

**CALL FOR A BALANCED APPROACH TO
SUBSIDIARITY AND PROPORTIONALITY
IN THE REFORM
OF THE EUROPEAN DATA PROTECTION FRAMEWORK**

SUMMARY

On 25 January 2012, the European Commission adopted a proposal for a reform of the European data protection framework. National Parliaments have eight weeks to submit a reasoned opinion as to whether the proposal complies with the principles of subsidiarity and proportionality.¹

The Data Industry Platform urges national Parliaments to take advantage of this opportunity to demand a more balanced approach in the reform process. This is especially true with respect to the fundamental principles of subsidiarity and proportionality.

Instead of a balanced approach, the European Commission proposes a rigorous data protection regime across all areas. The present proposal of the General Data Protection Regulation not only takes away essential national responsibilities, it also provides for an excessively strict, severely bureaucratic and vastly unpredictable framework.

The proposed General Data Protection Regulation does not comply with the principles of subsidiarity and proportionality, as it constitutes a serious threat for businesses in Europe. If adopted in the present form, it will hinder innovation and economic growth and will lead to substantial job loss. The National Parliaments have to raise their voice to avoid such consequences.

¹ Article 6 of Protocol No 2 on the Application of the Principle of Subsidiarity and Proportionality (Official Journal 30.3.2010 - C 83/206).

CONSIDERATIONS

With respect to the issues of subsidiarity and proportionality, the Data Industry Platform urges national Parliaments to take the following concerns into account:

1. Subsidiarity

According to the general principle of subsidiarity in the European Union, law-making decisions should be taken as closely as possible to the citizens affected. In violation of this rule, the proposal provides for extensive rights for the European Commission to develop fundamental data protection rules on its own. In addition, the proposed procedures (the so-called “delegated acts” and “implementing acts”) do not include the checks and balances of an orderly legislative process. They also do not require industry consultation, which is essential to ensure that measures are practical in a global economy.

The approach proposed by the European Commission will restrict autonomy of national data protection authorities and courts to implement data protection rules in an appropriate manner. Under the proposed approach, businesses will be faced with ever changing standards that could be enacted very quickly. Such procedures will take away the consistency of the regulatory framework and make the future framework vastly unpredictable. Businesses will have no reliable basis for long-term investments or the development of innovative business models.

The proposed rights of the European Commission to adopt “delegated acts” and “implementing acts” should be limited to those issues which relate to the transfer of personal data to third countries only. In all other areas, the powers of the European Commission should be removed.

2. Proportionality

The general principle of proportionality requires that all legal initiatives of the European Union achieve a legitimate goal with the least onerous measures. The proposed General Data Protection Regulation does not comply with this principle, because its provisions are not proportionate to the objective of protecting individuals’ rights and giving them more control. It is imperative for businesses that a more balanced approach be taken. The Data Industry Platform, therefore, calls for an intensive review of the reform under the principle of proportionality. Such review should take into account the following concerns:

- **The proposal is excessively strict:** The proposed General Data Protection Regulation extends the scope of data protection law and limits flexibility to use data for legitimate business purposes (for example, to customize product offerings or to operate credit information bureaus). By limiting this flexibility, the proposal requires businesses to request consent from individuals in situations where such a request is not proportionate. At the same time, the proposal makes it more difficult to gain and prove valid consent. As a consequence, businesses will have difficulties not only marketing their existing products, but also operating established and innovative business models. Companies lose the right to know their customers. By introducing rigorous sanctions of up to 2% of the worldwide revenue of a business, extended enforcement powers of data protection authorities and additional consumer protection group enforcement rights, the proposal causes an unjustified level of compliance risks for businesses.
- **The proposal is severely bureaucratic:** The proposal introduces administrative and operative burdens for businesses that are not proportionate and mostly technically unfeasible (for example, the “right to be forgotten”, “privacy by design”, “privacy by default”, extended documentation duties, prior impact assessment and approval requirements, new administrative procedures at the European Commission level, a general obligation to inform about data breaches without undue delay as well as unlimited data access rights including the “right to data portability”). It also increases the responsibilities and liabilities of service providers (for example, by undermining established liability rules and exemptions) in a disproportionate way.

The European Commission has not given any convincing reasons for the enormous increase in restrictions proposed in the draft Regulation. For the majority of the changes, there is no justification as to why the already high level of protection under the existing data protection framework should be increased any further with effect to all types of businesses. By increasing protection where it is unwarranted, the European Union will not only damage its own economy. The approach will also jeopardize global harmonization efforts in data protection law by embarking down a rough path where other countries in the world are not likely to follow.

./.