



Europe



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](#)



Europe



GSMA Europe and ETNO

Briefing Papers on the proposed General Data Protection Regulation (GDPR)

International Data Transfers

September 2012

Summary

International data transfers are essential for pan-European businesses that operate and cooperate in a global context. ETNO and GSMA support the principle that international transfers of personal data from the European Union (EU) should ensure an equivalent level of protection for individuals as established under EU law. We thus believe the proposal for a General Data Protection Regulation (GDPR) represents an improvement in facilitating the transfer of personal data to third countries. We especially welcome measures to simplify the process for adopting Binding Corporate Rules (BCRs).

However there remain issues to be resolved through the GDPR:

- Completion of BCRs under Directive 95/46/EC can take up to 2-3 years. For companies to find it at all feasible to operate under this regime, it is absolutely necessary to streamline the procedural aspects for BCRs in the GDPR. The GDPR should continue to embed flexibility by broadening and clarifying the scope of a “group of undertakings” to recognise the flexibility of the corporate ownership form and allow for binding rules that apply to other forms of ownership or control.
- Clauses approved by the Commission have so far failed to address the wide range of possible commercial arrangements relating to data processing relationships; it is unlikely that additional standard clauses approved by a supervisory authority will better address this, and authority approval for other contractual language simply cannot keep pace with the speed of business.
- A true, independently verified accountability framework would allow EU controllers, who remain accountable to EU law for their data processing, to attest their compliance with a global binding corporate rules framework or contractual clauses while avoiding the lengthy delays that prior approval from a supervisory authority can introduce.

It is possible to envisage a regime that recognises the importance of international data flows by minimising administrative burdens without any lessening of the high level of protection European citizens can expect no matter where their data is sent.



Europe



Proposed rules in the GDPR

International data transfers under Directive 95/46/EC

Under Directive 95/46/EC, the transfer of personal data to countries outside the EU is permitted only if the receiving country ensures an adequate level of protection¹, as determined under EC procedures. If a third country is not acknowledged to provide an adequate level protection, a transfer may take place under other circumstances, for example: (1) by obtaining consent from the data subject, (2) to perform a contract, or (3) where the controller adduces adequate safeguards for data protection. The directive has been interpreted to allow organisations to show adequate safeguards by using one of several recommended standard contractual clauses or by adopting BCRs for transfers to companies *within* the same group of undertakings.

Most of the current options render the international transfer of personal data unnecessarily cumbersome: using the standard clauses requires the maintenance in some cases of huge numbers of contracts, and BCRs may take up to three years to gain the necessary approvals from supervisory authorities.

One of our member companies maintains multiple hundreds of internal agreements at their headquarters level alone, a full time task for an employee whose attention could better be focused on activities that provide real privacy benefits to its customers and employees. Others have struggled with years-long processes to capture the approval of all applicable supervisory authorities for their BCRs, or find themselves operating in countries where additional legal burdens are placed on companies wishing to make use of the BCR process.

Recent decisions have simplified the BCR process somewhat, for example, providing where possible for mutual recognition of the approval by a primary authority. But such simplifications have only gone so far in making BCRs a workable solution to the intractable problem of balancing the protection of data when it crosses EU borders with the ongoing need for global data flows in a networked world.

GDPR improves international data transfers

With the GDPR, the European Commission retains its power to take decisions regarding the adequacy of third countries. However, for the first time the GDPR sets out a clear legal basis and details for BCRs (Article 43), providing for greater legal certainty and streamlined processes. The GDPR also extends the use of BCRs to cover data processors and “groups of undertakings” and introduces more flexibility for mechanisms that enable transfers to third countries without an adequate level of protection.

Article 42(1) and (2) in the GDPR allow the controller or processor to determine appropriate safeguards for the transfer of data via legally binding instruments. These include BCRs and standard clauses approved by the Commission, as under the present regime. The GDPR also introduces the possibility of using standard data protection clauses authorised by a supervisory authority. However, controllers wishing to use non-standard contractual clauses between themselves and processors or recipients of data, will continue to require the prior authorisation of the national supervisory authority.

Under the GDPR, companies making use of BCRs will not need to seek the approval of more than one supervisory authority, an improvement over the current process. Article 42 (3) ensures that when BCRs or standard clauses have been adopted and approved, no further authorisations or approvals are needed as safeguards for the transfer.

¹ The Commission has acknowledged that certain countries, including Canada and Switzerland, have the necessary protection. See http://ec.europa.eu/justice/data-protection/document/international-transfers/adequacy/index_en.htm



Europe



While the GDPR clarifies that BCRs can apply to groups of processors, a vague definition of **group of undertakings** does not make it clear whether companies can use the streamlined BCR processes for its cooperation among controllers and processors with varying levels of control.

Issues and impact

The GDPR represents an **improvement** in facilitating the transfer of personal data to third countries. But continuing to base most procedures for managing international transfers on form contractual clauses or prior approval of a supervisory authority will continue to impose untenable restrictions on the speed at which companies can move and adapt in a global environment, to the detriment of innovations and customers. Steps to further **simplify international data transfers** are important in reducing the administrative burden of EU/EEA businesses and to strengthening international trade and the international competitiveness of EU businesses.

- Today, certain EU/EEA countries do not accept the transfer of personal data to third countries based on BCRs. In Germany and Hungary the BCR is only a safeguard for an adequate level of data protection but not expressly recognised as a legal basis to transfer data to a company of the group in a third country. Additionally a contract on commissioned data processing must be concluded or a legal basis according to Article 6 must apply. Our objective is thus to achieve clarification that, if a justification exists for one entity of the group it should apply for all entities of the group so that commissioned data processing contracts can be avoided.
- Moreover, the completion of BCRs under the current regime can be very lengthy (up to 2-3 years). There is an unnecessary **lack of flexibility** in the requirement that a BCR will specify “the structure and contact details of the group of undertakings and its members.” This means that every time there is a change in any of these details, the revised BCR has to be presented to the supervisory authority, which must restart the coordination process with the European Data Protection Board and the Commission.

While incremental improvements have been made in the context of the model transborder data flow clauses, companies wishing to avoid prior authorisation by relying on the standard clauses often find that their terms do not allow for common business arrangements. A better approach is necessary, and that streamlines and addresses these procedural issues without sacrificing the protection of customer data wherever it is transferred and processed.

A true, independently verified accountability framework would allow EU controllers, who remain accountable to EU law for their data processing, to attest their compliance with a global binding corporate rules framework or contractual clauses while avoiding the lengthy delays that prior approval from a supervisory authority can introduce.

We welcome the proposed **extension of BCRs to processors** provided by Article 43 and look forward to hearing how the European Commission plans to expedite the application process. However, clarity and certainty should be granted to other arrangements between corporate entities, by clarifying the definition of *group of undertakings* to allow BCRs to dealings between controllers and processors (e.g., in the cloud computing environment) when controllers and processors are not part of the same group of companies.

- Processes to assess whether a third country can guarantee an **adequate level** of personal data protection should be carried out in a reasonable time, corresponding to the importance of international data exchange in the global economy.



Europe



Policy considerations

- European companies heavily depend on the collection, storage, distribution and use of information in order to operate. This is particularly true for telecommunications companies, where the processing of information is an essential element of their operations. The economic reality is that European companies increasingly operate on a global scale;
- Therefore, personal data needs to be transferred across borders, both within a group of undertakings and to third parties. This is becoming the norm rather than the exception, and the route of data transfer often cannot be defined by point-to-point communications, but rather by a number of actors, each having different roles and responsibilities. Cloud computing is a good example of this, with a complex value chain and multiple entities involved in delivering services to consumers;
- In parallel to strong consumer protection, data-protection rules must consider business interests by safeguarding the flow of data internationally, rather than cutting them off or restricting them.



Europe



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