

Open Letter to the EU Institutions on the General Data Protection Regulation 'The Opportunity for Triangles'

Brussels, 12 June 2015

ICDP welcomes progress towards the adoption of a General Data Protection Regulation through the agreement on a Council General Approach and the upcoming start of the trilogue negotiations.

ICDP firmly believes that the modernisation of Europe's current data protection framework presents an opportunity to eliminate existing differences and divergences in the interpretation and implementation of today's rules while also providing a predictable and flexible regulatory regime that ensures both the protection of citizens' privacy and the adaptation of the legislative system to the needs of 21st century data-driven innovation.

We recognise that striking the right balance and harmonising the various approaches to data protection is not an easy task and we commend Member States for their considerable efforts to achieve a reasonable compromise.

However, more work needs to be done to achieve a coherent and consistent legal framework; minimise exceptions and ensure workable, flexible rules that will stand the test of time in a fast changing environment. In particular we call on EU Institutions to:

- Recognise the value of **pseudonymous data**
- Preserve the current model of **legitimate interest**
- Avoid mandating **explicit consent** in all circumstances
- Ensure a workable **one-stop-shop mechanism**
- Allow for the **free flow of data** across borders
- Implement a well-defined **risk-based approach**
- Move away from blanket **joint liability for controllers & processors**
- Restrict **profiling** only for those operations that produce significant negative effects

We wish to emphasise that the EU institutions must not legislate for the worst case scenario and should instead focus on creating a European privacy regime that can act as a catalyst for growth an innovation across all industry sectors in the years to come.

Yours sincerely,

Members of the Industry Coalition for Data Protection (ICDP)¹

¹ ICDP is comprised of 20 associations representing thousands of European and international companies who are building, delivering, and advancing the digital experience. Members of ICDP include: ACT | The App Association, American Chamber of Commerce to the EU (AmCham EU), BSA | The Software Alliance (BSA), Computer and Communications Industry Association (CCIA), European Coordination Committee of the Radiological, Electromedical and Healthcare IT Industry (COCIR), DIGITALEUROPE, European Association of Communications Agencies (EACA), E-Commerce Europe, European Digital Media Association (EDiMA), European Multi-channel and Online Trade Association (EMOTA), European Publishers Council (EPC), European Internet Services Providers Association (EuroISPA), Federation of European Direct and Interactive Marketing (FEDMA), Federation of European National Collection Associations (FENCA), GS1, IAB Europe, Interactive Software, Federation of Europe (ISFE), Japan Business Council in Europe (JBCE), and the World Federation of Advertisers (WFA)

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Flexible, privacy-friendly and future proof legislation

It is important that the Regulation strikes the right balance between the need to ensure a high level of protection of personal data and an innovation friendly environment that supports the objectives of strengthening data-driven innovation in Europe.

Extending the full range of obligations and the threat of very considerable sanctions to any kind of data that has a remote potential of identifying an individual will hardly contribute to this innovation friendly environment.

The **recognition of the value of pseudonymous data** as a subset of personal data is therefore welcomed as it would ensure the much needed flexibility to process data that cannot directly identify the data subject, while ensuring a reasonable level of protection. In this sense, we share the approach taken by the Parliament that no preference should be articulated on the basis of whether data is pseudonymous from the onset or became such following a pseudonymisation process. We also support suggestions that the creation of such a sub-category should also trigger a clear indication of flexibility. In this sense, the approach taken by the Parliament is a good basis for negotiations.

We also strongly welcome the recognition that **if the data does not permit the controller or processor to identify a natural person, the controller/processor should not be obliged to acquire additional information in order to identify the data subject for the sole purpose of complying with the legislation**. This provision is a very significant step to ensure that the Regulation itself encourages data minimization.

We also strongly encourage the EU institutions to **preserve the current model of legitimate interest and avoid the overly restrictive approach suggested by the Parliament**. We would like to recall that the legitimate interest legal basis is the one the key provisions that allowed the 95 Directive to adapt to the substantial changes that occurred over the last decades and in the meanwhile ensure the protection of personal data by providing a **reasonable right to object for data subjects**. It is also uniquely suited to encouraging data controllers not to identify data subjects.

We also welcome the prudent approach taken by Member States and **avoid mandating explicit consent in all circumstances**. This wisely takes into consideration the experience of other EU legislation that clearly demonstrated the need for a nuanced approach to consent, in particular in the online environment.

One-Stop-Shop Mechanism

ICDP has been a committed supporter of a meaningful one-stop-shop mechanism that allows companies to deal with a single privacy regulator no matter how many Member States they operate within, and face one decision and one outcome. ICDP wishes to reiterate that this is of particular importance for European SMEs that need legal clarity and an efficient and affordable decision making and judicial review mechanism.

While we support the efforts of the Council to reach a consensus amongst Member States, we believe the outcome in the Council General Approach fails to encapsulate a true one-stop-

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shop mechanism. We are particularly concerned about the possibility of multiple parallel court proceedings when the decision is appealed and while we welcome the introduction of provisions that would address this question, we believe they should be further strengthened to ensure that any process ends with one decision.

As we enter trilogue discussions, we encourage the EU institutions to **embrace the principle of a strong one-stop-shop mechanism** and avoid as much as possible an over-complicated system bringing legal uncertainty to companies and citizens alike, which fragments rather than supports the shared goal of creating a Digital Single market.

International Data Transfers

There is a **clear consensus on the importance of data transfers to 21st century trade and the need to ensure predictable data transfers**. To meet this need, compliance requirements to enable legitimate flows of data should be less burdensome. By simplifying certain existing instruments, ensuring the applicability of mutual recognition of decisions around them, these instruments could be made available to a broader range of stakeholders than is the case today, while fully maintaining the rights of citizens at all times regardless of where the data is processed.

We welcome the prudent approach taken by Member States avoiding the use of the Regulation for misguided political objectives.

We strongly hope that such a **reasonable approach can be maintained and rules and obligations creating deliberate conflict of legal requirements will be avoided**. Companies legitimately doing business in multiple jurisdictions should not be held hostage of political debates.

Similarly, ICDP strongly cautions the EU institutions to **avoid the adoption of language that foresees the expiration of existing and well-functioning mechanisms** that enable the international transfer of data (sunset clauses). To the contrary, the Regulation should clearly state that decisions and authorization adopted based on the Data Protection Directive (95/46/EC) should remain in force. Many European companies have invested considerable time and effort to ensure compliance by e.g. using European model clauses or implementing Binding Corporate Rules within their group of companies. Sunset clauses would create enormous legal uncertainty and place unnecessary strains on relations with trade partners leading to economic losses.

On the other hand, we **encourage suggested improvements from the Council to the adequacy process** and the **on-going efforts to provide appropriate legal status to binding corporate rules (BCRs) for both controllers and processors**, including joint undertakings or group of enterprises engaged in a joint economic activity.

We also strongly welcome the acknowledgement that legitimate interest ground is a valid basis for data transfers.

Risk-Based Approach

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ICDP has been a long-time promoter of a well-defined risk-based approach as it has the potential to substantially improve outcomes for data subjects while reducing administrative burdens for data controllers and processors. We welcome the introduction of such an approach by the Council, which could now be refined during trilogues in order to achieve a workable and meaningful risk-based system.

We caution against an agreement that introduces an overly broad definition of 'high risk' processing, and insist on the need for one clear and unambiguous definition. It is equally important to highlight that only 'high risk' processing should be subject to a consultation with national data protection authorities before processing. Failure to do so will force businesses to wait until already overburdened authorities evaluate their submission for consultation.

We also urge negotiators to honour one of the fundamental objectives of the reform and ensure a truly consistent and harmonised approach to legal obligations and reject proposals whereby every Data Protection Authority could draft its own list of processing requiring an impact assessment or other provisions that clearly go against the spirit of a consistent approach and the digital single market.

Along those lines, we would also praise explicit reference in the regulation to determined and consistent implementing tools (EDPB template, ETSI/CEN/CENELEC or ISO standards, delegated act, Code of Conduct endorsed by WP29 or EU certification seal). Such a reference would allow accountable data controllers and processors to implement concretely privacy-by-design without wondering whether they meet –or not- EU institutions requirements.

Controller & Processor Roles and Responsibilities

We welcome the Council proposal to move away from a joint several liability for both controller and processors, which would clearly introduce significant burdens on the European data processing market with no concrete gain for the data subject.

The approach taken by the Council clarifying that the primary liability for damage rest with the controllers is an important step in the right direction. **We urge the EU institutions to further refine this approach during trilogue discussions.**

We encourage the EU institutions to revisit the doubts expressed by the Article 29 Working Party over the concept and consider the 2010 model clauses as a viable solution to those situations where the controller ceases to exist.

Protecting consumers against harmful profiling

ICDP recognises the need to have provisions in the future Regulation to protect data subjects against the risks arising from some types of profiling that could produce serious harm, and to ensure they will be able to hold the data controller accountable for any negative consequences arising.

However, we wish to stress to the EU institutions that the Regulation should not restrict all profiling, as the ability to process data to extract new actionable insights is absolutely essential to a knowledge-based economy, a key to building the information society, and should therefore be at the heart of the EU's Digital Single Market.

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We urge the EU institutions to avoid creating a framework which could restrict profiling across various industry sectors irrespective of the objectives pursued. We encourage the trilogue negotiations to address the threshold of 'significant effect', which is too vague.

ICDP proposes to keep a wide definition of profiling in the future, but to raise the legal threshold above which harmful activities are restricted compared to those types of personal data processing which encompass positive effects.