

2 April 2015

Mr Bruno Gencarelli
Directorate General for Justice
European Commission
B-1049 Brussels
Belgium

FINANCIAL
MARKETS
LAW
COMMITTEE

Dear Mr Gencarelli

FINANCIAL MARKETS LAW COMMITTEE—THE EUROPEAN DATA PROTECTION REFORM PROPOSALS

The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty, or misunderstanding, present and future, 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 FMLC has taken an active interest in the European Commission's proposed Regulation (the "proposed Regulation") and Directive (the "proposed Directive") on the protection of individuals with regard to the processing of personal data and on the free movement of such data (together the "Proposals").¹ Its work culminated in the publication of three letters and a paper (all of which are attached hereto). In early 2015 you were so kind as to take the time to meet me in Brussels. At this meeting, we discussed the ways in which the current Proposals differ from the original EU legislative framework on data protection (the "original framework") the centrepiece of which is Directive 95/46/EC, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "1995 Directive") and you were keen to understand the significance of these changes for market participants.

I write to you in the hope that the FMLC might be of service in offering an account of the impact of key differences between the original framework and the Proposals. The details given in this letter go solely to establish the relevance of the issues of legal uncertainty set out in the correspondence and paper referred to above and are not intended to support any wider concerns as to policy issues which may have been raised with you by others.

Changes to the Burden placed on Data Controllers

Various provisions within the Proposals significantly increase the burden of responsibility placed on Data Controllers when compared with the existing data protection regime. This is described by Peter Hustinx as "one of the major shifts in data protection law" and in this respect he notes that the proposed Regulation requires the data controller to demonstrate "an adequate legal basis for processing, that consent is real consent, and that measures continue to be effective."²

One example of this shift is the result of a relatively minor amendment to the definition of "the data subject's consent". The addition of the word "explicit" to the definition of "the data subject's consent" significantly increases the burden placed on data processors and

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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).

² See Peter Hustinx, "EU Data Protection Law: The Review of Directive 95/46/EC and the Proposed General Data Protection Regulation", at p. 32.

controllers, since the previous framework did not require explicit consent.³ The FMLC identifies and discusses issues arising from this and similar drafting amendments in its previous publications.⁴ Other examples of this shift are the requirement on data controllers to provide for data protection “by default” and the fact that they may well be subjected to Commission delegated acts providing for requirements as to data protection “by design”.⁵ Furthermore, the Proposals provide for the creation of new responsibilities. *Inter alia*, under the Proposals, a data controller must perform impact assessments⁶ and designate a data protection officer.⁷

Extraterritorial reach

It is clear that the Proposals are made in the context of policy and political evaluations,⁸ upon which it is not for the FMLC to comment. The FMLC notes, however, that certain elements of the Proposals will be difficult to apply in practice. For example, the Proposals will apply not only to data controllers and processors established in the EU⁹ but also to an entity based in a third country when it offers goods or services in the EU or monitors the behaviour of data subject in the EU.¹⁰ This is an extension of the territorial reach of the original Directive. The FMLC notes that it will be exceedingly difficult to enforce sanctions against a non-cooperative third country entity.

Additionally, a key change under the Proposals is the introduction of significant limitations on data controllers’ and processors’ ability to engage in the exchange of information across borders. Whilst the original Directive contains provisions on the transfer of data to third countries, the FMLC notes that the proposed Directive and Regulation significantly extend restrictions on exchange of information across borders.¹¹ The FMLC addresses concerns arising in this context in its letter of 8 July 2014 as well as section 8.3 of its Paper.

New concepts

The provisions on profiling,¹² data protection officers¹³ and the so-called ‘One-stop shop’¹⁴ are entirely new concepts introduced by the Proposals. It is not for the FMLC to comment on the policy decisions underlying the introduction of new regulatory concepts or tools. I would, however, refer you to the FMLC’s previous work on issues of legal uncertainty arising in this context.

³ See Article 2 original Directive, Article 4(8) proposed Regulation. The FMLC is also cognisant that a Presidency Compromise Text of the Proposed Regulation, dated 30 June 2014 proposes the use of the word “unambiguous” and makes various changes to the original Proposals, and that a Presidency Compromise Text of the Proposed Directive, dated 1 December 2014 has been published.

⁴ Indeed, whilst tacit, albeit unambiguous, consent previously sufficed, active and explicit consent to processing would be required under the Proposals (See Directive 95/46/EC, Article 7 and the proposed Directive, Article 7 and proposed Regulation, Article 6).

⁵ Proposed Regulation, Article 23(2) and (3).

⁶ Proposed Regulation, Article 22(2)(c) and 33.

⁷ Proposed Regulation, Articles 22(2)(e), 35-37.

⁸ “The revelations of large scale monitoring of our online behaviour by the US National Security Agency and other intelligence services have rightly sent shock waves around the world... it is now clear that many business practices... are also based on extensive monitoring of consumer behaviour”. Peter Hustinx, *Ibid.*, at p. 2.

⁹ Proposed Regulation, Article 3(1).

¹⁰ Proposed Regulation, Article 3(2). See also Peter Hustinx, *Ibid.*, at p. 33.

¹¹ Original Directive, Article 25; proposed Directive, Article 33; and proposed Regulation Articles 44 – 44, respectively.

¹² Proposed directive, Article 9, proposed Regulation Article 20.

¹³ Proposed Directive, Articles 30 – 32, proposed Regulation Articles 35 – 37.

¹⁴ Proposed Regulation, Article 51.

Sanctions

Under the original framework Members States are tasked with adopting measures to facilitate commensurate sanctions. The Proposals, in contrast, provide for the imposition of major fines for breaches.¹⁵

The Right to Erasure and the Right to be Forgotten

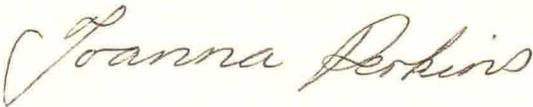
The FMLC notes that Right to Erasure under the original Directive was not a prominent feature, whilst it has formed a significant part of the Proposals.¹⁶ The Right to be Forgotten is one of a number of significant additions or extensions. The FMLC has addressed issues of legal uncertainty arising in the context of the Right to be Forgotten in its letter of 8 July 2014 and in section 7 of its Paper.¹⁷

Lawfulness and Legitimacy of Processing

The right of data controllers and processors to process data even where the grounds for legitimate or lawful processing are satisfied are considerably restricted in the Proposals.¹⁸ Consent must be given for "one or more *specific* purposes" (emphasis added) under the proposed Regulation, whilst the original Directive only requires "unambiguous... consent" (in absence of certain exceptions).¹⁹ The proposed Regulation subjects the legitimacy and lawfulness of processing to Union and Member State law whilst the original Directive does not, explicitly, do so.²⁰

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 to arrange such a meeting or should you require further information or assistance.

Yours sincerely,



Joanna Perkins
FMLC Chief Executive

Copied to: Ms Paraskevi Michou, Paulo Miguel Silva, Elisabeth Stafford

¹⁵ Original Directive, Article 24. Proposed Directive, Article 55, proposed Regulation, Article 78 – 79.

¹⁶ Proposed Directive, Article 16, proposed Regulation, Article 17.

¹⁷ The FMLC has addressed issues of legal uncertainty arising in the context of the Right to be Forgotten in its letter of 8 July 2014 and in section 7 of its Paper.

¹⁸ See proposed Directive art 7, proposed Regulation Article 6.

¹⁹ Original Directive Article 7; proposed Regulation Article 6.

²⁰ Proposed Regulation article 6(3). I refer you to section 4 of the FMLC's Paper for an analysis of issues of legal uncertainty arising in this context.