

EU Data Protection Reform: Close to the finishing line

“ I am now optimistic that the EU data protection reform process will be finished in 2015” said **Andrea Vosshoff**, Germany’s Federal Data Protection Commissioner, introducing a panel discussion on 5th November 2014 organised together with the European Data Protection Supervisor at the Representative of the State of North Rhine-Westphalia to the EU, Brussels. Stewart Dresner reports from Brussels.

She said that several points remain open, including:

1. the question of which processing by public authorities should be included in the new EU DP Regulation? Art. 6 assumes that processing is in the public interest. The Council of Ministers (DAPIX) Committee is now discussing a compromise clause stating that the Regulation should not be undermined by national law. Lowering of standards should not be permitted.
2. the decision of the European Court of Justice (ECJ) in the Right to be forgotten/Google case demands a balance between data protection and freedom of expression. Guidelines are needed for actual cases. Profiling, predicting human behaviour, is the business model for various service providers. But this undermines the right to self-determination. The scope of the Regulation should include not only *access* to the information but also the *creation* of the information.

“We are working to protect privacy values, not just technical principles.”

Latest news from the Italian Presidency

Mr. Stefano Mura, Head of the Department for International Affairs at Italy’s Ministry of Justice, said that the Council of Ministers provisionally agreed on international transfers of personal data in June this year under Greece’s Presidency. Citizens want their data protected not only in the EU but also outside the EU. “We demand a high level of confidence...Trust must be further strengthened.” In the October Council of Ministers, they agreed on the obligations of controllers and processors. “Action must be taken to mitigate risks.”

In the December Council meeting, they would cover rules applicable to the public sector and dispute resolution, including the one-stop shop.

Why are these discussions taking so much time? This subject cuts across competencies in the EU. Member States require co-ordination at national level before co-ordination at EU level. “Reform marks a radical shift in perspective in the construction of the European Union. This is no longer only about a single market. It is now about human rights. We need to check our principles against ever changing realities.”

On the ECJ Right to be forgotten/Google case, Italy’s Presidency is encouraging discussion on how to implement the decision. We need to take into account competing rights of freedom of expression, to both give and receive information.

EU Data Protection Reform: Close to the finishing line, Brussels, 6 November 2014

Stewart Dresner, Chief Executive, Privacy Laws & Business

stewart.dresner@privacylaws.com www.privacylaws.com

A future Council meeting will cover:

1. application of the Regulation to processing in the public sector. The majority want both a level playing field across the EU and freedom for Member States to regulate their public sectors. "I am confident of finding a balanced solution", he said.
2. the one-stop shop is, "a perfect example of the balancing exercise" needed. The new Data Protection Board will provide coordination. It will be an advantage for controllers and processors to achieve greater consistency and we "must achieve effective remedies for individuals....The system has to make sure that the data subject has access to remedies in the state where they choose to reside. Data protection cannot be merely theoretical." Coordination is needed between the lead and other DP Authorities. "Much will depend on the future jurisdiction of the ECJ."

Jan Philip Albrecht MEP, the Vice-Chair of the LIBE Committee (on Civil Liberties, Justice and Home Affairs) in the European Parliament, said that to achieve a quick result in the trilogue, it would be best if the Council of Ministers' position is close to that of the European Parliament.

Dr Ole Schroeder, Member of the Bundestag (German legislature) and Parliamentary State Secretary at the Federal Ministry of the Interior, said that there is increasing political pressure in Germany to raise data protection standards. The processing of law making is not simple. For example, the ECJ Google decision involves not only the company but also individuals and newspaper editors.

Paul Nemitz, Director, DG Justice C, Fundamental Rights and Union Citizenship, European Commission, said that he had confidence in the Italian Presidency. "We need political leadership to make things acceptable" but feared that the reform process might not be completed in 2015.

Axel Voss MEP, Vice-Chair of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, said that the ECJ Google decision "makes no distinction between commercial data and penal data...We need to liberate private households from data analysis."

Isabelle Falque-Pierrotin, President of the CNIL (France's DPA) and Chair, the EU Art. 29 DP Working Party (DPWP), said that adoption of the EU DP Regulation in 2015 is crucial to DPAs because:

1. for credibility "we have to show that the unity of European regulators will make us stronger."
2. "the Regulation will provide us with new compliance tools and stronger sanctions including higher fines"
3. "we need to overcome our differences and reach a result." There are expectations on this text because of the Snowden revelations. Citizens want a unified data market in Europe.
4. it will lead to positive steps, for example, on the one-stop shop. The Art. 29 DPWP was not in favour of the original Commission proposal on this point. Now we are in a more de-centralised and open system. We agree with the latest proposal of the Italian Presidency on:

EU Data Protection Reform: Close to the finishing line, Brussels, 6 November 2014

Stewart Dresner, Chief Executive, Privacy Laws & Business

stewart.dresner@privacylaws.com www.privacylaws.com

- proximity to the citizen, and
- integrity and harmonisation of the decision-making system.

The governance model is being adapted to the digital era. The Italian Presidency's risk-based approach is a good idea. The accountability principle should apply to all processing but be appropriate to the risk. The DP Officer function should apply to all organisations and not be related to the risk.

We have concern about pseudonymisation. There is lower risk in terms of security. But there is a tendency in the negotiations to reduce protection for pseudonymised data but we don't want that. We should not get rid of principles in a rush to adopt the Regulation in 2015.

Peter Hustinx, European Data Protection Supervisor (EDPS), and co-organiser of this event with Andrea Vosshoff, made two points:

1. There needs to be a sense of urgency. The EDPS published its Opinion in the summer of 2007, that a change to the EU DP Directive was unavoidable. For example, Facebook now has over 1 billion users. There is ambition in the programme of the new European Commission President, Jean-Claude Juncker, to benefit the digital economy.
2. The Italian Presidency needs to take the responsibility to come to a decision which holds on to the quality principles. "I will not see the Promised Land [he expects to retire at the end of November] but I hope that it is soon."

Mr. Stefano Mura responded saying that the commitment on concluding the negotiations in 2015 is shared among the 28 EU Member States.

Dr Schroeder said that Germany had provided much input into the legislative process. Citizens expect us to give all issues careful consideration. It is not all about speed. "We should look at the content....we need to do justice to enable Big Data but also protect data." Consent will remain important but we need to balance that with the legitimate interests of others."

Jan Philip Albrecht MEP responded that the European Parliament worked for 18 months towards a consensus to adopt the Regulation and to protect the interests of citizens and small and medium enterprises. The aim of the European Parliament is uniform DP legislation in all areas, including police and judicial activities. "If some subjects are outside its scope, then we are leaving problems for the future."

Isabelle Falque-Pierrotin "We are condemned to find solutions." Even within the Art. 29 DPWP there are differences of opinion. But we are starting to anticipate implementation of the EU DP Regulation. We need a real operational network with common tools and coordination. It needs a change of culture for DPAs, as they are mostly focused on their own countries. The Art. 29 DPWP is working on common guidelines to implement the ECJ Google decision in a common way. "The Council of Ministers will succeed because there is no other way."

Paul Nemitz said that a DP Regulation for the public sector will not require the abolition of any

EU Data Protection Reform: Close to the finishing line, Brussels, 6 November 2014

Stewart Dresner, Chief Executive, Privacy Laws & Business

stewart.dresner@privacylaws.com www.privacylaws.com

German law. The Council of Ministers can decide with a qualified majority regarding the one-stop shop so that citizens can obtain a remedy in their own states. “We need a corridor of possible solutions.” by means of political decisions so that the reform process can come to a conclusion.

Peter Hustinx concluded on the need and urgency for reform. It is important that there is substance in stronger protection to match the big ambition behind the reform process. It is necessary to reduce unhelpful inconsistency and diversity. Every Member State likes its system best but this situation is bad for data protection and costly for organisations. We need consensus on scope and a comprehensive approach starting on one date. “Otherwise, we will have a limping horse.”

The architecture will be agreed in the coming months. The EDPS’s Opinion in March 2012 covered interaction between national law and EU law with some flexibility for national specificities. Governance issues are being solved including the one-stop shop. “The European Commission could develop the trilogue in instalments...We need a positive spirit to go forward and an EU-wide perspective and consensus.”

“The Art. 8 right to the protection of personal data in the EU Charter of Fundamental Rights is an autonomous right. We are now working to give it EU-wide effectiveness.”

Stewart Dresner, Chief Executive, Privacy Laws & Business www.privacylaws.com 7 November 2014

EU Data Protection Reform: Close to the finishing line, Brussels, 6 November 2014
Stewart Dresner, Chief Executive, Privacy Laws & Business
stewart.dresner@privacylaws.com www.privacylaws.com