If you kids ask that one more time…

Well, I think it's only fair for us poor Data Protection kids in Europe to have been asking this on repeated occasions over the last three and a half years. It's certainly a frequent topic of conversation with clients and practitioners alike. And the answer is? Well, nearly…

It's been a long road, but something of a milestone was reached on Monday as the Council of Ministers finally passed its own "general approach" on proposed changes to the Commission's draft Data Protection Regulation. That's nearly three and a half years after the European Commission first published its draft of the Regulation in January 2012.

This "general approach" – which can be found here - is effectively the Council's starting position for negotiations with the other two European institutions (the Commission and the Parliament) to reach a final form of wording on the Regulation. This "trilogue" stage is due to start on the 24th June.

So, where do we stand on timing?

You might think that means (to steal another travel analogy) full steam ahead towards a quick resolution.

Well, certainly the talk has now swung to focus on "when", rather than "if" the Regulation will be passed. And, officially, the stated aim is to reach a final agreement by the end of 2015.

However, this appears optimistic. The length of time that the Council has taken to reach its agreed position is indicative of both the variety and strength of views on the key issues at stake with the reform of data protection across Europe. This was evident in the fact that in the last draft of the Council's text that was seen before the official announcement there remained over six hundred Member State reservations – or areas where particular Member States expressed a reservation with the approach being adopted. Expect to see these as areas of stalled negotiations during trilogue.

Outcome?

Well, it's unlikely to be all plain sailing from here and there may still be some bumps in the road.

On the face of it, the Council has certainly stuck closer to the Commission proposal than the European Parliament in key areas. For example, on fines, the Council have agreed on the same limit as the Commission (a maximum of 2% of worldwide annual turnover). The Council also has agreed that a single regulation should apply rather than another directive subject to local implementation (something that had been a real sticking point for some Member States). It is also agreed with the application of the law to non-European entities and the "new" right to be forgotten.

June 19, 2015
These are important fundamental principles that need to be aligned. So definitely some positive signs for reaching agreement.

However, there are still some that will require quite a bit of work. In particular, what was apparent from the Council's text is that many Articles provide for Member State carve outs. With these Articles operating like a Directive, the idea of having a fully harmonised Regulation is certainly under threat and this will likely be an area discussed in length during negotiations.

So, the long winding road continues. But, even once you allow for the two year transition period, we’re still likely to reach the go-live date for the new rules sometime in 2018. Not much time to plan!

For more thoughts on this - and all the other latest developments in the privacy and data security world - see our blog.

Your Key Contacts

Chantal Bernier
Of Counsel, Ottawa
D +1 613 783 9684
chantal.bernier@dentons.com

Nick Graham
Partner, London
D +44 20 7320 6907
M +44 7795 618 315
nick.graham@dentons.com