

12 March 2012

## DIGITALEUROPE

COMMENTS ON

### PROPOSED EUROPEAN COMMISSION'S REGULATION ON DATA PROTECTION

#### **Welcome improvements**

DIGITALEUROPE welcomes the European Commission's proposed Regulation on Data Protection. This is an important step towards building a future proof legislative framework which should enable a strong protection of privacy while at the same time recognizing the importance of data flows for the internal market.

The proposed legislation contains welcome improvements which are crucial to making this Regulation effective and efficient. First of all, we support the European Commission's goal of enhancing the single market by increasing harmonisation on data protection rules across the 27 Member States. The introduction of the concept of a one stop shop for data protection issues will not only increase legal certainty, but also reduce administrative burdens and create an incentive for DPAs to move to a mutual recognition model. We also welcome the goal of making the framework more efficient by reducing the unnecessary administrative burdens such as the elimination of notification obligations. These developments would allow for DIGITALEUROPE's members, especially SMEs, to focus their efforts on what is important; ensuring strong data protection instead of producing paperwork with no added benefits.

#### **Significant challenges remain: 7 key issues threatening the EU's digital technology industry**

There are still some aspects of the Regulation that create significant challenges to the goals of the Regulation but also to continued economic growth. We would like to encourage the European Parliament and the Council to look at the following **7 key issues** as having a crucial impact on the development of the EU's digital technology industry.

The proposed provisions on the relationship between **data processor and controller** risk creating legal uncertainty with regards to responsibility and liability, especially given the complexities of cloud computing. A clear distinction of the obligations of data controller and processor should be maintained.

**New administrative burdens** are created, thus undermining the Commission's overall objective of creating a more efficient system. The provisions on prior notification/consultation, Privacy Impact Assessments (PIA), Privacy by Design/Default and on an extensive documentation obligation risk creating useless paper trails and impose unnecessary costs instead of focusing on the actual outcomes.

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To ensure the goal of **more harmonisation** is achieved, the concept of “main establishment” should be clarified, the new European Data Protection Board (EDPB) should be made more transparent and accessible (following the BEREC example) and the consistency mechanism should be opened to other stakeholder input.

Some of the definitions need to be clarified. **The definition on personal data** risks encompassing almost all data and hence, we would like to see more of a contextual approach being recognized in the framework. Individuals should have the right to make an informed choice about how their data will be processed. Therefore, it is important to recognize this in **the definition of consent**. However, no modalities on the provision of ‘consent’ should be defined and the requirements should not be set artificially high, such as requiring an explicit consent in all cases. The exceptional circumstances under which even ‘consent’ cannot serve as a legal basis for data processing need to be better defined and justified, and consent in employment contexts needs to be still possible in specific cases.

With regards to increasing security measures within organisations, we welcome the introduction of the **data breach notification obligation**. To make it workable and avoid wrong notifications, the 24 hour rule should be removed, an appropriate standard of harm should be introduced as trigger of notifications and technical protection measures should be further incentivised.

Any legislative framework should be backed up by harmonised and predictable enforcement. The provisions on **administrative sanctions** however introduce considerable uncertainty, risk creating fragmentation and lack proportionality. In addition, a DPA should have the discretionary power to look at the overall internal processes when deciding on sanctions.

Finally, many of the changes foreseen in the Regulation will depend on the effectiveness of the DPAs and ability of the Commission to issue **delegated and implementing acts** in efficient, timely and transparent manner, considering stakeholders input. However, we would like to stress that to ensure legal certainty, the Commission does not need to give itself powers to adopt the delegated and implementing acts in all the proposed areas, since in many of the relevant Articles, the requirements and criteria are already enumerated in a detailed manner.

## ABOUT DIGITALEUROPE

**DIGITALEUROPE** is the voice of the European digital economy including information and communication technologies and consumer electronics. DIGITALEUROPE is dedicated to improving the business environment for the European digital technology industry and to promoting our sector's contribution to economic growth and social progress in the European Union.

**DIGITALEUROPE** ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 60 global corporations and 37 national trade associations from across Europe. In total, 10,000 companies employing two million citizens and generating €1 trillion in revenues. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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