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## GSMA Europe and ETNO briefing papers on the proposed General Data Protection Regulation

- **Inconsistencies between the GDPR and the e-Privacy Directive**  
*Inconsistencies between the 2002 Directive and the proposed Regulation are likely to lead to inconsistent consumer privacy experiences and rights for equivalent services and data. We discuss possible ways to avoid this.*  
Articles concerned 2, 3, 4, 31, 89 - [Link](#)
- **Applicable law**  
*We welcome the proposals in this field, but suggest some key improvements to ensure legal certainty for business and consumers and to ensure European consumers are protected irrespective of from where a service or product is being provided.*  
Articles concerned 3, 4, 51 - [Link](#)
- **Consent in the online environment**  
*We highlight key issues of over-relying on consent and suggest a context-based approach, while highlighting the link with transparency requirements and compatibility issues with the ePrivacy Directive. We propose measures to create consistent and effective privacy experiences for consumers.*  
Articles concerned 4, 6, 7, 9, 14, 79 - [Link](#)
- **International data transfers**  
*We welcome measures to simplify transfers and the codification of Binding Corporate Rules (BCRs). However, we are concerned that related procedural requirements are too strict and call for a review of these.*  
Articles concerned 4, 6, 42, 43 - [Link](#)
- **Sanctions**  
*We highlight the importance that sanctions are not only proportionate but fair, necessary and assist in ensuring effective protection for privacy.*  
Articles concerned 15, 28, 32, 79 - [Link](#)
- **Documentation obligations**  
*We point to the risk that new documentation obligations will lead to costly, time-consuming burdens without improving the protection of personal data.*  
Articles concerned 22, 28 - [Link](#)
- **Futureproofing the GDPR**  
*We express our views on how consistency mechanisms, delegated powers, comitology and self-regulation can play a key role to ensure the future-proofness of this regulation.*  
Articles concerned 38, 57, 60, 62, 86, 87 - [Link](#)
- **Data Protection Impacts Assessments**  
*While supporting PIAs, we suggest improving the text in order to avoid unreasonable burdens to businesses and innovation.*  
Articles concerned 33, 34 - [Link](#)
- **Data breach**  
*We welcome harmonization in this field and point to a few improvements aimed at ensuring that the principle is applied in a fair and proportionate way.*  
Articles concerned 31, 32 - [Link](#)



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## **GSMA Europe and ETNO**

### **Briefing paper on the proposed General Data Protection Regulation**

#### **Documentation obligations**

September 2012

#### **Summary**

ETNO and GSMA are concerned that the introduction of new documentation obligations in Article 28 of the proposed General Data Protection Regulation (GDPR) will lead to costly, time-consuming burdens without improving the protection of personal data.

- While the aim of Article 28 is to reduce the administrative burden on controllers, the obligations for documenting all processing operations seriously risk increasing the administrative burden compared to the current rules. We therefore propose a simplification of the rules in accordance with the European Data Protection Supervisor's (EDPS) proposal;
- We are also concerned that identical obligations apply to data processors and data controllers, which poses a particular problem in the area of cloud computing;
- In light of this, we believe the new rules contained in Article 28 conflict with the principles of accountability and efficiency that are set out in Article 22 of the GDPR.



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## Proposed rules in the GDPR

Article 22 of the GDPR lays down the principle of the accountability of the data controller, which implies that the controller should ensure and demonstrate compliance with the regulation. The underlying principle is that the measures taken by the controller to comply with the regulation should be appropriate and effective.

Article 22 refers to the obligation to keep documentation contained in Article 28.

Article 28 introduces an obligation for controllers and processors to maintain documentation of “all processing operations” for which they are responsible (such an obligation does not apply to natural persons and companies with fewer than 250 employees). This obligation replaces the general obligation to notify individual processing operations to the supervisory authority under Articles 18(1) and 19 of Directive 95/46/EC. The intent of this change is to reduce the administrative burden on controllers.

## Issues and impact

### Increase in administrative burdens

ETNO and GSMA believe the obligations to maintain documentation of all processing operations in Article 28 will involve heavy bureaucratic requirements and therefore seriously risk increasing rather than reducing the administrative burden, compared to the current rules<sup>1</sup>.

Such risk was even identified by the EDPS in its opinion on the data protection reform package of 7 March 2012:

*The EDPS ... has serious reservations about ... whether [Article 28] would indeed lower the administrative burden generated by the data protection rules as much as expected. ... The introduction of a duty to maintain detailed documentation of all processing operations is ... likely to create a considerable burden for many controllers. It is also questionable whether the maintenance of detailed documentation of all processing operations is an ‘appropriate and effective measure’ to ensure and demonstrate compliance with data protection rules in an increasingly dynamic environment, both for small, medium-size and large organisations, and this even more so in the foreseeable future.*

The objective of Article 28 should, in our view, be that data controllers and processors keep track of the main and relevant activities under their responsibility (i.e., know what you do and how you do it) and be able to respond to queries from the data protection authority (DPA). The objective should not be to impose on companies a bureaucratic checklist that loses its connection with the principle of appropriateness.

In addition, Article 28 imposes identical obligations on both data controllers and processors. This is not efficient, all the more because the obligations listed affect controllers and processors differently. For example, the obligations listed in Article 28 2 (c), (d), (g), and (h) are of much greater relevance to controllers than to processors. We believe it would be more efficient to give controllers and processors the flexibility to arrange how such documentation is maintained.

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<sup>1</sup> This is surprising, considering that the obligation of documentation replaces the obligation to notify the DPA (Arts. 18 and 19 Directive 95/46/CE) and that the latter obligation in some Member States (such as Italy) has been greatly simplified by the national legislator and is limited to the processing of particular categories of data, such as genetic data, biometric data or other data disclosing geographic location of individuals.



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### Cloud computing

This element is of particular concern and importance in the cloud computing area, where the party offering cloud computing services at the retail level is often the data processor. Under the current legislative proposal, the cloud computing data processor will therefore be confronted with heavy documentation obligations in parallel with the data controller. ETNO and GSMA believe that a more pragmatic and efficient way of working needs to be found to avoid negatively affecting the development of cloud computing services.

### Policy considerations

- In light of the concerns set out above, we firmly believe that the **obligations under Article 28 should be simplified** in order to become effective and proportionate, and thus aligned with Article 22 of the proposal. In this respect, only Article 28(2)(a, b) should be maintained, combined with a general duty to keep an inventory and description of the way the controller ensures that processing operations comply with data protection rules;
- In addition, it would be much more efficient to **give controllers and processors the flexibility to arrange how such documentation is maintained**. This could be done, for example, by allowing contractual arrangements between controllers and processors that assign specific tasks and/or allow controllers to act on processors' behalf and vice versa;
- Such enhanced flexibility is clearly needed in the area of **cloud computing**, where telco providers generally act as data processors and may not have the required insights to comply with all aspects of the documentation obligation. Imposing disproportionate documentation obligations (identical to the controllers' obligations) risks severely slowing the development and roll out of new cloud computing offerings and services.



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### About GSMA

The GSMA represents the interests of mobile operators worldwide. Spanning 219 countries, the GSMA unites nearly 800 of the world's mobile operators, as well as more than 200 companies in the broader mobile ecosystem, including handset makers, software companies, equipment providers, Internet companies, and media and entertainment organisations. The GSMA also produces industry-leading events such as the Mobile World Congress and Mobile Asia Congress.

For more information, please visit Mobile World Live, the online portal for the mobile communications industry, at [www.mobileworldlive.com](http://www.mobileworldlive.com) or the GSMA corporate website at [www.gsmworld.com](http://www.gsmworld.com).

In the European Union the GSMA represents over 100 operators providing more than 600 million subscriber connections across the region. [www.gsmworld.com/gsma\\_europe](http://www.gsmworld.com/gsma_europe)

### About ETNO

ETNO, the European Telecommunications Network Operators' Association, is the voice of Europe's leading providers of e-communications services and investors in tomorrow's services and infrastructure.

ETNO's 38 member companies and 11 observers from Europe and beyond represent a significant part of total ICT activity in Europe. They account for an aggregate annual turnover of more than €600 billion and employ over 1.6 million people. ETNO companies are the main drivers of broadband and are committed to its continual growth in Europe.

ETNO contributes to shaping an investment-friendly regulatory and commercial environment for its members, allowing them to roll out innovative, high-quality services and platforms for the benefit of European consumers and businesses.

More information: [www.etno.eu](http://www.etno.eu)

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