



**Viviane REDING**

Vice-President of the European Commission  
Justice, Fundamental Rights and Citizenship

Rue de la Loi, 200  
B-1049 Brussels  
T. +32 2 298 16 00

*Brussels, 10 December 2012*

*Dear Ambassador Kennard,*

*As I am sure you will be aware, you and I both participated in Forum Europe's conference on data protection last week. I noted that you mentioned the proposals on EU data protection reform in your speech to the conference.*

*I agreed fully with what you had to say on the urgency of the dossier. It is a priority for the European Commission to have a modern and harmonised data protection framework that protects individuals' fundamental rights and creates an environment of confidence in which businesses can thrive. The urgency means that it is vital to be careful in how the content of the proposals is presented: any misconceptions might create confusion and slow down the negotiations. This is why the European Commission recently published a "Myth-Busting" page on its website, debunking several myths about the data protection reform package. This page can be found at the following address [http://ec.europa.eu/justice/newsroom/data-protection/news/121207\\_en.htm](http://ec.europa.eu/justice/newsroom/data-protection/news/121207_en.htm).*

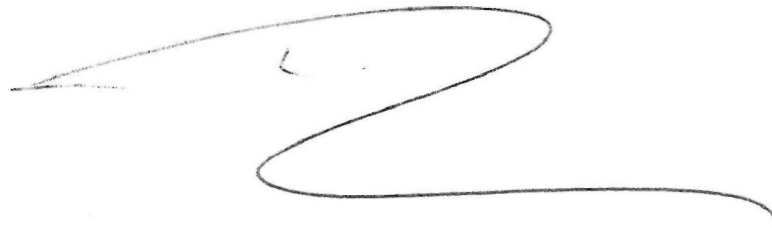
*In this context, I saw that there was one point in your speech that was not correct – your suggestion that the Regulation required explicit consent in all circumstances. In fact, the proposed Regulation will not alter the current situation, in which consent serves as one of several bases for making the processing of personal data lawful. Organisations will remain able to rely on other bases that do not require consent, such as the legitimate interest of the controller or the performance of a contract. Regarding those situations where consent is used, the reason that the European Commission wishes for consent to be "explicit" is because consent has to be real and meaningful for it to be a legitimate basis for processing: interpreting silence as implied consent is not fair on the data subject. I would be most grateful if such errors about the content of the proposals were avoided in the future.*

*Ambassador William Kennard  
United States' Ambassador to the European Union  
Rue Zinnerstraat 13  
B-1000 Brussels, Belgium*

*I would also like to say that I did not feel it was appropriate for you to question the proposal to empower the European Commission to lay down certain technical rules pertaining to the application of the Regulation. Delegated and implementing acts are part of the constitutional order of the Union and their usage is laid down within the Treaty on the Functioning of the European Union. I should recommend a study of Articles 290 and 291 of the Treaty which set out these forms of legal acts. Delegated and implementing acts neither allow the European Commission to act unilaterally nor imply that stakeholders cannot be consulted. Likewise I think I do not need to recall here that the Treaty was agreed to by all Member States of the European Union. Furthermore, such comments on decision-making within the European Union are equivalent to the European Commission passing judgement on the scope of empowerments given by the US Congress to the US Executive including to its Regulatory Agencies. Such statements would not be welcomed.*

*I fully understand the close interest the United States Government is showing in the proposals. I am confident that the reformed data protection laws will be good for all businesses active in the EU, regardless of where they are based: strong and clear laws that are a gold standard for data protection in the twenty-first century and a template for data protection rules around the world.*

*Yours sincerely,*

A handwritten signature in black ink, consisting of a large, stylized 'S' shape with a horizontal line extending to the right.