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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 (GDPR)

Applicable law

September 2012

Summary

ETNO and GSMA strongly welcome proposals to simplify and harmonise the rules for data controllers or processors located in the European Union (EU). We especially welcome the intention to apply the General Data Protection Regulation (GDPR) to companies outside the EU who offer goods or services to individuals in the EU. However, we believe a number of issues need to be addressed for its application to be effective.

- The application of the GDPR is dependent on whether a company is established in or outside the EU (Article 3). To ensure its effective application, we recommend clarifying the definitions and meaning of 'establishment' and 'context'.
- Article 3(2) seeks to apply data protection rules to data controllers established outside the EU where their activities relate to the offering of goods or services to individuals in the EU. To avoid uncertainty over what 'offering' means, explicit criteria should be added to the Article or in Recital 20.
- In Article 3(2), the 'monitoring' of the behaviour of individuals should apply to data that are *collected* and not just monitored, to avoid uncertainty in interpretation and application.
- Article 51 of the GDPR establishes that a national data protection authority (DPA) can act as a lead authority (i.e., a one-stop shop) in cases where a controller is established in several EU Member States. There is a need to clarify these rules and their application to controllers not established in the EU to ensure a unified approach and equal application of the rules.
- The European Commission should develop mutual and legally binding mechanisms (Article 45), including legally binding codes of conduct that apply and can be enforced internationally, to ensure the protection of personal data of individuals in the EU. All provisions in the e-Privacy Directive conflict with provisions in the GDPR should be repealed from the e-Privacy Directive by means of the GDPR¹.
- The GDPR also gives Member States freedom to adopt local measures regarding health and employment-related personal data. This undermines the objective of a harmonised set of rules and we call on the Commission to ensure consistent interpretation and application of these Articles by Member States.

¹ See joint ETNO GSMA Europe Briefing Note on the inconsistencies between the proposed GDPR and the e-Privacy Directive.
www.gsma.com/gsmaeurope/wp-content/uploads/2012/07/GSMA_ETNO_Briefing_note-ePrivacy_GDPR_inconsistencies_0712.pdf



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Proposed rules in the GDPR

The GDPR seeks to address the issue of divergent and often contradictory data protection laws within the EU by Article 3 (Territorial Scope)². Article 3(1) deals with companies located in the EU. It applies in the “context of the activities of an establishment of a controller or processor in the Union.”

Articles 3(2) (a) and (b) deal with companies located outside the EU. They apply to “the processing of personal data of data subjects (individuals) residing in the Union by a controller not established in the Union where the processing activities are related to:

- (a) the offering of goods or services to data subjects in the Union
- (b) the monitoring of their behaviour”

Article 4(13) defines ‘main establishment’ and is crucial in determining when Article 3 applies. Article 25 obliges companies ‘not established’ in the Union to appoint a representative to act on its behalf. Article 51 of the GDPR seeks to establish a lead data protection authority for companies established in more than one EU Member State.

Issues and impact

ETNO and GSMA strongly welcome proposals to simplify and harmonise the rules for data controllers located in the EU. We also especially welcome proposals to apply the GDPR to companies located outside of the EU who offer goods or services to, or who monitor the behavior of, individuals in the EU. However, the current proposals will not achieve their desired aim unless the EU legislators adequately:

- Clarify the meaning of:
 - ‘establishment’ and ‘in the context of activities’
 - ‘offering’ goods and services
 - ‘monitoring’ of behaviour
- Address the relationship between the GDPR and the e-Privacy Directive by repealing conflicting provisions from the e-Privacy Directive by means of Article 89 of the GDPR. This would ensure a harmonised and technologically neutral application of the rules and help create consistent privacy experiences for consumers.

Establishment — Companies located in the EU

Application of the GDPR’s rules depends greatly on whether a company is or is not established in the EU. The current definition of ‘establishment’ relies primarily on where a company’s main decisions are taken or where the main processing activities take place. This creates ambiguities and possible loopholes.

- Telecommunications companies (telcos) that maintain infrastructure and operations in the EU will be at a disadvantage compared to companies that operate from outside the EU and offer equivalent services and process equivalent data, but that do not maintain a presence in the EU
- An example is in the European Court of Justice (ECJ) decision that determined ‘establishment’ “requires at a minimum a staffed office with a degree of permanence and stability: ‘both human and technical resources necessary for the provision of particular services are permanently available’”³. This definition

² See Annex 1 for a comparison of the current rules in the DPD and the proposed rules in the GDPR (including relevant recitals and definitions).

³ See Case C-168/84 Bergholz ECR [1985] 2251 [14] and Case C-390/96 Lease Plan Luxembourg ECR [1998] I-2553 as referenced in ‘Data Protection Jurisdiction and Cloud Computing – When are Cloud Users and Providers Subject to EU Data Protection Law?’ by W Kuan Hon, Julia Hörnle and Christopher Millard.



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is not consistent with that in Article 4(13) of the GDPR and would clearly capture telco providers that maintain physical infrastructure in one or more EU Member States.

- Other ambiguities include: which national data protection regulator would be considered the lead authority under Article 51 where telcos operate across multiple EU Member States? In which country would the controller be deemed to be 'established' for the purposes of Article 3(1)?

In the GDPR an EU company's place of establishment is also determined by the 'context of the activities' of the company, however, this can also create ambiguities. For example,

- an EU telco may be 'established' in Madrid where the main decisions are taken, but personal data may be processed via company facilities in London, or services may be accessed by consumers in the UK, using facilities located in the UK. This may in some circumstances lead to the application of local law depending on the context of the activities (consider for example, Articles 81 and 82 discussed below).

Further clarification is required concerning the role of 'context' in determining the applicability of law, the proper exercise of rights and the lead DPA. This is especially relevant given that the criterion of 'context' does not apply to companies not established in the EU.

Establishment — Companies not located in the EU

Articles 3(2)(a) and (b) are currently too ambiguous and require strengthening.

The term 'offering' services in Articles 3(2)(a) should include explicit criteria pursuant the ECJ decisions⁴ in Pammer and Hotel Alpenhof, cases C-585/08 and C-144/09.

- The ECJ established a number of criteria that determined whether a service was targeted at specific Member States including: the use of language or currency other than those used in the trader's place of establishment, the mention of telephone numbers with an international dialing code, marketing focused on the consumer's domicile;
- In addition, the Article 29 Working Party includes the delivery of goods or services to Member States and accessibility to the service or acceptance of EU credit cards⁵;
- A definition of "offering" services should also include free, advertisement funded that promote local businesses, services or products to an individual in the EU.

In Article 3(2)(b) the GDPR should adopt an express and more comprehensive definition of 'monitoring' to provide legal certainty for business and individuals. The article must apply to data that are *collected* and not just monitored, to be effective in practice.

- For example, Recital 21 links and seems to restrict monitoring to the tracking of individuals on the internet and the creation of profiles. The article and recital do not address data that are collected.

Application and enforcement beyond the EU.

Article 45 of the GDPR requires the development of mechanisms to ensure international co-operation and enforcement of the regulation. One legal expert has commented that *"a State may not carry out an investigation in another State without consent of the State where the enforcement is to be conducted, if the purpose is to enforce the first State's own administrative, criminal, or fiscal law"*⁶. To ensure the effective enforcement of the GDPR, the Commission must:

- Establish international, enforceable agreements between the European Data Protection Board (EDPB),

⁴ Judgment of the Court (Grand Chamber), In Joined Cases C585/08 and C144/09 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0585:EN:HTML> & <http://conflictoflaws.net/2010/ecj-on-pammer-and-hotel-alpenhof/>

⁵ Opinion 8/2010 on applicable law, adopted 16 December 2010

⁶ Legal expert, Christopher Kuner, in Submission to the 'Consultation on the Commission's comprehensive approach on personal data protection in the European Union'



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other countries and regional privacy enforcement networks⁷

- Support the adoption of an internationally applicable, legally-binding, self-regulatory code of conduct as first proposed by the previous European Commissioner for Telecommunications, Martin Bangemann in 1998⁸.

Relationship between the GDPR and the e-Privacy Directive⁹

In order to provide legal certainty for business and consumers and to ensure consumers have consistent privacy experiences, it will be necessary to have one applicable law. Three key aspects of the relationship between the GDPR and the e-Privacy Directive need to be addressed.

- First, the GDPR extends the definition of personal data to include location data and identifiers that are currently subject to the e-Privacy Directive;
- Second, Article 3(2) of the GDPR applies to the monitoring of behaviour of individuals that may also fall under Article 5(3) of the e-Privacy Directive;
- Third, the e-Privacy Directive does not expressly apply to businesses outside the EU who serve individuals within the EU and is subject to local interpretations and rules of Member States.

Adoption of local measures for health and employment data

Articles 81 and 82 give Member States freedom to implement specific measures in relation to personal data concerning health and personal data processed in employment contexts. This may lead to non-harmonised and conflicting rules, legal uncertainties, unnecessary costs and restrictions. It may also further impede a single internal market in data protection.

The provisions may also permit data controllers not established in the EU to choose a Member State with the weakest 'applicable law' and enforcement. This point is also acknowledged by the Article 29 Working Party in their opinion of the GDPR¹⁰.

Policy considerations

- Keep and strengthen the application of Article 3, especially with regard to processing activities based on offering goods and services to individuals in the EU from outside the EU.
- The divergent and often weak application and enforcement of data protection rules may encourage some non-EU based companies to locate their business in countries with less stringent rules and enforcement. The Commission needs to more effectively address the relationship between technology, law and jurisdiction, adopting a model that creates informational responsibilities that follow the flow of data and that treat functionally equivalent data and services in equivalent ways in law, irrespective of borders.
- The Commission should work with other governments, especially the USA and emerging privacy enforcement networks to ensure compliance with EU law. This should build upon the OECD's Privacy Law Enforcement proposals¹¹ and the Global Privacy Enforcement network, and others such as the

⁷ <https://www.privacyenforcement.net/>

⁸ http://europa.eu/legislation_summaries/information_society/strategies/l24193_en.htm

⁹ See joint ETNO GSMA Europe Briefing Note on the inconsistencies between the proposed GDPR and the e-Privacy Directive. www.gsma.com/gsmaeurope/wp-content/uploads/2012/07/GSMA_ETNO_Briefing_note-ePrivacy_GDPR_inconsistencies_0712.pdf

¹⁰ Opinion 01/2012 on the data protection reform proposals, adopted 23 March 2012

¹¹ www.oecd.org/sti/privacycooperation



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Ibero-American Network¹². The enforcement powers shall also, beyond that which is stated in previous proposals, deal with the execution of sanctions by national supervisory authorities. Consideration may be given to sanctions being executed by the EDPB, where these apply to data controllers not established in the EU.

- The Commission should clarify the rules on 'establishment' and the 'context of activities' of a data controller so that only one main establishment shall apply in order to provide legal certainty for all parties, especially data controllers operating across multiple EU Member States. This will also help prevent regulatory arbitrage by organisations not established in the EU but who seek to forum shop or take advantage of loopholes.
- All e-Privacy Directive provisions conflicting with GDPR should be repealed by the latter.

¹² www.privacyenforcement.net and http://www.redipd.org/la_red/Historia/index-iden-idphp.php



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Annex – Table of comparison between applicable Directive 95/46/EC and the proposed GDPR Articles and Recitals

General Data Protection Regulation proposal – Articles	Data Protection Directive 95/46/EC – Articles	General Data Protection Regulation proposal – Recitals
Article 3 – Territorial Scope	Article 4 – National Law Applicable	
	Paragraph 1	
Paragraph 1	Paragraph 1 (a)	Recital (19)
Paragraph 2	Paragraph 1 (c)	
Paragraph 2 (a)		Recitals (20), (64)
Paragraph 2 (b)		Recital (21)
Paragraph 3	Paragraph 2 (b)	Recital (22)
Paragraph 3	Paragraph 2	
Article 4 – Definitions		
Paragraph 13 – main establishment		Recital (27), (97), (98)
Paragraph 14 – representative		
Article 25 – Representatives of controllers not established in the Union		Recital (63)



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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 or the GSMA corporate website at 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

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

GSMA Europe

Martin Whitehead
Director GSMA Europe
Park View, 4th floor
Chaussée d'Etterbeek 180
1040 Brussels
T: +32 2 792 05 56
E: mwhitehead@gsm.org

ETNO

Daniel Pataki
Director ETNO
Avenue Louise, 54
1050 Brussels
T: +32 2 219 32 42
E: pataki@etno.be

