

# Data Protection & Privacy

*Contributing editor*  
**Rosemary P Jay**



2016

GETTING THE  
DEAL THROUGH 

GETTING THE  
DEAL THROUGH 

# Data Protection & Privacy 2016

*Contributing Editor*  
**Rosemary P Jay**  
**Hunton & Williams**

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Business development managers  
Alan Lee  
alan.lee@lbresearch.com

Adam Sargent  
adam.sargent@lbresearch.com

Dan White  
dan.white@lbresearch.com



Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2015  
No photocopying without a CLA licence.  
First published 2012  
Fourth edition  
ISSN 2051-1280

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of August 2015, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

<b>Introduction</b>	<b>4</b>	<b>Luxembourg</b>	<b>80</b>
Rosemary P Jay Hunton & Williams		Marielle Stevenot, Rima Guillen and Charles-Henri Laevens MNKS	
<b>EU Overview</b>	<b>7</b>	<b>Malta</b>	<b>86</b>
Rosemary P Jay Hunton & Williams		Olga Finkel and Robert Zammit WH Partners	
<b>The Future of Safe Harbor</b>	<b>9</b>	<b>Mexico</b>	<b>92</b>
Aaron P Simpson Hunton & Williams		Gustavo A Alcocer and Miriam Martínez D Olivares	
<b>Austria</b>	<b>11</b>	<b>Poland</b>	<b>97</b>
Rainer Knyrim Preslmayr Rechtsanwälte OG		Arwid Mednis and Gerard Karp Wierzbowski Eversheds	
<b>Belgium</b>	<b>18</b>	<b>Russia</b>	<b>104</b>
Wim Nauwelaerts and David Dumont Hunton & Williams		Ksenia Andreeva, Anastasia Dergacheva, Vasilisa Strizh and Brian Zimpler Morgan, Lewis & Bockius LLP	
<b>Brazil</b>	<b>25</b>	<b>Singapore</b>	<b>111</b>
Ricardo Barretto Ferreira and Paulo Brancher Barretto Ferreira e Brancher - Sociedade de Advogados (BKBG)		Lim Chong Kin and Charmian Aw Drew & Napier LLC	
<b>Chile</b>	<b>30</b>	<b>Slovakia</b>	<b>123</b>
Claudio Magliona and Carlos Araya García Magliona & Cía Abogados		Radoslava Rybanová and Jana Bezeková Černejšová & Hrbek, sro	
<b>Denmark</b>	<b>35</b>	<b>South Africa</b>	<b>129</b>
Michael Gorm Madsen Rønne & Lundgren		Danie Strachan and André Visser Adams & Adams	
<b>Germany</b>	<b>41</b>	<b>Spain</b>	<b>137</b>
Peter Huppertz Hoffmann Liebs Fritsch & Partner		Marc Gallardo Lexing Spain	
<b>India</b>	<b>47</b>	<b>Sweden</b>	<b>143</b>
Stephen Mathias and Naqeeb Ahmed Kazia Kochhar & Co		Henrik Nilsson Gärde Wesslau Advokatbyrå	
<b>Ireland</b>	<b>52</b>	<b>Switzerland</b>	<b>150</b>
Anne-Marie Bohan and John O'Connor Matheson		Lukas Morscher and Kaj Baebler Lenz & Staehelin	
<b>Italy</b>	<b>60</b>	<b>Taiwan</b>	<b>157</b>
Rocco Panetta and Adriano D'Ottavio NCTM Studio Legale Associato		Ken-Ying Tseng and Rebecca Hsiao Lee and Li, Attorneys-at-Law	
<b>Japan</b>	<b>68</b>	<b>United Kingdom</b>	<b>163</b>
Akemi Suzuki Nagashima Ohno & Tsunematsu		Rosemary P Jay Hunton & Williams	
<b>Korea</b>	<b>74</b>	<b>United States</b>	<b>169</b>
Jin Hwan Kim, Brian Tae-Hyun Chung, Jennifer S Keh and In Hwan Lee Kim & Chang		Lisa J Sotto and Aaron P Simpson Hunton & Williams	

# EU Overview

Rosemary P Jay

Hunton & Williams

## Proposal for the reform of the data protection regime in the European Union

In January 2012, the European Commission delivered a package of draft measures for the reform of the data protection regime in the European Union (EU). The two proposed legislative instruments are:

- a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (the Regulation) (COM(2012) 11/4 DRAFT); and
- a Directive of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data (Police and Criminal Justice Data Protection Directive) (the Directive) (Version 34 2011-11-29).

The Directive will only apply to a limited set of personal data processed by public bodies dealing with criminal justice matters. For most of the public sector, and all of the private sector, the relevant instrument will be the Regulation.

This package of legislation would bring about a radical overhaul of the current data protection regime in the EU. At present, EU member states have national data protection laws that are based on a general data protection Directive from the mid-1990s (Directive 95/46/EC). Although the core components of those national laws are very similar in all EU member states, there are differences in many areas (eg, the level of control exercised by local supervisory authorities over the transfer of personal data to locations outside the European Economic Area). The Regulation will replace all of those national laws with one common legal instrument bringing a higher degree of consistency to the position in the EU.

The consistency will not be absolute. There will remain some areas in which EU member states may adopt different approaches. For example, the extent of the exemption to protect the right to freedom of expression will remain subject to national discretion. However, in the main, the same data protection legal instrument will apply throughout the EU.

It might have been expected that a proposal that brought a level of consistency to data protection standards across the EU would have been widely welcomed by regulators, businesses and civil society organisations. However, the response to the Regulation has been distinctly turbulent, with different groups (including supervisory authorities, data controllers, data processors and data subjects) all pursuing diverging interests.

### Process

The Regulation is being adopted through the European Union's ordinary legislative procedure. This requires equal input from the European Parliament and the Council of the European Union. The European Parliament consists of directly elected MEPs from all EU member states. The Council of the European Union is a body that brings together representatives of the national governments of all of the EU member states to work on EU matters. It should not be confused with the European Council, which consists of government leaders from the EU member states and which meets around four times a year to settle strategic priorities and policies. A proposal for legislation is put forward by the European Commission and that proposal is considered by both the Parliament and the Council. The Parliament considers reports produced by its relevant committees and

amendments put forward by its members. Meanwhile, the Council debates the positions and views put forward by its members. This process gathers views and responses from a wide range of organisations and interests across the EU.

Progress through both the Parliament and the Council has been slow. The Parliament published its text of the Regulation on 12 March 2014, but the Council took until 15 June 2015 to publish its proposed text. There are now three texts (one from each of the Commission, the Parliament and the Council). There is much commonality among these texts, but there are also significant areas of disagreement between them. During the second half of 2015, the Commission, the Parliament and the Council will meet together in a series of 'trilogue' meetings, in order to resolve the outstanding differences between their respective texts. Under the proposed timetable for this process, an agreed position will be reached in December 2015, although it is possible that there may be further delays.

### Impact of the Regulation

The main changes proposed by the Regulation are wide-ranging, and include the following:

- The Regulation will introduce dramatically increased fines for breaches of data protection law. Whereas, under the current regimen, the maximum fines in most EU member states are generally below €1 million, fines under the Regulation may be as high as €100 million, or 2 to 5 per cent of annual worldwide turnover.
- The Regulation will have significantly broader territorial scope than the current law. Entities that are established outside the EU, but either: (i) offer goods or services to data subjects in the EU; or (ii) monitor the behaviour of those data subjects, will be subject to the Regulation even if they have no physical presence in the EU.
- There will be a significant shift of power and influence away from local supervisory authorities. Although local supervisory authorities will continue to be responsible for enforcement of EU data protection law, the Commission and the newly created European Data Protection Board will have broad delegated powers to produce guidance on how the Regulation should be enforced. Local supervisory authorities will also lose influence as a result of the proposed 'one-stop shop' arrangements, under which multinational organisations would be regulated by one 'lead authority', rather than being subject to the decisions of supervisory authorities in each EU member state in which they operate.
- Data processors (ie, those who process personal data on behalf of a controller) will take on direct legal compliance obligations under the Regulation (whereas data processors have no direct legal compliance obligations under the current law).
- There will be a widening of the obligations of data controllers to follow specific and detailed rules in order to achieve compliance with the required standards including, for many controllers, the mandatory appointment of a data protection officer.
- The rights given to individuals will be extended and increased. These include a right to 'data portability' and the oddly named 'right to be forgotten'.

Although data controllers will no longer be required to register with their local supervisory authorities under the Regulation, data subjects must be provided with more detailed information than is required at present, and data controllers are obliged to maintain detailed internal inventories of

their data processing activities. The Parliament has proposed a set of icons with standard meanings in an apparent effort to make privacy notices more easily accessible, although the Council does not appear to support this initiative.

Despite the promise of a more liberal regime on transfers of personal data out of the European Economic Area, there will remain continued restrictions on such transfers under the Regulation. The obligations on data controllers include new requirements for consultation with, or prior approval of, the supervisory authority in specified cases, and there are complex rights for data subjects, or representative groups, to take action in their own member states.

### Conclusions

It appears likely that the text of the Regulation, including implementing provisions, will be finalised by spring 2016. There will then be a two-year period before the Regulation comes into force, to allow businesses time to adjust their practices to comply with the Regulation. Consequently, the effective date of the Regulation is likely to be some time in the first half of 2018, although it remains possible that there may be additional delays. There remains a need for hard negotiation and compromise during the trilogue process, in order to reconcile the positions taken by the Commission, the Parliament and the Council in their respective texts of the Regulation. On the positive side, perhaps the intense debate and level of involvement on all sides demonstrates that finally we are all coming to recognise how important the issue of data protection is in today's world.

This article presents the views of the author and do not necessarily reflect those of Hunton & Williams or its clients. The information presented is for general information and education purposes. No legal advice is intended to be conveyed; readers should consult with legal counsel with respect to any legal advice they require related to the subject matter of the article.

**HUNTON &  
WILLIAMS**

**Rosemary P Jay**

**[rjay@hunton.com](mailto:rjay@hunton.com)**

30 St Mary Axe  
London EC3A 8EP  
United Kingdom

Tel: +44 20 7220 5700  
Fax: +44 20 7220 5772  
[www.hunton.com](http://www.hunton.com)

## Getting the Deal Through

Acquisition Finance	Domains & Domain Names	Licensing	Real Estate
Advertising & Marketing	Dominance	Life Sciences	Restructuring & Insolvency
Air Transport	e-Commerce	Loans & Secured Financing	Right of Publicity
Anti-Corruption Regulation	Electricity Regulation	Mediation	Securities Finance
Anti-Money Laundering	Enforcement of Foreign Judgments	Merger Control	Securities Litigation
Arbitration	Environment	Mergers & Acquisitions	Ship Finance
Asset Recovery	Executive Compensation & Employee Benefits	Mining	Shipbuilding
Aviation Finance & Leasing	Foreign Investment Review	Oil Regulation	Shipping
Banking Regulation	Franchise	Outsourcing	State Aid
Cartel Regulation	Fund Management	Patents	Structured Finance & Securitisation
Climate Regulation	Gas Regulation	Pensions & Retirement Plans	Tax Controversy
Construction	Government Investigations	Pharmaceutical Antitrust	Tax on Inbound Investment
Copyright	Initial Public Offerings	Private Antitrust Litigation	Telecoms & Media
Corporate Governance	Insurance & Reinsurance	Private Client	Trade & Customs
Corporate Immigration	Insurance Litigation	Private Equity	Trademarks
Cybersecurity	Intellectual Property & Antitrust	Product Liability	Transfer Pricing
Data Protection & Privacy	Investment Treaty Arbitration	Product Recall	Vertical Agreements
Debt Capital Markets	Islamic Finance & Markets	Project Finance	
Dispute Resolution	Labour & Employment	Public-Private Partnerships	
Distribution & Agency		Public Procurement	

Also available digitally



# Online

[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



# iPad app

Available on iTunes



Data Protection & Privacy  
ISSN 2051-1280



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Official Partner of the Latin American  
Corporate Counsel Association



Strategic Research Sponsor of the  
ABA Section of International Law