

KEEP EUROPE GROWING

June 30 2015

Cutting the Gordian knot of a progressive EU Data Protection Regulation

Dear GDPR triologue stakeholders of European Institutions,

The European Data Coalition represents 20 European organisations across different sectors with significant operations within and beyond the European Union (EU). As the important triologue stage of the Europe's data protection reform begins, **the Coalition hopes negotiating parties will succeed in developing a progressive legal text.** This framework must not be based on a zero sum preconception that technological progress comes at the expense of privacy. Nor should it introduce unnecessary additional regulatory obligations. A progressive solution will need to balance interests and recognise that promoting innovation contributes to the fulfilment of several additional EU goals such as growth and sustainable development while upholding privacy.

As the digital revolution picks up speed, a successful European data-driven economy founded on trust and transparency must have adequate data protection rules. We welcome the European Commission's proposal for a General Data Protection Regulation (GDPR), as well as the positions of the European Parliament and Council. These all contain important and helpful proposals for reforming Europe's data protection system. **However, the current debate leads stakeholders to believe they must choose between protecting privacy and fostering innovation.** In our view, it is possible to promote both, despite this not having yet been sufficiently reflected in the current debate. The Coalition is keen to assist the institutions in establishing a progressive Data Protection Regulation that safeguards privacy and contributes to technological progress. To do this, political leaders should consider the following principles:

1. Less can be more

For a competitive and innovative European Digital Single Market, the regulatory balance must be right. Policymakers should regulate only where there is clear need to do so, backed by principles of smart regulation to avoid stifling innovation, investment and entrepreneurship. As the Letter from the Article 29 Working Group to triologue stakeholders highlighted, the Regulation "must be appropriately balanced in order to guarantee a high level of protection of individuals and allow companies to preserve innovation and competitiveness".¹ Removing requirements that impose heavy burdens on companies with marginal gains for data protection would improve the Regulation without lowering data protection standards. For instance, the additional requirements² on Binding Corporate Rules (BCRs), an arrangement that already functions well, don't necessarily raise privacy standards, are overly prescriptive and result in a high administrative burden.

¹ http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2015/20150617_appendix_core_issues_plenary.pdf

² See, additional conditions for Binding Corporate Rules to be adopted, as laid down in Art. 43(2)(d) of the Regulation as proposed by the European Parliament

During trialogues, the Coalition urges stakeholders to consider the quality of the Regulation, recognizing that there are cases where less is more. **Data provisions must be constructed with sufficient regard to the context for which they are intended.** Otherwise, proposed requirements risk contradicting the overall objective: to protect data subjects. Inappropriate new measures may also undermine existing arrangements that have proven effective. The Coalition's members have identified in previous documents these problematic issues.³ For instance, joint liability between data controllers and processors is particularly detrimental to businesses providing cloud services. Blurring the responsibility between controller and processor would cause unnecessary confusion for data subjects, overwhelming costs and bring ambiguity to the controller-processor relationship.

We believe that the introduction of reasonable administrative fines is important to the revision of Europe's data protection regime. Unethical companies who use non-compliance as a competitive advantage inject mistrust into the business-client relationship and should be penalised. However, as pointed out in our position papers, a calculation of fines that does not account for the size of data processing activities within companies is unfair and would lead to disproportionate fines for companies.

2. Privacy is not an absolute right nor is it the only right

Privacy concerns, although very important, are only one piece in building a progressive data protection framework. **A "tunnel vision" approach to the protection of privacy rights could lead to the neglect of other rights enshrined in the EU Treaties.** According to the TFEU, it is an "essential objective" of the Union to bring about "constant improvements of the living and working conditions" of EU citizens. This makes it a legal imperative for the EU to work towards economic sustainability, competitiveness and full employment. GDPR trialogue stakeholders should consider whether overemphasizing the right to privacy and abandoning other Treaty values would be in contradiction with the EU's objectives for the internal market.⁴ An unyielding focus on privacy threatens the operations of European organisations in the future digital single market and compromises sustainable development, economic growth, job creation and social progress in Europe.

During trialogues, the Coalition urges stakeholders to remember that the protection of personal data under Article 8 of the European Charter of Human Rights **"is not an absolute right, but must be considered in relation to its function in society"**.⁵ Rather legislators must strike an appropriate balance between (*inter alia*) data privacy, economic development and advances in science and technology.

3. Innovation meets fundamental rights

Fast-developing digital technology is radically transforming our social and professional lives and enabling us to meet fundamental rights. For instance, the ability to collect, analyse and profile children diagnosed with cancer as well as the treatments they receive is a key success factor in awareness-raising work.⁶ These data analytics help to save lives and are aimed at promoting fundamental rights. Good examples can also be witnessed in other areas. For example, governments can improve social security by analysing data on unemployment models, environmental organisations can collate geospatial and satellite data to monitor deforestations,⁷ NGOs using predictive analytics can assist companies to eradicate slavery from their supply chain.⁸

³ <http://europeandatacoalition.eu/en/>

⁴ Treaty on European Union Art. 3(3), 2010 O.J. C 83/01

⁵ See *Handbook on European Data Protection Law*, European Union Agency for Fundamental Rights (FRA), Council of Europe (CoE) and the European Court of Human Rights (ECHR), p. 21, 2014

⁶ <http://europeandatacoalition.eu/en/company-b-ab/>

⁷ <http://epi.yale.edu/the-metric/big-data-environment-conversation-angel-hsu>

⁸ <http://www.cio.com/article/2936341/predictive-analytics/how-predictive-analytics-can-help-end-slave-labor.html>

During trialogues, the Coalition urges negotiators to remember that excessive favouritism towards **the protection of personal data comes at the expense of the fulfilment of other equally important rights** as noted above. Europe cannot realise the full potential of a Digital Society without relying on the collection and processing of data to create knowledge, competences and capabilities. Progressive legislation is the key to a successful European digital environment enabling improvements in fundamental rights and economic rights while also encouraging the promotion of societal goals.

4. Fulfilment of the Digital Single Market

In a letter to the President of the European Council dated 23 June, 8 Prime-Ministers consider that a **European Digital Single Market that is open and connected to the wider world is the prerequisite for a highly competitive digital ecosystem**. The future Regulation should account for the global nature of today's value chains and the increasing role of global digital markets wherein products and applications are based on systems constructed in both EU and non-EU countries.

During trialogues, the Coalition urges stakeholders to remember that the free flow of data across borders is crucial to ensuring European companies' access to fast growing markets inside and outside the EU. A more effective promotion of BCRs would facilitate further international transfers. Also, the introduction of legitimate interest as a legal basis to transfer data, as proposed by the Council in June 2015, will have immense economic relevance for companies based in the EU. Without legitimate interest as a safeguard for international data transfers, the ability for EU-based data processing to benefit from global scales while accessing national markets is damaged.

Conclusion

In conclusion, the Coalition supports the effort to reform the EU's Data Protection regime. It is vital that trialogue negotiations lead to **the adoption of a progressive framework that: is not built on a zero-sum preconception, recognises that the right to privacy is not absolute right, promotes other Treaty values and allows companies to innovate and remain competitive**. To do so, trialogue stakeholders should prevent the introduction of measures that are solely focused on increased privacy protection and so lose sight of other fundamental Treaty values such as economic development, job creation and the advancement of science and technology.

The Coalition is keen to contribute to the forthcoming trialogue discussions with our views, concerns and suggestions to truly improve the framework and to avoid the aforementioned risks.

We urge the negotiating parties to cut the Gordian knot that is data protection and conclude a progressive data protection framework for Europe!



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ABOUT THE COALITION

Our Coalition is made up of twenty European companies, from SMEs to Global Multinationals and non-profit organisations operating in a variety of sectors on a national, regional and global scale. With an aggregate turnover (2013) of over € 158 billion and some 752,000 employees worldwide, our footprint allows us to bring growth, progress and jobs to the EU's economy. Our membership includes...

... a global leader in power and automation solutions...
... the leading Central and Eastern European e-commerce company...
... a productivity solutions provider of compressors, vacuum solutions, construction and mining equipment...
... a non-profit organisation dedicated to collecting money to prevent and combat child cancer diseases...
... a global leader in household appliances...
... two providers of communications technology and services...
... a designer, engineer, manufacturer and distributor of outdoor power products...
... an investment company...
... a SME provider of online marketing through search engine marketing, conversion and lead generation...
... an e-commerce company providing payment services for online storefronts...
... an engineering group in tooling, materials technology, mining and construction ...
... an enterprise software corporation...
... a global provider of heavy trucks and buses, engines and services...
... a provider of assured, secure cloud services to the UK public sector...
... a global provider of renewable solutions in packaging, biomaterials, wood and paper...
... the leading university in technology and digital arts programmes...
... a provider of business software and services to more than 340 000 business in the Nordics...
... a producer and distributor of trucks, buses and construction equipment...
... the leading company in advanced mobile services...

Our businesses are profoundly different but deeply united by the need for clear roles and responsibilities, open cross-border data flows, balanced codified sanction guide lines, effective one stop shop and absence of overly prescriptive rules as fundamental conditions for long-term growth, competitiveness and prosperity, for both us and the economies in which we operate.

For further information please visit us www.europeandatacoalition.eu or contact us at info@europeandatacoalition.eu