



INDUSTRY COALITION FOR DATA PROTECTION

Reforming Europe's Privacy Framework - How to find the right balance

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Representing leading business organisations in Europe the Industry Coalition for Data Protection (ICDP, see below for membership) would like to share their key thoughts on the Commission's proposal for a new EU Data Protection Regulation. This statement builds on the coalition's extensive work in May 2011¹.

Industry acknowledges the opportunity to modernise the European data protection framework. We believe it is in the interest of consumers and businesses alike that the revised EU data protection framework is robust, balanced, effective, relevant and future-proof. By fully harmonising EU data protection rules, the proposed Regulation would bring about increased legal certainty and would mark an improvement for businesses and consumers. In particular, the ICDP welcomes the decision to create a lead Data Protection Authority (DPA) under a "Main Establishment" regime. This approach will bring necessary clarity and reduce burdens for companies operating in multiple EU markets. However, the success of this approach will depend on complete applicable law and jurisdictional clarity and on clear requirements as to which DPA will be responsible.

However, the benefits of greater harmonisation are at risk of being outweighed by the costs of failing to strike the right balance between the protection of Europeans' fundamental right to privacy and data protection, and the promotion of innovation, competitiveness and growth in the Digital Single Market. If enacted in the present draft form, the Regulation would delay the launch of innovative services in Europe, cause substantial loss in revenues for businesses of all sizes and in a wide range of industries, limit opportunities for new market entrants,

¹ See http://www.digitaleurope.org/Portals/0/Documents/Digital%20Economy/20111115_ICDP%20press%20release.pdf

strongly increase administrative costs and create legal uncertainty. Although helpful in some cases, certain exceptions for SMEs will not necessarily have the sheltering effect intended as both SMEs and larger companies operate in an ecosystem where compliance of all players is mandatory (to avoid joint liability). As such, the best way for the new rules to protect SMEs appropriately is to ensure a legal framework that is simple, proportionate and easy to comply with. In fact, many of these requirements will not enhance the protection of individuals' data but simply lead to inefficient processes, overburden data protection authorities and create false expectations for users.

Additionally, the administrative sanctions should be reviewed in a way that ensures striking a fair balance between the protection of personal data of a data subject and the freedom to conduct a business enjoyed by an operator.

Specifically, the coalition feels substantial changes will be required on the following issues in order to strike an appropriate balance:

- 1. Personal Data definition:** The new definitions of "data subject" and "personal data" encompass potentially an unlimited range of information, from anonymised online identifiers to an individual's full name and address, their medical records and religious beliefs. In order to make this broad definition workable in practice, the Coalition proposes to introduce a context based approach into the definition of personal data and the intentionality of the controller to identify the data subject. Two recitals recognize that context is a relevant factor in this respect, and that data which does not identify a data subject is not personal data. These important limitations should be expressly reflected in the definition of "data subject". We also believe that while pseudonymous data is covered by the definition of personal data, the Regulation should explicitly recognize its specificities and clarify how the general obligations can be adapted accordingly.
- 2. Explicit consent:** By requiring a single form of "explicit consent" for all categories of information (from the anonymous to the truly sensitive), the proposal would not allow for any differentiation between asking for people's consent to placing a cookie, collecting their full name and address, or recording their religious and political beliefs. This risks increasing "consent fatigue" and may lead people to automatically consent to anything, undermining the special care that should be applied in the context of truly sensitive data. We propose a context-based approach to consent, permitting innovators to use different mechanisms to obtain consent that reflect how and in what contexts consent is obtained and data will be used.
- 3. Administrative burdens:** One of the objectives of the review of the Data Protection Framework in Europe is to reduce the administrative burdens. This is a worthy ambition and one which harmonisation and deletion of the notification system go some way towards achieving, as noted in the Impact Assessment accompanying the Regulation. Care needs to be taken, however, to ensure that compliance with new provisions and concepts in the Regulation do not simply replace one set of burdens with another, which may be even weightier than the original provisions.

4. **Technical mandates: Privacy by Design:** Privacy by Design should be considered a process for ensuring that data protection is carefully considered in the design and implementation of products and services and not be based on prescriptive and specific technologies. Imposing design mandates on particular technologies would directly challenge the technology neutrality of the legal framework, would result in significant burdens and would hinder rather than promote user privacy and security, by creating single points of failure.
5. **Data processor/data controller:** The future legal framework should provide for a clear distinction of the responsibilities of a data controller and a data processor. Blurring these will only bring more uncertainty, will not serve the harmonization objectives of the reform and is not the way to deal with the complexities of Cloud. The relation with data subjects is established and maintained by controllers and this is why the existing legal framework foresees direct responsibilities for controllers whilst the responsibilities of processors are left to be determined bilaterally between controllers and processors, depending on the circumstances. This current approach is well understood and has proven to be workable.
6. **Sanctions:** The Regulation takes a “one-size-fits-all” approach and applies the same sanctions to all types of violations regardless of their severity/harm and/or impact. This should be addressed. The text should specify that only the lead DPA can impose a single sanction per infringement and that it can be applied only to legal entities at national level or at EU level, rather than focusing on a whole group of undertakings at global level. It should be left to the discretion of the lead DPA to decide whether a sanction should be applied (and at what level), therefore we call for a change from “shall” to “may”.
7. **European Data Protection Board:** European data protection policy must be formulated in a transparent manner that reflects the views of a broad range of stakeholders. Therefore the new European Data Protection Board (EDPB) should follow the European Commission’s own Better Regulation initiative and be made more transparent and accessible by establishing a consistency mechanism open to other stakeholders’ input (following the BEREC and ENISA example).

Members of the Industry Coalition for Data Protection



The Association for Competitive Technology (ACT AIBSL) is an international non-profit association based in Brussels. ACT is an international advocacy and education organisation representing more than 4,000 innovative small and medium-sized enterprises (SMEs) in the information communication technology (ICT) sector from around the world, including some 1,000 members in the European Economic Area (EEA). ACT advocates an environment that inspires and rewards innovation. Its mission is to help members leverage their intellectual assets to raise capital, create jobs, and continue innovating.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate U.S. investment in Europe totalled €1.4 trillion in 2009 and currently supports more than 4.5 million jobs in Europe.

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The Business Software Alliance (www.bsa.org) is the leading global advocate for the software industry. It is an association of more than 70 world-class companies that invest billions of dollars annually to create software solutions that spark the economy and improve modern life. Through international government relations, intellectual property enforcement and educational activities, BSA expands the horizons of the digital world and builds trust and confidence in the new technologies driving it forward. BSA's members include: Adobe, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, CNC/Mastercam, Intel, Intuit, McAfee, Microsoft, Minitab, Progress Software, PTC, Quest Software, Rosetta Stone, Siemens PLM, Sybase, Symantec, and The MathWorks.

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DIGITALEUROPE

DIGITALEUROPE is the voice of the European digital economy including information and communication technologies and consumer electronics. DIGITALEUROPE is dedicated to improving the business environment for the European digital technology industry and to promoting our sector's contribution to economic growth and social progress in the European Union. DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 57 global corporations and 37 national trade associations from across Europe. In total, 10,000 companies employing two million citizens and generating €1 trillion in revenues.

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The European Digital Media Association (EDiMA), is an alliance of Internet platform companies whose members include Amazon EU, Apple, eBay, Expedia, Google, Microsoft, MIH Group, Nokia, Yahoo! Europe, Orange and others. EDiMA's members provide Internet and new media platforms offering users a wide range of online services, including the provision of audiovisual content, media, E-commerce, communications and information/search services. EDiMA represents Internet platform businesses in EU policy formation, on matters affecting the online environment and believes EU policy should maximise the development of new online services and business models to the benefit of innovators and EU consumers.

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EMOTA, the European Multi-channel and Online Trade Association, is the trade organisation that represents, at European and international level, the interests of e-commerce companies and retailers interacting with customers through various distance sales channels.

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The European Publishers Council (EPC) is a high level group of Chairmen and CEOs of Europe's leading media groups actively involved in multimedia markets spanning newspapers, magazines, online publishing, journals, databases, books and broadcasting. We have been communicating with Europe's legislators since 1991 on issues that affect freedom of expression, media diversity, democracy and the health and viability of media in the European Union. The overall objective has always been to encourage good law-making for the media industry.

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EuroISPA is the world's largest association of Internet Services Providers (ISPs) representing the interests of more than 1800 ISPs across the EU and the EFTA countries. EuroISPA is a major voice of the Internet industry on information society subjects such as cybercrime, data protection, e-commerce regulation, EU telecommunications law and safe use of the Internet (www.euroispa.org).

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The Federation of European Direct and Interactive Marketing (FEDMA) represents the direct marketing sector at European level. Its national members are the Direct Marketing Associations (DMAs) from Europe and beyond, as well as companies that use direct and interactive marketing at a multi-national or even pan European level. FEDMA's membership represents the entire Direct Marketing value chain, ranging from small print houses and media agencies to large online retailers, including distance sellers, service providers, media/carriers of direct marketing and even postal operators. Many of FEDMA's direct members are small and medium sized enterprises.

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IAB Europe is the voice of the online advertising sector through its 29 national associations representing more than 5,000 company members, as well as corporate members including Adconion, Adobe, ADTECH, Alcatel-Lucent, AudienceScience, BBC, CNN, comScore Europe, CPX Interactive, Criteo, e-Bay, Ernst & Young, Expedia Inc, Fox Interactive Media, Gemius, Goldbach Media Group, Google, GroupM, Hi-media, InSites Consulting, Koan, Microsoft Europe, MTV, Netlog, News Corporation, nugg.ad, Nielsen Online, Orange Advertising Network, Prisa, Publicitas Europe, Sanoma Digital, Selligent, Smartclip, Specific Media, Tradedoubler, Truvo, United Internet Media, ValueClick, White&Case, Yahoo! and zanox. Supported by every major media group, agency, portal, technology and service provider, IAB Europe coordinates activities across the region including public affairs, benchmarking, research, standards settings, and best practices.

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The interactive software industry is the fastest growing sector of the European content industry, with consumer spending at 16 billion € in 2011, compared to a global market of 60 billion €. The Interactive Software Federation of Europe (ISFE) comprises 11 major publishers and 16 European trade associations. It was established in 1998 to represent the interests of the sector towards countries of the European Economic Area, international institutions and the general public. In 2003, ISFE founded the [Pan-European Game Information](#) system, which was handed over to PEGI S.A. in 2009, a not-for-profit organisation with a social purpose. PEGI is used and recognised throughout Europe and has the enthusiastic support of the European Commission. It is considered as a model of European harmonisation in the field of minor protection.

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Japan Business Council in Europe (JBCE) was established in 1999. It is the European organization representing companies of Japanese parentage operating in Europe. The mission of JBCE is to contribute to European Public Policy. JBCE membership currently consists of around 60 multinational companies and covers a wide range of industry sectors, including air-conditioning, automotive, chemicals, consumer electronics, engineering, industrial machinery, information and communication technology, medical equipment, photo and imaging equipment. JBCE takes an active role in enhancing understanding of Japanese companies and their business in Europe and to put forward the views of its members on legislative issues currently under debate and on the public policies issues which will shape the years to come.

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TechAmerica Europe represents leading European high-tech operations with US parentage. Collectively we invest Euro 100 bn in Europe and employ approximately 500,000 Europeans. TechAmerica Europe Member companies are active throughout the high technology spectrum, from software, semiconductors and computers to Internet technology, advanced electronics and telecommunications systems and services. Our parent company, TechAmerica, is the oldest and largest high-tech association in the US

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WFA is the only global organization representing the common interests of marketers. It brings together the biggest markets and marketers worldwide, representing roughly 90% of global marketing communications spend, almost US\$ 700 billion annually. WFA champions responsible and effective marketing communications.

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