

21 November 2014

Daniel Johns
EU and International Data Protection Policy
The Ministry of Justice
102 Petty France
London
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Dear Mr Johns

EU Data Protection Reforms

As you know, 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.

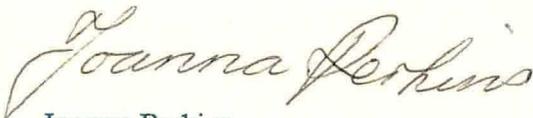
The FMLC has taken an active interest in the European Commission's proposed Regulation (the "proposed Regulation") and Directive (the "proposed Directive")¹ on the protection of individuals with regard to the processing of personal data and on the free movement of such data (together the "Proposals") through the recent publication of a letter and paper (attached hereto) which address issues of uncertainty arising in the context of the Proposals.

Further to its separate letters to you of 6 August 2014 and 3 November 2014, the FMLC wishes to draw your attention to ways in which some of the issues of legal uncertainty, identified in the documents above, may be addressed by way of drafting amendments.

To this end, please find attached an annex which sets out specific issues of legal uncertainty and possible drafting amendments that the Committee believes may serve to address or ameliorate some of the issues of uncertainty identified. The FMLC notes, however, that it has not addressed all of the issues of legal uncertainty identified in its previous work on the basis that to do so would reach beyond the ambit of the remit of the FMLC.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter and the attached documentation. Please do not hesitate to contact me to arrange such a meeting or should you require further information or assistance.

Yours sincerely



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FMLC Chief Executive

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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)

DISCUSSION OF LEGAL UNCERTAINTIES ARISING IN THE AREA OF EU DATA PROTECTION REFORMS

ANNEX—DRAFTING SUGGESTIONS

For further information about the issues identified in this annex, and further issues of legal uncertainty identified by the FMLC, please refer to the FMLC [Paper](#) and [Letter](#).

- * *Italics* represent suggested addition.
- ** ~~Strikethrough~~ represents suggested deletion.

ISSUE OF LEGAL UNCERTAINTY IDENTIFIED BY THE FMLC		SUGGESTED AMENDMENTS
Issues raised in FMLC Paper on the European Data Protection Reform Proposals		
1.	The interaction of Article 7 with more permissive provisions of the Draft Regulation and Directive (for example Recital 20 and Article 4 of the Draft Directive) is structurally unclear (section 2 of the FMLC Paper).	Proposed amendments to Article 7 of the Draft Directive: <i>“(1) For the purposes of this Directive, Member States shall provide that the processing of personal data is lawful only if and to the extent that processing is necessary: (a)[...] (d)[...] public security (2) Further processing not incompatible with these purposes which is permissible under the Regulation is lawful to the extent that it is carried out according to the terms of Regulation (EU).../2012.”</i>
2.	Articles 9(2)(j) and 21(1)(b) of the Draft Regulation obfuscate the application of the Proposals to data which may be the subject of both criminal investigatory and administrative (or other) processing (section 2 of the FMLC Paper).	The FMLC suggests the deletion of Article 9(2)(j) and proposes the amendment of Article 9(1) of the draft Regulation to read as follows: <i>“(1) The processing of personal data, revealing race or ethnic origin, political opinions, religion or beliefs, trade-union membership, and the processing of genetic data or data concerning health or sex life or criminal convictions or related security measures shall be prohibited.”</i>

3.	<p>The term “public authorities” is undefined (section 3 of the FMLC Paper).</p>	<p>It is suggested that a new Article 4(20) be inserted to read: “(20) ‘competent authority’ has the meaning given to it in Directive XX/YYYY.”</p> <p>Furthermore, Article 3(14) of the Draft Directive should be amended to read: “‘competent authorities’ means any publie authority competent for the prevention investigation, detection or prosecution of criminal offences or the execution of criminal penalties.”</p> <p>Finally, Recital 16 of the Draft Regulation should be amended as follows: “The protection [...] However, data processed by publie <i>competent</i> authorities under this Regulation when used for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties should be governed by the more specific legal instrument at Union level (Directive XX/YYYY.” <i>(sic.)</i></p>
4.	<p>The Draft Regulation does not provide for lawful processing of data in the context of purely regulatory, not strictly legal obligations (section 4 of the FMLC Paper).</p>	<p>Article 6(1)(c) of the Draft Regulation should be amended to read: “(c) processing is necessary for compliance with a legal <i>or regulatory</i> obligation <i>or an obligation arising under a code of conduct which has its basis in regulation</i> to which the controller is subject;”</p> <p>OR</p> <p>Recital 36 should be amended as follows: “Where processing is carried out in compliance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest... the processing should have a legal basis in Union law <i>or in the national law</i> of a Member State, <i>or in a regulatory obligation or an obligation arising under a code of conduct which has its basis in regulation...</i>”</p>
5.	<p>Legal uncertainty is caused by territorial issues.</p> <ol style="list-style-type: none"> 1. There is uncertainty as to the scope of the safe-harbours set out in Article 2(2), 2. recent jurisprudence illustrates the risks associated with the storage of data in different geographical locations and legal jurisdictions (section 5 of the FMLC Paper and FMLC Letter). 	<p>The issues of uncertainty surrounding Article 2(2) of the Draft Regulation are resolved by the amendment suggested in Point 3, above, regarding the addition of an Article 4(20) of the Draft Regulation.</p>

6.	<p>Data subjects' right to withdraw consent. Despite data subjects' right to withdraw consent for the processing of data, its processing remains lawful under either Article 6(a) or 6(b) when undertaken in performance of a contract. It is unclear whether contracts which prohibit the withdrawal of the data subject's consent during the term of the contract are compatible with Article 7(3) (section 6 of the FMLC Paper).</p>	<p>It is proposed that Article 7(2) of the Draft Regulation be replaced by the following: <i>"If the data subject's consent is to be given in the context of standard terms provided to the data subject for which the data controller or processor is responsible, the meaning and effect of that consent must first be drawn to the attention of the data subject. The prominence of the notice provided shall be commensurate with the data subject's rights and with the obligations imposed by the standard terms."</i></p> <p>Additionally, it is suggested that Article 7(3) of the Draft Regulation be amended as follows: <i>"the data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal or the lawfulness of processing to which at least one of paragraphs (b) to (f) of Article 6(1) applies."</i></p>
7.	<p>Issues of legal uncertainty may also arise in the context of Article 26(4), which covers the situation in which a processor exceeds the instructions it has received from a data controller to process personal data (section 6 of the FMLC Paper).</p>	<p>Article 26(4) of the Draft Regulation should be amended to read <i>"If a processor processes personal data other than as instructed by the controller, the processor shall be considered to be a controller in respect of that processing and shall be subject to the rules on joint controllers laid down in Article 24."</i></p>
8.	<p>The broad nature of the prohibition of profiling and the exceptions thereto give rise to particular issues for the insurance industry (section 7 of the FMLC Paper).</p>	<p>It is suggested that Article 20 of the Draft Regulation is amended to read as follows:¹</p> <p style="text-align: center;"><i>" Article 20 Measures based on profiling</i></p> <p>1. Every natural person <i>The data subject shall have the right not to be subject to a decision evaluating personal aspects relating to him or her, which is based solely on automated processing, including profiling, and measure which produces legal effects concerning him or her. this natural person him or her or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict in particular the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour</i></p> <p>2. A data subject <i>Subject to the other provisions of this Regulation, a person may be subjected to a decision measure of the kind referred to in</i></p>

¹ N.B. this proposed amendment replicates suggestions made by the Council of Ministers' proposals of 30 June 2014, available [here](#).

		<p>paragraph 1 only if <i>it</i>: the processing:</p> <p>(a) is necessary for is carried out in the course of the entering into, or performance of, a contract, where the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or where suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the right to obtain human intervention; between the data subject and a data controller; or</p> <p>(b) is expressly authorized by a Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's legitimate interests; or</p> <p>(c) is based on the data subject's explicit consent. subject to the conditions laid down in Article 7 and to suitable safeguards.</p> <p>3. In cases referred to in paragraph 1 the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, such as the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision. Automated processing of personal data intended to evaluate certain personal aspects relating to a natural person shall not be based solely on the special categories of personal data referred to in Article 9.</p> <p>4. Decisions In the cases referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless points (a) or (g) of Article 9(2) apply and suitable measures to safeguard the data subject's legitimate interests are in place. , the information to be provided by the controller under Article 14 shall include information as to the existence of processing for a measure of the kind referred to in paragraph 1 and the envisaged effects of such processing on the data subject.</p> <p>5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and conditions for suitable measures to safeguard the data subject's legitimate interests referred to in paragraph 2."</p>
9.	<p>In the appointment of Data Protection Officers under Article 35(5) uncertainty arises with regard to the precise nature and scope of legal expertise that a data protection officer must possess (section 9 of the FMLC Paper).</p>	<p>It is suggested that Article 35(5) of the Draft Regulation be amended either to read: "The controller or processor shall designate the data protection officer on the basis of professional qualities and, in particular, expert knowledge of data protection law and practices and ability to fulfil the tasks referred to in Article 37. The necessary level of expert knowledge shall be determined in particular according to the data processing carried out and the protection required for the</p>

		<p>personal data processed by the controller or the processor.”</p> <p>Or</p> <p>“The controller or processor shall designate the data protection officer on the basis of professional qualities and, in particular, expert <i>appropriate</i> knowledge of data protection law and practices and ability to fulfil the tasks referred to in Article 37. The necessary level of expert knowledge shall be determined in particular according to the data processing carried out and the protection required for the personal data processed by the controller or the processor.”</p>
ISSUES RAISED IN THE FMLC’S LETTER ON THE EU DATA PROTECTION REFORM PROPOSALS		
10.	<p>Issues of legal uncertainty arising under Recital 79 of the Draft Regulation:</p> <ol style="list-style-type: none"> 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. 	<p>It is proposed that Article 44 of the Draft Regulation is amended as follows:</p> <p>“1. In the absence of an adequacy decision [...]</p> <p style="padding-left: 40px;">(d) the transfer is necessary for <i>public security or other</i> important grounds of public interest.[...]</p> <p>5. The public interest referred to in point (d) of paragraph 1 must be recognised in Union law or in the Law of the Member State to which the controller is subject <i>or set out in agreements or memoranda between public authorities in Member States or between such authorities and public authorities established in third countries</i>”</p> <p>Additionally, a Recital 87 should be added to the Draft Regulation, to read:</p> <p><i>“In particular, important grounds of public interest may be set out or recognised in agreements or memoranda between public authorities in Member States or between such authorities and public authorities established in third countries.”</i></p>
11.	<p>Issues arising in the context of the Right to be Forgotten:</p> <p>The plain meaning of Articles 17(1) and 21 of the Draft Regulation is unclear, and the legal uncertainty resulting is exacerbated by overlap between these Articles (and section 7 of the FMLC Paper).</p>	<p>It is suggested that Article 17 of the Draft Regulation is amended to include a new paragraph 1(a) to read:</p> <p><i>“This right applies unless the data controller demonstrates compelling legitimate grounds that override the fundamental rights or interests of the data subject”</i></p> <p>Article 21 of the Draft Regulation should be amended to read as follows:</p> <p>“1. The grounds referred to in Article 17(1)(a) and 19(1) above are that the processing of data is necessary to safeguard:</p> <p style="padding-left: 40px;">(a) public security;</p>

- (b) the prevention, investigation, detection and prosecution of criminal offences;*
- (c) other public interests of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters and the protection of market stability and integrity;*
- (d) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;*
- (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);*
- (f) the protection of the data subject or the rights and freedoms of others.*

1-2. Union or Member State law may restrict or further restrict by way of a legislative measure the scope of the obligations and rights provided for in points (a) to (e) of Article 5 and Articles 11 to 16, 18, 20 20 and Article 32, when such a restriction constitutes a necessary and proportionate measure in a democratic society to safeguard: *the proposed measures listed in paragraph (1) above.*

- ~~*(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, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters and the protection of market stability and integrity;*~~
- ~~*(d) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;*~~
- ~~*(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);*~~
- ~~*(f) the protection of the data subject or the rights and freedoms of others.*~~

12. Issues arising in the context of the interaction of the Proposals with Investigative Powers in Non-EU Jurisdictions.

Resolved by the amendments proposed in point 10 above.