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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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Briefing paper on the proposed General Data Protection Regulation

Futureproofing the GDPR –

Consistency Mechanism, Delegated Powers, Comitology and Self-Regulation

September 2012

Summary

ETNO and GSMA believe that as European Union (EU) legislators cannot predict future privacy or data protection challenges, the General Data Protection Regulation (GDPR) requires mechanisms to ensure it is 'futureproof'.

- Amending the GDPR every time a new challenge arises would weaken legal certainty for businesses and consumers;
- The proposed consistency mechanism and Delegated Acts within the GDPR are crucial to avoid diverging implementations of the GDPR and the need for consistency among national data protection authorities (DPAs);
- Many proposed Delegated and esp. Implementing Acts will cause additional administrative burden and future bureaucracy. These should be deleted from the GDPR;
- Self-regulatory measures undertaken by industry on existing and new services and products could be a major tool to futureproof the regulation;
- To realise the full potential of self-regulation, incentives need to be implemented in the GDPR for undertakings choosing to adopt codes of conduct.



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Proposed rules in the GDPR

The European Commission's proposal for the GDPR foresees three mechanisms to ensure a consistent application and future development of the regulation:

- Consistency mechanism, Article 57
- Implementing Acts (based on Committee procedure), Article 87
- Delegated Acts, Article 86

It also provides a specific role for industry to complement the legislative framework by developing and adopting Codes of Conduct and certification (assurance) schemes, as set out in Articles 38 and 39.

The **consistency mechanism** allows the European Data Protection Board (EDPB), any supervisory authority (DPA) of the Member State and the Commission to bring any matter before the EDPB for an opinion by simple majority vote, pursuant to Article 58. Under the same provision, supervisory authorities are obliged to communicate relevant draft measures to the EDPB and the Commission. Article 60 allows the Commission to suspend any measures by DPAs for up to 12 months (Article 60) and to adopt Implementing Acts on the correct application of the GDPR.

Following the committee procedure under Article 87¹, the Commission may lay down **Implementing Acts** regarding forms, processes and standards to be applied. Article 41(3) allows the EC to decide whether a third country's legal framework offers an adequate level of protection (adequacy decision).

A further measure consists of **Delegated Acts** laid down in Article 86, to complement or amend nonessential elements of the regulation. The EC is empowered for an indeterminate period, revocable at any time, to further specify 'criteria and conditions' of provisions listed in Article 86. The European Parliament and Council exercise extensive scrutiny over Delegated Acts, including the possibility to reject the Commission's proposal. Both Delegated Acts and Implementing Acts are binding in nature.

Because Article 27 of the existing Data Protection Directive has failed to deliver self-regulation to date, the GDPR encourages in Article 38 the drawing up of **codes of conduct** (CoCs) intended to contribute to the application of the regulation. Minimum standards for CoCs have been provided in Article 38. To complement self-regulation, the GDPR encourages and strengthens European **certification** mechanisms for data protection seals and marks.

Issues and impact

Mechanisms to make the GDPR futureproof are necessary to avoid inconsistent application across Member States and to ensure it can address privacy challenges of the future. EU legislators cannot address every future privacy issue or circumstance through the regulation without the GDPR becoming overly restrictive and bureaucratic. Amending the regulation every time a new challenge appears is not an option, as this would weaken legal certainty for businesses and consumers alike.

Delegated Acts

Specifying criteria and conditions of the regulation through Delegated Acts, which can be revoked at any time by the European Parliament and Council, is the most balanced way to address future challenges. The European Commission as a College is better placed to take such decisions than national or EU Data

¹ Pursuant to Regulation (EU) No 182/2011: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:055:0013:0018:EN:PDF>



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Protection Authorities (DPAs), since the Commission is committed not only to data protection and privacy but to wider economic and societal objectives.

- Delegated Acts should be used when technological and social changes render aspects of the regulation out of date, or raise new privacy concerns that were not foreseen when the regulation was approved;
- ETNO and GSMA strongly believe the Commission should consult industry and other stakeholders before any such measure is put into force; self-regulation and co-regulation could prove to be more flexible in addressing technological and social changes. Above all, Delegated Acts must not replace effective codes of conduct that have been put in place by industry meeting the high requirements of Article 38 (2, 4). The Commission should be legally obliged to consider whether self-regulation would be quicker, more efficient and flexible in addressing these new challenges.

Implementing Acts

Rules put in place through Implementing Acts (following the committee procedure) are of a more technical nature and will be decided with less institutional involvement of the European Parliament and Council. Nevertheless the Commission would be able to add additional requirements for industry and consumers, influencing data protection rules. This strongly risks countering the overall objective of lowering the administrative burden for industry and risks adding new bureaucracy instead.

Consistency Mechanism

Member States' national data protection authorities (DPA) have interpreted and applied the current Data Protection Directive in very inconsistent and conflicting ways. The existing mechanisms of the Article 29 Working Party have not helped address this problem. Choosing the Regulation as the preferred legal instrument will require explicit measures to ensure the consistent application across Member States' Data Protection Authorities. The proposed Consistency Mechanism between Data Protection Authorities on EU level will help solve this problem and ensure the precedence of European decisions over national DPA decisions.

Self-Regulation

Self-regulation is sometimes mischaracterised as a way to undermine consumer protections and rights provided in law. However, codes of conduct do not replace legal requirements or fundamental rights. On the contrary, they can be used to help authorities as well as industry by addressing specific situations and improving legal certainty and consumer experiences, rendering regulatory action unnecessary.

Commissioner Kroes highlighted this point² on 28 November 2011:

Industry self-regulation has an important, complementary role to play in this reform. But let me be clear: self-regulation is not a fig leaf for non-compliance; self-regulation only works if there is strong, legally binding regulation in the first place. This is why I encourage codes of conduct for businesses in Europe provided that they are fully in line with European data protection law.

ETNO and GSMA welcome article 38(4) as it allows the Commission to enforce sector codes of conduct vis-à-vis all sector undertakings. Pursuant to Article 38(2) and (3), industry associations may submit draft codes of conduct to national and European authorities. Subsequently, these may give an opinion on compliance with the law of the code.

² Commissioner Viviane Reding in a speech: http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/data-protection_en.pdf



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Industry would benefit from legal certainty if the Commission were obliged to give opinions on the compliance of codes of conduct and this could ensure business interests and practical product requirements are acknowledged in (self-)regulation.

However, in order to encourage industry players to draw up CoCs, clear incentives need to be evident in the new legal framework. It is important to provide incentives for signatories over non-signatories by allowing them to enforce the CoCs in their own manner and to partially exempt individual companies from obligations to DPAs — i.e., supervision, enforcement and fines — as long as the respective DPA recognizes the CoC as being functionally operational.

Policy considerations

- The **consistency mechanism** is required for consistent application and interpretation of the new framework among the Member States;
- **Delegated Acts** are balanced and indispensable measures to 'futureproof' the GDPR. Only Delegated Acts that may add to bureaucracy should be deleted. However, before enacting Delegated Acts, the Commission should acknowledge the industry's self- and co-regulatory efforts in Article 86;
- The **consistency mechanism**, in its entirety, is critical to the GDPR's effectiveness. Such decisions by the European Data Protection Board should be binding for national DPAs;
- Implementing Acts following the **committee procedure** should, however, be mostly eliminated from the proposal, as they risk unnecessary red tape;
- **Self-regulation** needs to be further strengthened by incentivising undertakings to adopt codes of conduct. To achieve this, controllers should be exempted from some of the requirements (Article 28), impact assessments (Article 33), prior authorisation and consultation (Article 34(1) and (2)) and fines (Article 79, if the CoC provides fines);
- To further incentivise the development of **codes of conduct**, supervisory authorities and the Commission should be obliged to provide an opinion on the compliance of a specific code of conduct related to the regulation. The potential enforcement of existing codes of conduct to the whole sector in Article 38(4) helps to increase sector involvement in the development of codes of conduct.



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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.

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