08 July 2014

FINANCIAL MARKETS LAW COMMITTEE

Françoise Le Bail
Director General
Directorate-General Justice
European Commission
Rue Montoyer
B-1049 Brussels
Belgium

Dear Ms Le Bail,

EU Data Protection Reforms

The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

The purpose of this letter is to highlight issues of legal uncertainty which arise under the European Commission's proposed Regulation and Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "Proposals").[1] In addition to highlighting the issues set out in this letter, the FMLC intends to address further issues of legal uncertainty arising under the Proposals in due course.

The Proposals amend the existing regulatory approach introduced by Directive 95/46/EC, which was created to protect the fundamental right to data protection and to guarantee the free flow of personal data between Member States. The current framework has not prevented fragmentation in the way the Directive's provisions have been implemented across the EU and rapid technological developments have given rise to new challenges in the protection of personal data. The Proposals are therefore intended to address these issues by building a comprehensive and more coherent framework. The FMLC welcomes this but notes that the Proposals as currently drafted are likely to cause difficultly for data controllers, in particular owing to potential conflict with obligations owed to competent authorities in the exercise of their regulatory and investigative functions.

Data Sharing Agreements

Recital 79 of the proposed Regulation states:

> This Regulation is without prejudice to international agreements concluded between the Union and third countries regulating the transfer of personal data including appropriate safeguards for the data subjects.

This recital gives rise to two issues of legal uncertainty: (1) the relationship between the preamble and Chapter V of the proposed Regulation; and (2) the scope of the preamble, in particular with regard to international agreements between non-sovereign official sector entities.

It is unclear whether the recital is intended to create an independent safe-harbour—in the case of personal data transferred pursuant to international agreements—from the provisions of the proposed Regulation which restrict the transfer of personal data. In particular, Chapter V of the proposed Regulation subjects the transfer of personal data to a number of conditions where the data are undergoing processing or are intended for processing after transfer to a third country or to an international organisation. These conditions include subjecting such transfers to the requirement that the transferee ensure an adequate level of protection of the data or to

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appropriate legally binding safeguards. To the extent that an international agreement falls within the scope of Recital 79 and contemplates the transfer of personal data in circumstances inconsistent with the provisions of Chapter V, it is therefore unclear whether such conditions apply. To the extent that the intention is to create a safe-harbour with regard to the transfer of personal data pursuant to international agreements, it would be beneficial for drafting to that effect to be included in the text of the Regulation (as opposed to in the text of the recitals).

Furthermore, it is unclear whether the application of the recital is restricted to agreements entered into between sovereign states, or whether it instead applies more broadly, for example to international agreements entered into between national regulators. One such agreement is the IOSCO Multilateral Memorandum Of Understanding Concerning Consultation And Cooperation And The Exchange Of Information (the "MMOU"), which sets out the intention of certain national regulators in both EU and non-EU jurisdictions with regard to mutual assistance and the exchange of information. It would be helpful if the recital were amended to clarify that it applies, in the interests of international comity, to international agreements entered into between governmental entities and agencies (such as members of IOSCO) other than sovereign states.

Right to be Forgotten

Article 17(1) of the proposed Regulation sets out the right of a data subject "to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data [...]". The right is available when, *inter alia*, "the data are no longer necessary in relation to the purposes for which they were collected" or "the data subject withdraws consent on which the processing is based... or when the storage period consented to has expired". A very limited set of restrictions on the availability of the right are listed in Article 17(3), including compliance with Member State law (at Article 17(3)(d)), where "such laws shall meet an objective of public interest".

Article 21 of the proposed Regulation, however, further stipulates that the rights of a data subject set out in Articles 5, 11 to 20 and 32 may be restricted by Union or Member State law, when such a restriction constitutes a necessary and proportionate measure in a democratic society to safeguard: (a) public security; (b) the prevention, investigation, detection and prosecution of criminal offences; (c) other public interests of the Union or of a Member State [...]; (d) [...]; and (e) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (a), (b), (c) and (d) [...].

The plain meaning of these two articles is unclear. In particular, regarding the requirement of "public interest" in Article 17(3)(d), it is unclear whether the requirement has the effect that the data controller is required to comply with the Regulation by breaching Member State laws which do not meet the objective. This lack of clarity is exacerbated by the unresolved overlap between Article 17(3) and Article 21, both of which purport to provide for Member State laws that may qualify the rights of the data subject, but in different terms. The net effect, however—subject to what is said below about Articles 17(1)(c) and 19(1)—appears to be that, absent the adoption of a specific legislative measure under EU or Member State law, a data controller will not be entitled to resist a demand for erasure of personal data even where the retention of that data is a necessary and proportionate measure to safeguard public security and/or the the prevention, investigation, detection and prosecution of criminal offences, let alone data the retention of which would assist competent authorities in the performance of their regulatory functions. That is, it would appear that even personal data relating directly to the commission of financial crime by the data subject must be erased by the data controller.

That this would be an unusual legislative outcome is clearly reflected in Recital 16,

which explains that the Regulation should not apply to data processing for the purposes of prevention, investigation etc. of criminal offences and refers to the Commission's proposed Directive, which addresses the processing of data for these purposes. This approach creates considerable uncertainty regarding the correct approach to the storage or erasure of personal data in the interregnum between the enactment of the Regulation and the implementation of the Directive. It also places a great deal of emphasis on the requirements for "lawful processing" set out in the proposal for a Directive (Article 7), which fall short of permitting the data controller to retain data in the circumstances contemplated by Article 21 of the Regulation and, in particular, those contemplated by Article 21(e).

A right to be forgotten which accrues as a consequence of the data subject's right to object (Articles 17(1)(c) and 19(1)) is presumably qualified by the proviso in Article 19(1): "unless the controller demonstrates compelling legitimate grounds... which override the interests or fundamental rights and freedoms of the data subject". This, however, is not explicit in Article 17 and, in any event, the interrelationship of the proviso with both Articles 17(3) and 21 is unclear, notwithstanding the very evident overlap.

The FMLC takes the view that it would be preferable for the circumstances stipulated in Article 21 directly to qualify the data subject's right of erasure under Article 17 and his right to object under Article 19 (i.e. to act as an exhaustive list of limitations on the rights conferred by Articles 17 and 19, without further implementation in Member State or EU law). If it were thought desirable, a longstop could be introduced (say, ten years) after which the circumstances in question would no longer act as grounds for qualifying or overriding the right to erasure in respect of historical data.

Interaction with Investigative Powers in Non-EU Jurisdictions

Financial regulators in non-EU jurisdictions are frequently granted extensive investigative powers with respect to entities authorised to carry out a regulated activity in the jurisdiction in question. For example, the US Securities and Exchange Commission and the Commodity Futures Trading Commission are granted broad investigative powers under the Securities Exchange Act 1934 and Code of Federal Regulation, respectively. The Office of the Comptroller of the Currency and the U.S. Federal Reserve are granted comparable powers.

For entities subject both to the obligations imposed by the Proposals and to the obligation to cooperate with a competent authority in the exercise of its regulatory and investigative functions, a conflict may arise where the local regulator seeks disclosure of data protected as a result of the Proposals. The entity in question would, in these circumstances, be compelled logically to breach one or other set of obligations (potentially resulting in the incurring of a very significant sanction in an EU jurisdiction or a loss of authorisation to carry out the relevant activity in a foreign jurisdiction). To the extent that it is intended to resolve such conflict by enabling a data controller to make disclosures to financial regulators under such circumstances, the FMLC suggests (above) that the rights of the data subject should be qualified by reference to the restrictions in Article 21.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me for that purpose.

Yours sincerely,

Joanna Perkins

Joanna Perkins
FMLC Chief Executive

[1] The proposal for a Regulation: COM(2012) 11 final; 2012/0011 (COD) and the proposal for a Directive: COM(2012) 10 final; 2012/0010 (COD).