will be much softer in a country where business interests are more prominent and citizens' awareness of personal data is much lower than in Europe.

India and China are also moving towards stricter regimes for those who deal with private data. Details are still unclear and risks of abuses of a too vague legislation is close by.



An informal paper of the US Commerce Department shows a number of concerns raised by Washington during the EU negotiations.

Before the Commission proposal was made public at the end of January, the US complained about the negative impact of the proposed rules, which they said would affect consumer protection, public security cooperation and even human rights.

The lobbying was successful since eventually the final text issued by the Commission takes on board many of the concerns raised by Washington.

international organisation in question ensures an adequate level of protection," reads the regulation on data protection proposed by the Commission.

Despite this apparently clear statement against easy transfers, the regulation adds a string of derogations that may seriously hamper the possibility of blocking a transfer on the grounds of a lack of adequate protection.

European Digital Rights (EDRI), which represents 28 privacy and civil rights organisations, says the original proposal included stricter requirements than the text

intense lobbying, the proposal has changed in a way that is likely not to have a significant impact on these intrusive operations, EDRI claims.

EU Internal Affairs Commissioner Cecilia Malmström is said to have lifted her veto to the initial Reding proposal after she got reassurances that the new rules would have not hindered the security cooperation between the EU and the US, which entails exchange of personal data in ways that still remain unknown to most citizens.

In recent months, Malmström has played a key

Companies 'left in limbo' by new data protection regime



The new data protection regime envisaged by Justice Commissioner Viviane Reding is going to change the legal landscape from the ground up, according to expert Christopher Kuner, but the proposed changes are so technical he questions whether companies will be able to comprehend them.

Companies say that they would much rather have to comply with a very onerous set of requirements than comply with 27 different sets, the lawyer said in an interview with EurActiv.

"But they need to be careful what they wish for, because the full implications are now sinking in: this is not going to be harmonisation at a low level but at a higher level, and in a number of countries – like the UK and Ireland, where they have traditionally had a hands-off approach – are suddenly faced with the notion of German-style data protection rules coming into force, and this raises all kinds of issues," warned the Hunton & Williams lawyer.

According to Kuner, IT and online companies have caught on to the idea of new rules, but the 'old economy' companies are likely to be left behind as they struggle to implement the new legislation.

The package proposed by the Commission also has huge implications for governments and regulatory authorities, and that is being ignored in the public discussion, argues Kuner.

"In many ways ordinary public authorities are far behind the private sector in terms of their sophistication in dealing with IT and data processing. Their budgets are being cut and they do not have the opportunities to go out and raise business

and money as the private sector does, so in a way they are going to be squeezed even harder than the companies in their efforts to keep within the rules," the lawyer added, taking as an example rules on police [data protection] co-operation.

At the same time, there are concerns that the proposal will be watered down. Kuner explained that the proposals that would affect the private sector most are in the form of a regulation, which, met by opposition, could be reconverted into a directive. That would need to be implemented by EU countries, which would adapt it to their national needs. If it remains a regulation, then opposition could also trigger more exemptions and de facto watering down the initial proposals.

"There are already some articles [in the draft regulation] calling on the member states to take their own action, some in-built subsidiarity, and this could be extended in the final version, diluting the effects of the regulation," said Kuner.

Opposition is also building outside Europe's borders. The United States wants to improve its data protection framework by including some ideas from Europe, but Washington has said that the proposals are not helpful.

"The Commission is not going to prioritise harmonising EU law with Chinese or US rules. It is great to have international harmonisation, but it is a lower priority than getting the rules straight in Europe. Justice Commissioner Viviane Reding and her colleagues are keen for the EU to be a leader in privacy regulation and are pursuing their agenda aggressively," argued Kuner.

Commission looks to new standards for public sector data

The European Commission launched this month a consultation designed to streamline electronic public-sector information amid uncertainty as to how new data protection rules will affect public administrations as well as the private sector.

The consultation, which will run for three months, aims to create consistency in how administrative categories – such as people, vehicles, businesses and locations – are described in member states' government information systems.

The exercise is designed to counteract inconsistencies in the processing of information that can result in a mismatch of data when nationals of one EU country receive services in another.

A new 'vocabulary'

Currently this mismatch results in data processing problems and the EU executive's Interoperability Solutions for European Public Administrations (ISA)

programme is developing central "data vocabulary", with the aim of making it easier to re-use and share information.

The move is seen as the potential genesis of more harmonised online government services, but it comes at a sensitive time as public services prepare for a rigorous new data-protection regime that will affect them as well as private users.

Under the proposed regime, public administrative data – such as criminal investigations – will be subject to special exemptions and be covered by a directive rather than a regulation. This would not be the case with private data.

There are doubts as to how the new system can work since many public administrations access the data of private operators, creating scope for grey areas.

Investigations protected, but up to what point?

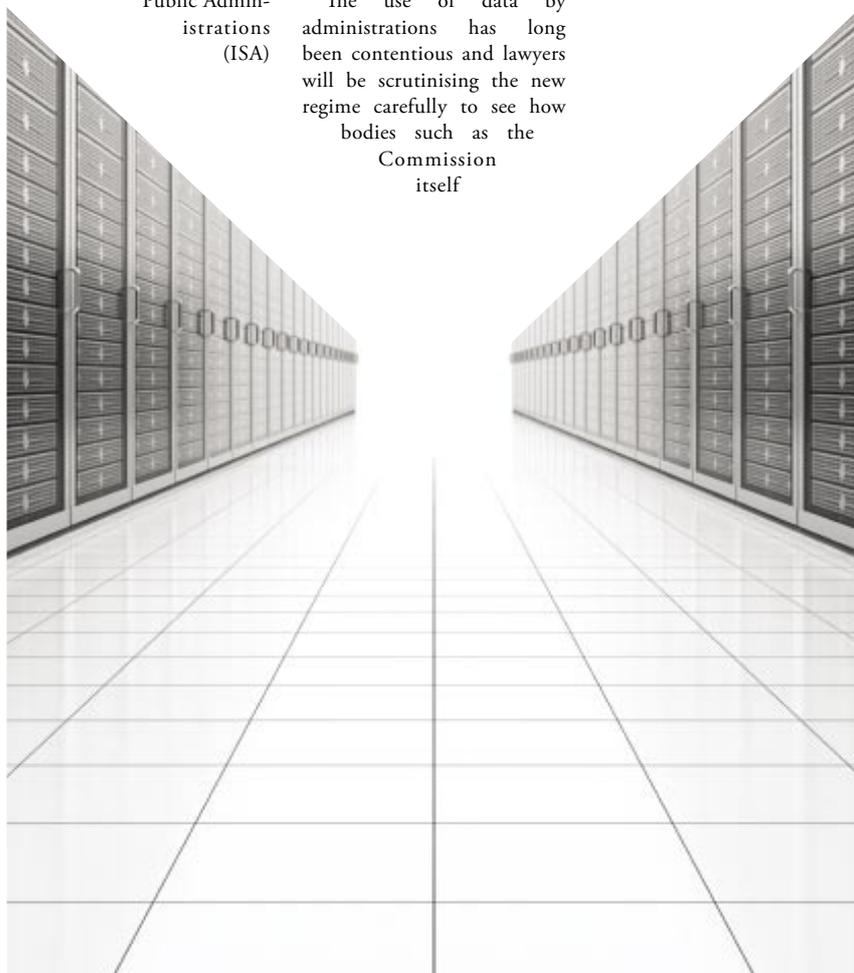
The use of data by administrations has long been contentious and lawyers will be scrutinising the new regime carefully to see how bodies such as the Commission itself

reserve the right to manage data for use on their own investigations.

The Commission's competition department, for example, regularly swaps information with its counterparts in the US and Japan in the course of its investigations.

The core vocabulary will provide a model of specific features that could be used to catalogue and describe a person, including the date and place of birth and the gender. It is possible to add more detailed information, such as whether she or he is a voter, an employee, a passenger or a patient. The other two vocabularies describe data entities in the domains of business and geographical location.

The Commission said that the new rules for such information categories would be non-binding, instead they would highlight the issue to encourage more rational systems.



Smartphone use changes debate on data protection



Consumer organisations and industry are squaring for battle over how far smartphone users' personal data can be used under the European Union's proposed data protection regime.

Large institutions and tiny app-makers alike have been accused in recent months of mishandling personal data.

Last week the Wall Street Journal alleged that internet

giant Google and advertising companies have been bypassing the privacy settings of millions of people using Apple Inc.'s internet browser on their iPhones and computers, allowing them to track the Web-browsing habits of people who intended this surveillance to be blocked.

The companies used special computer code that tricks

Apple's Safari Web-browsing software into letting them monitor many users, the Journal reported.

Consent required under draft rules

Draft rules proposed by Justice Commissioner Viviane Reding would require some form of consent from smartphone

users before companies could use the personal information contained in applications.

Although the rules cover ordinary computer users, their effects will be keenly felt in the booming smartphone sector, in which there is fierce competition amongst companies creating 'apps' for phone users.

Such tech companies frequently offer products for free and get income from online ads that are customised using data about customers.

Reding's draft rules would enable protection of personal information and ban companies from data-mining, said Jérémie Zimmerman, a spokesman for civil liberty group Squaring the Net.

Fears the regulation may not stick

There are doubts as to how strong the final data protection rules will be, however, amid fears a proposed regulation to rein in the private sector might

eventually be watered down to a directive, giving rise to nuanced interpretations across the EU's member states.

Kimon Zorbas, the vice president of IAB Europe, which represents the online advertisers, told EurActiv the ability of companies to analyse and collect data "affects innovation", and the productivity of such companies was not be taken into account by the draft data protection rules.

"The reality is the world is moving into data analysis and our economies will not compete without being able to collect, store and analyse data," Zorbas said.

The debate over privacy is raging in the US as well, where lawmakers trying to reassure a worried public have introduced more than a dozen privacy bills in Congress. The Obama administration has called for a Privacy Bill of Rights to encourage companies to adopt better practices.

IT giants still wary of EU on data protection

New EU data protection rules could threaten growth in the high-tech cloud computing sector in Europe, says a report published yesterday (22 February) by a leading industry group.

However, it also finds that existing legislation across Europe is better-suited to support the expansion of cloud than many emerging economies including China and India.

The report ranks 24 countries by their "cloud-friendliness" depending on factors including data protection, cybersecurity and intellectual property rights. It was prepared by the Business Software Alliance, or BSA, a lobbying group whose members include Microsoft, Apple, Dell, Intel and Adobe.

The document criticises European Commissioner for Justice Viviane Reding's regulation proposal on data protection, presented last month, saying it "has the potential to undermine its benefits with new, overly prescriptive rules [that] threaten to undermine the economic advances that a truly global cloud can provide."

The criticism comes despite moves to water down the proposal to accommodate economic and security concerns



raised by Commissioner for Trade Karel De Gucht, Commissioner for Digital Agenda Neelie Kroes, and the US government.

EU proposal 'too prescriptive'

Reding's legislation would require companies of more than 250 employees that hold personal information to assign a data protection officer, to warn the authorities of a data breach within 24 hours, and to establish documentation and security procedures for data processing.

BSA's director of government affairs in Europe, Thomas Boué, called the provisions "too prescriptive". "It's going to be a box-ticking exercise but will it

protect the data? That remains to be seen," he said.

Boué said the numerous 'delegated acts' in the regulation – specific rules that have to be defined by the Commission at a later date – are creating "legal uncertainty" for IT firms considering cloud computing.

These delegated acts include the definition of "public interest" in data transfer authorisation; the conditions for children to grant their consent to sharing personal data; documentation and security requirements for data processing; and the "right to be forgotten".

Matthew Newman, spokesperson for Reding's office, downplayed the fears, saying the Parliament and national governments are

involved in the process. "We always consult broadly before making proposals," he said.

Security concerns

More generally European countries rank high in the report for "cloud-readiness". In contrast, fast-growing emerging countries including China, India, Indonesia and Singapore "do not yet have any substantial data protection laws," the BSA report says.

The report claims this will limit the benefits these countries draw from cloud computing saying, "users will fully accept and adopt cloud computing only if they are confident that private information stored in the cloud, wherever in the world, will not be used or disclosed by the cloud provider in unexpected ways."

In recent years the information and communications technology sector has been expanding massively in emerging economies. The number of Chinese internet users reportedly reached over 500 million at the end of 2011 and it has been estimated that the country's ICT sector will nearly double in turnover between 2010 and 2015, reaching around €300 billion.

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