



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 paper on the proposed General Data Protection Regulation (GDPR)

#### Sanctions

September 2012

#### Summary

ETNO and GSMA believe that a consistent approach to sanctions for non-compliance with data protection and privacy regulations are necessary and justified, but it is of utmost importance that they be proportionate, fair and applied according to objective criteria. The sanctions outlined within the proposed General Data Protection Regulation (GDPR) do not yet meet these requirements.

- A proportionate and effective sanctions regime must take in account the circumstances of noncompliance and whether harm has been caused to individuals as a result. Sanctions must not be imposed on an automatic basis, and should distinguish between intentional and unintentional behaviours. Article 79 of the GDPR ignores these criteria and requires national data protection authorities (DPAs) to automatically impose sanctions for non-compliance (except for derogation for small businesses);
- Sanctions for unintentional noncompliance should apply equally across small and large companies and address actual harm caused. Article 79(3) of the GDPR allows DPAs to issue warnings to companies with fewer than 250 employees for unintentional noncompliance, but this derogation does not apply to large companies. We believe it should be extended to all data controllers irrespective of the number of employees;
- The sanctions proposals appear to draw on existing antitrust and merger legislation<sup>1</sup>. However, this legislation gives national authorities discretion over whether to pursue a matter or impose a sanction. The possibility for qualified discretion by DPAs is missing from the GDPR and companies may face fines of up to 2% of their annual worldwide turnover;
- ETNO and GSMA consider the level of potential fines in the GDPR to be disproportionate and excessive. Where noncompliance does not result in harm to individuals, the GDPR should adopt metrics other than percentages of company global turnover to determine the maximum amount of a fine in particular circumstances;
- The introduction of **mandatory guidelines on sanctions** should be considered to help prevent the possibility of cumulative sanctions by various DPAs for the same infringement (i.e., *ne bis in idem*);
- The GDPR must ensure consistency with Article 15(2) of the e-Privacy Directive (2002/58/EC<sup>2</sup>), which relies on “judicial remedies, liability and sanctions of Directive 95/46/EC.”

<sup>1</sup> Article 23 of Regulation 1/2003 (antitrust) and Article 14 of Regulation 139/2004 (Merger Regulation)

<sup>2</sup> As amended by 2009/136/EC



Europe



## Proposed rules in the GDPR

Article 79 of the GDPR gives national supervisory authorities the power to impose a range of sanctions. These range from warnings for unintentional noncompliance to significant fines for intentional or negligent breaches of the rules. For example, failing to meet the conditions on consent can result in a 2% fine of a company's worldwide turnover.

## Issues and impact

ETNO and GSMA support efforts to establish sanctions in a consistent, proportionate and effective manner, according to clearly defined objective criteria. However, the GDPR proposals present a number of practical and conceptual concerns.

### Proportionality

Sanctions must address noncompliance that has harmful consequences for individuals. The GDPR, however, provides for disproportionate, unwarranted and excessive sanctions to be enforced for minor infringements that will not result in harm.

- In Article 28, sanctions of up to 1% of worldwide turnover can be imposed for simply failing to maintain documentation, even though such a minor infringement will not result in any harm to an individual
- Article 32 on data breach notification requires companies to notify an individual if "the personal data breach is likely to adversely affect the protection of the personal data or privacy" of the individual, and failure to comply attracts a fine of up to 2% of a company's worldwide turnover. In this example, a company could be fined for losing a file containing the names and addresses of individuals that are already in the public domain, even though the loss does not create or lead to harm

ETNO and GSMA believe that regulatory sanctions must concern how a data breach adversely affects data subjects, not the protection of the personal data itself. The individual should be the protected interest, not the data.

### Penalties and DPA discretion

The GDPR severely limits the discretion of DPAs to consider all the circumstances of noncompliance and requires them ("shall") to impose penalties for each point of noncompliance. DPAs have some discretion to determine whether a sanction is necessary only in cases of first and unintentional noncompliance by companies with fewer than 250 employees (Article 79(3)).

- This discrepancy is raised by the EDPS in his opinion on the EC Proposals adopted on 7 March 2012: "The EDPS notes that the Proposal seems to afford very little margin of appreciation to an authority with regard to the circumstances in which it would have to impose a sanction."
- We recommend that the wording in Articles 79(4), (5) and (6), "The supervisory authority shall" be replaced with the words "The supervisory authority may". Article 79(3) should also be extended to allow DPAs to issue warnings to all companies, irrespective of the number of employees

The proposed fines in Articles 79(4), (5) and (6) are based on a maximum amount in Euro or up to 2% of a company's annual worldwide turnover. This is considered excessive and appears to draw on Article 23 of Regulation 1/2003 (Antitrust) and Article 14 of Regulation 139/2004 (Merger Regulation) to help define a



Europe



sanctions regime. However, unlike these instruments, the GDPR does not give DPA discretion to decide whether to pursue a matter or whether to impose a sanction<sup>3</sup>.

- This will lead to disproportionate sanctions for minor infringements of the GDPR
- As above, DPAs must have a degree of discretion and be subject to objective guidance on whether to pursue a matter or impose a sanction

Articles 79(4), (5) and (6) present further challenges for businesses and disproportionate sanctions for noncompliance.

- The articles require DPAs to impose sanctions to anyone who *intentionally* or *negligently* fails to comply with a number of specific obligations. However, this may result in fines of up to 1% of a company's worldwide turnover where it inadvertently fails to give consumers access to their personal data in a requested format
- Similar fines apply where a company inadvertently fails to maintain specified documentation. These sanctions apply regardless of whether the inadvertent noncompliance causes harm to individuals and would be the same for a company that repeatedly and intentionally fails to comply with the rules

ETNO and GSMA believe administrative sanctions must be proportionate to the gravity of the impact and the harm caused to individuals.

### Consumer impact

The proposed sanctions will also have the unintended consequence of burdening consumers with information overload and excessive decision-making.

- Articles 12 and 14 require companies to provide individuals with a range of information and in a transparent way. A failure to comply with these obligations is subject to fines of 1–2% of a company's worldwide turnover. Companies are therefore likely to give individuals detailed information in order to avoid such fines
- This will not only burden businesses and lead to unnecessary design costs, but may also add additional burdens on data subjects who will be faced with excessive amounts of information provided out of context. This will erode the consumer experience and lead to privacy fatigue as individuals simply agree to lengthy privacy notices in order to access services

### Representation for non-EU controllers

The GDPR allows data controllers not established in the EU to appoint a representative.

- ETNO/GSMA believe it important that the appointment of a representative includes an obligation to give financial warranties to ensure any eventual penalties imposed under Article 78 and Article 79. These warranties must be enforceable under international law.

### Avoiding dual sanctions

As telecommunications companies, ETNO and GSMA members are subject to the provisions of the e-Privacy Directive 2009/136EC (amending 2002/58EC). The e-Privacy Directive and national implementations provide sanctions that reflect Chapter III of the Directive 95/46 /EC on judicial remedies, liability and sanctions.

- We believe the Commission must provide consistency across regulatory frameworks and ensure telecommunications companies are not subject to dual sanction regimes

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<sup>3</sup> With the exception of a derogation for small businesses



Europe



#### Policy considerations

- The primary objective of sanctions should be to foster compliance rather than to rely on punishment to ensure good practice. **Sanctions must be proportionate, necessary, justified and the last resort.** Sanctions should be imposed only where an organisation is found to have a wilful disregard for its obligations, rather than noncompliance as a result of some minor oversight
- **DPAs should have a degree of flexibility** with regard to the circumstances of noncompliance, with the ability to impose more severe fines on the companies that repeatedly and intentionally do not comply with the rules. DPAs should not be required to impose fines by default. The word “shall” should be replaced by “may” in Article 79. In addition, the exception found in Article 79 (3) should be extended to all commercial entities
- Sanctions must be **proportionate to the risks and any privacy harms** associated with the specific context of processing and only after consideration of all facts. This requires the development of objective criteria to guide DPAs. It also requires reconsideration of fines related to a company’s worldwide annual turnover, which is not directly related to the severity of the infringement and is therefore disproportionate
- Alternative ways should be explored to link sanctions to other metrics contemplated by accounting standards, such as net operating profit, EBITDA, market capitalisation, etc., or simply by eliminating the reference to a percentage of the company’s turnover. Whatever the chosen criterion, to ensure legal certainty, **a maximum amount of fine should be established** according to internationally accepted criteria.



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](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)

#### 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](mailto:mwhitehead@gsm.org)

#### ETNO

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