

**IRSG Data Protection Workstream – commentary**  
**Data processing for compliance with legal and regulatory obligations**

*The International Regulatory Strategy Group (IRSG) is a practitioner-led body of leading UK-based representatives from the financial and professional services industry. It is an advisory body to the City of London Corporation, and to TheCityUK. The Data Protection workstream has representatives from financial services firms, trade associations, the legal profession and data providers.*

**Issue**

The draft EC Regulation, as well as several Presidency text proposals, acknowledges the need to process data for compliance with a **legal** obligation to which the controller is subject (e.g. Art 6.1(c), 17.3(d), 33.5). However, the texts fail to recognise the need to process data for compliance with a **regulatory** obligation to which the controller is subject.

The draft Regulation needs to be amended to reflect that companies across several business sectors are subject to both legal and regulatory obligations. In order to ensure maximum legal clarity, a uniform implementation of the Regulation, and in order to avoid unintended consequences and conflicting requirements, we suggest that, throughout the legislation, the terminology used should be **‘legal or regulatory requirements’** or **‘legal requirements or mandatory requirements imposed by European or Member State Regulator’**. Article 9.2 (J) of the original EC proposal already includes similar terminology.

Furthermore at the international level eg in the context of the G8 and G10, agreements are reached which impose obligations on entities which are not articulated in specific legislation eg FATF and the Basel principles of effective data aggregation and risk reporting. In the UK the latter mandates data sharing between supervisory authorities and 3<sup>rd</sup> country regulators. As Basel is an international standard setting body firms are expected to adhere to the spirit of this guidance in the absence of a strictly legally binding text.

**Financial Services Context**

Financial services are subject to both legislative and regulatory requirements. While in some Member States, the terms ‘legislation/legislative’ encompass regulators’ requirements, in other Member States this is not the case. Clarity is required to ensure the proposed Regulation does not interfere with the ability of businesses to comply with regulatory and similar obligations. This may be best achieved by these uses of data being explicitly recognised in the drafting of the Regulation.

In the UK, the Financial Services and Markets Act, 2000 (‘FSMA’) established the FSA (now the Financial Conduct Authority - FCA) with the overarching regulatory objectives of maintaining market confidence and public awareness, protecting consumers and reducing financial crime. FSMA also provided the FCA with a range of rule-making, investigatory and enforcement powers. In turn, the FCA regulates most financial services markets, exchanges and firms. UK regulation is set out in texts such as the FCA handbook and guidelines published from time to time, and establishes standards that these firms must meet. FSMA then authorises the FCA to take action against firms, e.g. in the form of sanctions, if firms fail to meet the required standards.

The FCA requires firms to collect, assess and retain various types of data to evidence compliance with regulatory rules. For example, there are requirements for data collection relating to preventing and combating fraud and other criminal activities (such as anti-money laundering and terrorist financing) (see SYSC 3.2.6, SYSC 6.3). These provisions have been made in line with the requirements of the EU Anti-Money Laundering Directive and the international FATF Standards. The obligations also relate to the recording of communications, background checks on staff, due diligence on vendors and other areas which impact data protection. This data collection is relevant both prior to and as part of internal and external investigations. More generally, firms are required to maintain adequate records to evidence that they have treated their customers fairly (PRIN 6 FCA rule book).

It is our concern that complying with regulatory obligations issued by the FCA would not be seen as the same as complying with financial services legislation (such as the FSMA). Whilst the legislation set out in the FSMA sets out the overarching objectives of financial regulation, it does not create *per se* a legal obligation to comply with the rules set out by the FCA – rather, it spells out consequences that will follow if a firm does not comply. Where a regulatory obligation does not amount to a legal obligation but is backed up by statutory sanctions, the firm will have an obligation to comply with these requirements. This distinction needs to be acknowledged and reflected in the text of the Regulation.

Below are some examples of how the proposed Regulation, as currently drafted, could impact on the ability of firms to comply with their regulatory obligations:

#### Financial crime compliance:

- Financial services organisations use commercial "lists" such as World Check to fulfil their obligations (eg under SYSC 6.3 in the FCA handbook) to conduct adequate AML checks on Politically Exposed Persons (PEPs). These lists are derived from a range of sources and as such, the profiling restrictions of the Regulation could impact on a firm's ability to use these essential mechanisms.

#### Treating customers fairly:

- Financial services organisations are required to maintain adequate records of their customers and the services provided for them. These records evidence compliance with regulatory obligations and the overarching regulatory principles that customers are treated fairly and conflicts of interest are managed appropriately (PRIN 6 and 8 FCA rule book). Examples of record keeping requirements in the FCA rule book include – DISP 1.9, COBS 9.5 and 11.5, SYSC 9.1, ICOBS 2.4, SUP 12.9 and MCOB 2.8.

As currently drafted the requirements of the right to be forgotten (Article 17) could impact on the ability of firms to maintain this data.

#### Contact :

Audrey Nelson, IRSG Secretariat  
[audrey.nelson@cityoflondon.gov.uk](mailto:audrey.nelson@cityoflondon.gov.uk)

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