Mr. Heiko Maas
Federal Minister of Justice and Consumer Protection
Federal Ministry of Justice and Consumer Protection
Mohrenstraße 37
10117 Berlin
Germany

Brussels, 28 November 2014

Dear Minister Maas,

We are writing to you as the Industry Coalition for Data Protection (ICDP) in light of the upcoming meeting of the EU Justice and Home Affairs Council on 4-5 December 2014. We would like to share some thoughts on the key topics in the General Data Protection Regulation proposal that we understand will be on the agenda for this meeting, in particular the issues of flexibility/harmonisation and one-stop-shop.

Improve, not decrease, level of harmonisation

ICDP has been a strong supporter of a meaningful harmonisation of the data protection laws in Europe. We are, therefore, very concerned by recent proposals that suggest a significant divergence from the laudable objective of a harmonised approach to data protection in Europe.

Divergent implementation and interpretation of existing data protection rules, coupled with a lack of clarity on applicable law presents a clear challenge today that the data protection reform should strive to address. However, instead of improving this situation, many of the proposed changes may, in fact, even further decrease the level of harmonisation we currently have.

The reform process should also strive to **maintain the technology neutral and horizontal approach of the current framework, whereby rules and requirements apply to all sectors, regardless of their public or private nature or size.**

Therefore, ICDP calls on Member States to improve rather than erode the current level of harmonisation, maintain consistent and horizontal application of the rules and minimise existing differences and divergences in the interpretation and implementation of the requirements.

Towards a meaningful one-stop-shop mechanism

ICDP has been a committed supporter of a meaningful one-stop-shop mechanism that allows companies to deal with only a single privacy regulator no matter how many Member States they operate within, and face one decision and one outcome. This is of particular importance to European SMEs that need legal clarity and an *efficient and affordable decision making and judicial review mechanism*.

While we have always acknowledged the need to ensure 'proximity to the citizens', we believe that **one of the main advantages of a real one-stop-shop mechanism is reinforcing proximity to European SMEs**, thereby encouraging them to engage in cross-border provision of goods and services. This is essential to the functioning of the digital single market.

We, therefore, welcomed the JHA Council's explicit support to the one-stop-shop principle that would lead to "*arrive at a single supervisory decision, which should be fast, ensure consistent application, provide legal certainty and reduce the administrative burden*"[1]. **Unfortunately, the mechanism proposed for discussion at the orientation debate in December 2014 risks jeopardising all of these laudable objectives.**

As outlined below, the Presidency proposal seems to create a mechanism whereby all DPAs may get involved in the vast majority of cases. This is then coupled with the ability of each 'concerned' DPAs to veto a decision, rendering the process at best very burdensome.

Furthermore, by separating the decision making power from its implementation, defining the DPA that will give effect to the decision based on the residence and the satisfaction of the complainants, the proposed legal certainty afforded to organisations, in particular to SMEs, will be lost.

Finally, if decisions can be challenged before multiple courts in potentially different Member States, not just legal certainty and predictability, but also the goal of consistent application and interpretation of the rules will not be achieved.

In the Annex below, we have included a more detailed outline of our understanding of the system proposed by the Italian Presidency and the Industry Coalition's detailed observations on this mechanism. However, and in summary of the above, we fear that the proposed text may mark the end of the one-stop-shop, rather than achieving the objectives set out by the Council last year.

We take note of the important progress made under the Italian Presidency. We hope that our observations above will be taken into consideration in the run-up to, and during the deliberations of the December JHA Council. We are of course at your disposal should you or your services wish to discuss these issues in greater detail.

Yours sincerely,

Members of Industry Coalition for Data Protection (ICDP)

ICDP is comprised of 18 associations representing thousands of European and international companies who are building, delivering, and advancing the digital experience. Members of ICDP include: ACT | The App Association, American Chamber of Commerce to the EU (AmCham EU), BSA | The Software Alliance (BSA), European coordination committee of the radiological, electromedical and healthcare IT industry (COCIR), DIGITALEUROPE, European Association of Communications Agencies (EACA), E-Commerce Europe, European Digital Media Association (EDiMA), European Multi-channel and Online Trade Association (EMOTA), European Publishers

[1] Council Conclusion of 7 October 2013: 'Data protection: Council supports 'one-stop-shop principle'

Council (EPC), European Internet Services Providers Association (EuroISPA), Federation of European Direct and Interactive Marketing (FEDMA), GS1, IAB Europe, Interactive Software Federation of Europe (ISFE), Japan Business Council in Europe (JBCE), TechAmerica Europe and the World Federation of Advertisers (WFA)

ANNEX

DETAILED COMMENTS ON SELECT ISSUES OF THE DRAFT GENERAL DATA PROTECTION REGULATION

December 2014

1. **Establishing whether a case is local only by nature**, i.e. the processing only affects one Member State or persons in only one Member State. In this case, the local DPA will deal with the complaint.

   ➔ ICDP accepts the concept that in distinct cases that are only of local nature local DPAs may maintain competence for decisions affecting the rights of the data subject. However, these cases should be appropriately defined and the local DPA should have a duty to inform the lead DPA of these decisions.

   Limiting the competence of the local DPA to exclusively local cases is all the more important given the existing language barriers. Indeed, there are many organisations operating across borders that will not have the capacity to competently deal with a DPA in the language of that DPA based on, for example, the residence of a complainant. We could, for instance, think about a start-up mobile application developer in Rome with 10 employees that would face significant difficulties dealing with a complaint from the Spanish DPA simply because a Spanish resident downloaded their app.

2. **In 'important' cross-border cases**, i.e. where the controller or processor is established in more than one Member State, or established in only one, but the processing substantially affects or is likely to affect a substantial number of data subjects in other Member States, **the one-stop-shop mechanism should apply**.

   ➔ **ICDP takes the view that for all cases that are not only of a local nature, the one-stop-shop principle should apply, leading to one decision, one outcome, and if needed, one enforcement action.** As outlined below, this does not mean, however, that all matters dealt through a one-stop-shop system should automatically be subject to the consistency mechanism and be dealt with by the European Data Protection Board.

3. **Decision on who is the 'lead DPA' and which other DPAs would be involved in the decision making process,** based on whether or not they are 'concerned'.

   ➔ It is also our view, that where there is more than one establishment**, it is crucial to clarify the concept of 'main establishment',** applying the same criteria to both controllers and processors; as well as allowing non-EU controllers or processors to designate/identify a lead DPA.

- ➔ ICDP also strongly believes that it is **important to establish clear criteria on the definition of 'concerned'.** If all DPAs of the EU can be involved, as now proposed by the Presidency, the decision making process will be extremely burdensome and long, countering the objective of the Council to ensure a 'fast' process for the benefit of consumers. As proposed this does not constitute a one-stop-shop and should therefore cease to be presented as such.
- ➔ In this sense, we do not see why the simple fact that an organisation has an establishment in Member State X, which has no influence over the processing activities in question, should lead to the involvement of the DPA in Member State X. Furthermore, if being 'affected' by processing is loosely defined and, this could potentially create a situation where the threshold is so low as to lead to the involvement of all DPAs in the Union.

4. **Decision-making process,** based on a co-decision process, whereby each concerned DPA may have veto power and the EDPB would have binding decision making powers.
   - ➔ While we recognise the need to take utmost account of the opinion of the DPAs concerned and involved in the process, we believe that giving a veto power to 'each of the DPAs concerned' is unlikely to lead to a fast and efficient decision making process. **While the consistency mechanism and the involvement of the EDPB may well be justified in some cases, the trigger of such escalation should be based on a 'reasoned objection' due to lack of competence, risk to consistency or other sound legal reasons and supported by the majority of the DPAs involved**. This would provide further incentives for DPAs to find an agreement and limit the involvement of the Board to truly contentious issues, hence utilising resources in the most efficient way.
   - ➔ With regard to the exact role of the EDPB and the question as to whether a binding decisions on individual cases should be conferred to it, further dialogue may be required.

5. **Giving effect to a one-stop-shop decision** in a way that such decision will be 'adopted by the DPA best placed to deliver the most effective protection'.
   - ➔ As the Council highlighted in its conclusion of 7 October 2013, one of the stated objectives of the one-stop-shop is to 'provide legal certainty'. **Not letting organisations, in particular SMEs, foresee in which country the decision may be taken clearly goes against this desired objective** of ensuring clarity for SMEs.

     In our view, the need to match citizen expectations should not be so great as to jeopardise the workings of the system as a whole. As per the below, citizens have a range of options to claim remedies and proximity is reinforced by allowing data subjects to lodge a complaint with their local DPA, which, in turn, would co-ordinate, on their behalf, with the lead DPA.

6. **<u>Judicial review</u> –** If the complaint is rejected and the complainant does not agree with the decision, he/she may take legal action before his/her domestic courts. If complaints related to the same processing activities have been filed in more than one Member State, this could mean not only that the decision could be challenged before several courts of one Member States, but also that it could be challenged in multiple Member States at the same time. Where the decision is 'only partially satisfactory', it will be notified to 'all parties' and in case of legal action against the decision, the 'competent courts will be all the local courts of the concerned parties'.

   ➔ **Allowing the decisions to be challenged before more than one court would definitely undermine legal certainty as well as the aim of consistent application.** One should clearly not assume that local courts will all deliver the same, or even similar, judgments. This is why it is important that, should the possibility of challenging a decision before more than one court be granted, and should there indeed be more than one court case, the court of the country of the lead DPA should take over the case. Furthermore, if there is already one judgment in a Member State, the issue should be considered res judicata and no further court proceedings on that matter should be admitted (in line with the established EU *acquis* and mutual recognition).

   ➔ The existing EU *acquis* already provides data subjects with the right to judicial remedy, which is further strengthened by various instruments outlined in the Commission proposal, this way providing for an improved proximity to citizens. When it comes to judicial review of an authority's decision, however, one should not lose sight of the need to also ensure proximity to organisations, in particular to SMEs, which is crucial if the EU's objective is to promote cross-border provision of goods and services and to strengthen the digital single market.