

Political agreement on the EU General Data Protection Regulation - the data protection "big-bang"

Two months after invalidation of the US Safe-Harbor by the Court of Justice of the European Union (*Schrems v Data Protection Commissioner* - 6 October 2015), political agreement has been reached to replace the entire EU data protection legal framework.

After four years of negotiations, representatives of the European Commission, the European Parliament and the EU Council of Ministers have finally reached agreement on the new General Data Protection Regulation (the "GDPR"). Political agreement was reached on 15 December and the agreed text published on the following day. The LIBE Committee of the European Parliament has now also approved the text.

When the GDPR comes into force, in 2018, Directive 95/46/EC will be repealed and the GDPR will supersede the various national implementing laws, establishing a largely harmonised EU data protection regime which does not require local implementation.

With potential fines for breach of up to 4% of total annual worldwide turnover or EUR 20,000,000, data protection will more than ever be a strategic board-level issue. All organisations engaging in the processing of personal data – which means, essentially, all organisations – will need to consider the implications of

the GDPR for their operations and prepare for compliance in 2018.

Other major elements of the GDPR include:

More obligations for business...

- **Expanded scope:** GDPR, like the current Directive, will apply to data controllers established in the EU, but it will also apply to:
 - data processors; and
 - organisations outside the EU offering goods or services to EU data subjects or monitoring their behaviour.
- **One-stop shop:** Appointment of a lead data protection authority to deal with data processing issues in the context of pan-European data processing.
- **Accountability:** Removal of most requirements for filings with or approvals of data protection authorities, but data controllers will have to take various steps (through policies, privacy impact assessments, etc.) so that they can demonstrate their compliance with the new regime.
- **Data breach notification:** Obligations to notify the relevant data protection authority and/or the affected data subjects of personal data security breaches in a wide range of circumstances.
- **Data protection officer:** Companies processing sensitive data on a large scale or

monitoring a large amount of personal data will have to appoint a data protection officer. Most SMEs will be exempt from this obligation.

...And more rights for data subjects.

- **Data subject's consent:** Will be harder to obtain under the GDPR - for example, it will have to be "unambiguous".
- **Child's consent in the digital world:** Parental approval required as regards personal data processing of children under 16, or under 13 if required by a member state. This may be a material issue for social network operators.
- **Enhancement of data subject's rights:** Data subjects to be granted a right to be forgotten (codifying the existing right created by the courts), to object to "profiling" and to require their personal data to be ported from one service provider to another.

What won't change?

The GDPR will preserve the essential features of the current EU data protection regime, except for the cumbersome and largely ineffective registration requirements. It will not, for example, make any essential change to the Directive's restrictions on international data transfer and will not, therefore, solve the issues for

business created by the *Schrems* decision.

What else is happening?

Political agreement has also been reached on a new Directive on data protection in the law enforcement context (by the police and other law enforcement bodies), which falls outside the scope of the GDPR. This will require local implementation into national law.

Next steps:

The agreement reached on 15 December is provisional and requires formal validation by the European Parliament and the EU Council of Ministers. The Regulation will then be published in the Official Journal of the EU, probably in mid-2016. The GDPR will take effect two years later, in 2018.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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