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The new General Data Protection Regulation: Still a sound system for the protection of individuals?

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A B S T R A C T

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The five-year wait is finally over; a few days before expiration of 2015 the “trilogue” that had started a few months earlier between the Commission, the Council and the Parliament suddenly bore fruit and the EU data protection reform package has finally been concluded. As planned since the beginning of this effort a Regulation, the General Data Protection Regulation is going to replace the 1995 Directive and a Directive, the Police and Criminal Justice Data Protection Directive, the 2008 Data Protection Framework Decision. In this way a long process that started as early as in 2009, peaked in early 2012, and required another three years to pass through the Parliament’s and the Council’s scrutiny is finished. Whether this reform package and its end-result is cause to celebrate or to lament depends on the perspective, the interests and the expectations of the beholder. Four years ago we published an article in this journal under the title “The proposed data protection Regulation replacing Directive 95/46/EC: A sound system for the protection of individuals”. This paper essentially constitutes a continuation of that article: now that the General Data Protection Regulation’s final provisions are at hand it is possible to present differences with the first draft prepared by the Commission, to discuss the issues raised through its law-making passage over the past few years, and to attempt to assess the effectiveness of its final provisions in relation to their declared purposes.

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1. Introduction: a thorough reform but based on ideas already bypassed?

The five-year wait is finally over; a few days before expiration of 2015 the “trilogue” that had started a few months earlier

between the Commission, the Council and the Parliament suddenly bore fruit and the EU data protection reform package has finally been concluded. As planned since the beginning of this effort a Regulation, the General Data Protection Regulation (henceforth, the Regulation¹) is going to replace the 1995 Directive² and a Directive, the Police and Criminal Justice Data

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¹ The text referred to in this article is the compromise text reached after conclusion of the inter-institutional negotiations (*trilogue*) between the Commission, the Council and the Parliament, as made available online by the Parliament’s LIBE Committee on 17 December 2015. Readers are advised that this text will be different from the final text both in terms of numbering (a number of articles and preamble paragraphs in the compromise text are deleted or numbered inconsequentially) and in terms of wording (linguistic processing pending).

² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, pp. 31–50.

Protection Directive (henceforth, the Directive³), the 2008 Data Protection Framework Decision.⁴ In this way a long process that started as early as in 2009, through a relevant public consultation launched by the Commission, peaked in early 2012, when the Commission published its own proposals, and required another three years to pass through the Parliament's and the Council's scrutiny is finished. Whether this reform package and its end-result is cause to celebrate or to lament depends on the perspective, the interests and the expectations of the beholder. This paper will attempt a first assessment of one of its components, the Regulation, in this regard.

There is very little personal data processing that will remain unaffected by the combined effect of the Regulation and the Directive. Their combined scope covers all personal data processing executed by private actors as well as all similar processing undertaken by law enforcement agencies in the Member States; in fact, only processing by secret agencies for national security purposes⁵ and processing by EU law enforcement agencies is left unregulated. Apart from these exceptions, there will practically be no individual within the EU not directly affected by the reform. The new instruments are therefore expected to affect the way Europeans work and live together. However, these two instruments are only part of the EU data protection reform effort: at the same time important legislative initiatives have been undertaken with regard to Eurojust,⁶ Europol⁷ and the soon-to-be-founded European Public Prosecutor Office.⁸ Sector-specific legislation also currently under elaboration refers to the EU PNR Directive,⁹ while it should also be noted that Regulation 45/2001, establishing the European Data Protection Supervisor, also eagerly awaits its (promised) revision.¹⁰ Once all of the above have been enacted

nothing in the EU data protection edifice will remain the same.¹¹

A critical observer might note that the ideas behind the Regulation and the Directive go back to 2012 and that already all circumstances within which they were drafted have in the meantime changed substantially. From a political point of view, public debt, the war against terrorism and immigration have dominated the EU agenda over the past few years; data protection is found right in the centre of relevant debates, when for instance processing personal data of immigrants or alleged terrorists or when overstressing the limits of already exhausted Data Protection Authorities to cover each and every new type of personal data processing within their respective jurisdictions. Recent terrorist attacks in EU capitals have also affected social perceptions, with the emphasis being once again, as was the case back in 2001, on security rather than human rights.¹² Even technology has changed substantially within the past five years: smartphones and apps have carved up an important part in users' preferences over the open internet; the open internet itself is distinguished from the "dark" internet where supposedly all types of criminal activity takes place; cyber security incidents have occurred at an unprecedented pace at all levels, meaning both at corporate and at state level; big data, drones, the internet of things and other niche technologies constantly challenge the limits of legislation.

On the other hand EU case law has not stayed idle, calmly waiting for the new provisions of the EU data protection reform package to be finalised and come into effect. On the contrary, the Court of Justice of the European Union (CJEU) has over the recent past undertaken a substantial effort to protect individual data protection even, when needed, stretching the already exhausted provisions of the 1995 Directive to their real and imaginative limits.¹³ In this way, however, notions such as the right to be forgotten or extraterritoriality or international data transfers that are treated in the text of the new legislative instruments should not be considered as newcomers in the EU. In fact quite the opposite is true, because useful experience

³ Compromise text also made available by the LIBE Committee on 17 December 2015, as above.

⁴ Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350/60, 30.12.2008.

⁵ See Art. 2 of the Regulation and of the Directive respectively.

⁶ Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM/2013/0535 final.

⁷ Proposal for a Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, COM(2013) 173 final. At the time of drafting this article the trilogue stage was also completed on this Regulation; therefore, its formal adoption is also pending.

⁸ Proposal for a Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final.

⁹ Provisional text drafted by the Commission (based on its (rejected) initial draft: Proposal for a directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, COM(2011) 32 final) also approved by the Parliament and the Council on 2 December 2015.

¹⁰ A promise also undertaken in the text of the Regulation itself; see Preamble 14a.

¹¹ The regional and global scene ought also not be overlooked: The Council of Europe 1981 Convention, to which all EU Member States are signatory parties, is also currently in the process of being amended (see relevant Council of Europe webpages (Modernisation of Convention no.108, at www.coe.int); the OECD Guidelines have been revised only in 2013 (OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data).

¹² See The Economist, The terrorist in the data – how to balance security with privacy after the Paris attacks, 28 November 2015.

¹³ Reference is made here to the important cases of Schrems (Maximilian Schrems v Data Protection Commissioner, C-362/14), Weltimmo (Weltimmo s. r. o. v Nemzeti Adatvédelmi és Információszabadság Hatóság, C-230/14), Google Spain (Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, C-131/12), and data retention directive (Digital Rights Ireland and Seitlinger and Others, Judgment in Joined Cases C-293/12 and C-594/12). Perhaps this important pro-data protection trend can be explained by the fact that the Regulation is substituting a Directive and hence at least from a German point of view judicial redress for individuals becomes automatically limited (see Hornung G, A General Data Protection Regulation for Europe? Light and Shade in the Commission's Draft on 25 January 2012, SCRIPTed Vol. 9 issue 1, 2012, p. 67).

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