

# Personal data protection

## Council rewrites draft regulation

By Nathalie Vandystadt | Friday 08 March 2013

Discussions are moving forward, but with a clear determination to modulate and relax the future rules on the protection of Europeans' personal data, particularly online data. "On the question of whether the appointment of a data protection officer in companies should be optional, the answer is largely 'yes'," said Ireland's Justice Minister Alan Shatter after a debate by the 27 justice ministers, meeting in Council on 7 March in Brussels. By doing away with this obligation for companies to appoint a data protection officer, the Council would attack a pillar of Justice Commissioner Viviane Reding's star proposal. But several states find far too prescriptive certain aspects of the reform, which would also require companies that use personal data for commercial purposes, like Google, Facebook and Microsoft, to obtain users' consent.

The Irish EU Presidency still hopes to secure an initial political agreement on the proposal before the end of its term of office (end of June). For this first substantive debate, it raised the question of the data officer. Some countries are totally opposed to this measure. "There is a real danger in making it mandatory, especially for SMEs. It would cost up to €200 million for the UK alone," argued British Minister Chris Grayling. He wrote a letter to Reding denouncing the potential cost of the reform. She replied that the Commission was trying to strengthen the single market, exactly as demanded by Prime Minister David Cameron.

Germany, where data protection officers are already mandatory for the companies most concerned, argued in support of the system. However, it also noted that the system could be optional at EU level. The Commission's aim, though, is precisely to put an end to this patchwork of national rules.

### WHAT LEVEL OF RISK?

Given the danger of the initiative being scuppered, the Commission will try to hold its ground. It can agree to a less prescriptive regulatory approach based more on risks to data in terms of the company processing them. The Presidency suggests, for example, that high, medium and low levels of risk could be defined. "The key word should be simplicity. We are not here to create a toy for lawyers for multinationals," warned Reding, who refuses to see firms able to dodge the new obligations due to a lack of legal certainty.

According to the commissioner, the Irish idea of requiring all companies, including SMEs, to demonstrate their level of risk would paradoxically create much more bureaucracy in the Union. "If you, the ministers, force the corner butcher shop to prove that its activities present no risk to data, then you will deserve the Nobel Prize for bureaucracy," ironised Reding. The Commission therefore calls for "common criteria and parameters" with a clear distinction, for example, between sensitive data like medical data, and non-sensitive data like a butcher's customer base.

Everyone intends to protect SMEs from more bureaucracy. But the Commission wants clear rules. It argues that these small and medium-sized enterprises would not have to appoint a data officer unless their activities consist of exploiting personal data, eg the activities of an online advertising agency, web analysis, a medical centre or a loan company.

## **PUBLIC SECTOR**

The EU executive also agrees to introduce more flexibility in the regulation for public administrations. This was a request by Sweden, among others, which wishes to continue to be able to publish online public documents containing personal data. Similarly, Estonia wants to conserve its databases on police records and Bavaria (Germany) wants to keep its regional laws and a dual authority data protection system, one for the public sector and the other for the private sector.

This Council saw German Minister Hans-Peter Friederich agree to the idea of a single plan for the private and public sectors. Also, while a majority of states are convinced of the need for a regulation (directly applicable in the states), four countries – UK, Hungary, Denmark and Belgium – are still pushing for a directive.

For Dublin, this fundamental question can be settled only once it has been clearly raised to the ministers at the end of the process, said the Irish minister. For London, however, there is still a long way to go before reaching agreement.

According to Commission sources, France, Spain, Portugal, Poland and Bulgaria will be the countries most inclined to defend a proposal close to the Commission's ambitions for stronger data protection.

## **LAW ENFORCEMENT DATA?**

The ministers did not advance, on the other hand, on the separate draft directive on the protection of citizens' law enforcement data (such as police records). The proposal is roundly criticised by the United States, which is concerned that its bilateral agreements on the transfer of data for counter-terrorism purposes may be called into question. But the Council's working groups are moving forward, knowing that the European Parliament treats the two proposals as a package. "The more we advance on the regulation, the more we advance on the directive," said a Commission source. "The directive is in fact easier because it is more political. For example, what should happen with international agreements on the transfer of law enforcement data? Does the Lisbon Treaty, which makes provision for data protection, also apply at the level of law enforcement? For the Commission, the answer is 'yes'."

Reding: "We are not here to create a toy for lawyers for multinationals"

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