

2 EU General Data Protection Regulation

Trilogues underway after Council agreement

The new regulation aims to overcome the existing fragmentation and modernise the principles of the 1995 Directive. The European Parliament and the Council have already started the Trilogue negotiations, aiming to agree on a final text by end-2015.

A single and updated set of rules valid across the EU

The General Data Protection Regulation (GDPR), a single set of rules valid across the EU, will replace the 1995 Data Protection Directive, whose transposition into national laws has led to market fragmentation within the Union. The change from a directive to a regulation will therefore facilitate cross-border business activity. Moreover, the GDPR aims to update the regulatory framework, given the profound changes that have taken place in the way that personal data are collected, stored and processed. In this regard, the regulation will address new issues - such as profiling or pseudonymisation – and will incorporate the principles of risk-analysis approach and “privacy by design”. The scope of the GDPR will extend beyond the frontiers of the EU as it will affect companies that, although not established in the EU, offer goods or services to individuals residing in the EU or monitor their behaviour.

Three years since the Commission’s proposal

The European Council reached an agreement (“general approach”) on the General Data Protection Regulation (GDPR) on 15 June, three years after the European Commission made its legislative proposal. Trilogue negotiations between the Council and the European Parliament, which set out its position in March 2014, have already begun. They aim to agree on a compromise text by the end of 2015.

Points under discussion

The following are some of the most relevant points of disagreement between the Parliament’s position and the Council’s general approach. They will have to be discussed during the Trilogue negotiations to reach a common position of both co-legislators.

- The **definition of consent** that organisations are required to obtain from the data subjects if seeking to rely on consent as the legal basis for processing personal data. The European Parliament backed the Commission’s proposal, in which the consent has to be *explicit*, whereas the Council changed the requirement to *unambiguous* consent. The Council’s draft only requires the consent to be explicit for processing special categories of personal data (such as ethnic origin, political opinions, religion or beliefs).
- The requirement of a **data protection officer**. The Commission and the Parliament established certain conditions under which data controllers and processors would be required to designate a data protection officer. Instead, according to the Council’s draft, that position would only be mandatory “where required by Union or Member State law”.
- The **“one-stop shop”** mechanism for supervision. The Council’s general approach strengthens the role of the concerned supervisory authorities other than the lead authority (the one of the main establishment of the controller or processor). Indeed, when a possible infringement relates only to a jurisdiction, the authority of that jurisdiction would be competent over it. In general, the Council’s draft waters down the “one-stop shop” mechanism in comparison with both the Commission’s proposal and the Parliament’s position.
- The **joint liability** for controllers and processors, proposed by the Commission and broadly supported by the Parliament, is watered down in the Council’s general approach, with the controllers liable for any damages, unless the processors did not comply with their specific obligations.
- The **administrative fines** that supervisory authorities will be able to impose. Whereas the Parliament’s amendment raised the limit on possible fines (up to EUR100mn or 5% of turnover), the Council backed the limit proposed by the Commission (EUR1mn or 2% of turnover). Moreover, the Council’s draft introduces an additional provision specifying that, in case of violation of several provisions, the total amount of the fine may not exceed the amount of the gravest violation.

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