

**EMOTA's Response to the European Commission's public consultation on the legal framework for the fundamental right to protection of personal data**

The European E-commerce and Mail Order Trade Association, EMOTA, hereby welcomes the opportunity to participate in the Commission's consultation aimed at obtaining views on the new challenges for personal data protection.

The Commission invites to reply to three questions:

- 1. Please give us your views on the new challenges for personal data protection, in particular in the light of new technologies and globalisation*
- 2. In your views, the current legal framework meets these challenges?*
- 3. What future action would be needed to address the identified challenges?*

**1. EMOTA's views on the new challenges for personal data protection, in particular in the light of new technologies and globalisation:**

The major new challenge in the light of the fast spread of new technologies and the increasingly globalised economy requiring cross-border data transfers in- and outside the EU lies in the way in which enforcement bodies apply the data protection regulations and the principles of the Data Protection Directive 1995/46/EC to those new technologies.

EMOTA members report incoherent and often intransparent interpretation and application of the EU data protection regulations across the EU, with at times excessive administrative requirements hindering data processing and transfers.

EMOTA is of the opinion that a constructive dialogue with industry bodies is needed in this area. There is scope for the European Commission, Article 29 Working Party, the national Data Protection Authorities and stakeholders to work together on providing interpretative guidance.

**2. EMOTA's views on whether the current legal framework meets these challenges:**

We are afraid that reports about data security breaches and abuses of consumers' personal data (and the public outrage that follows) have created the impression that legislation does not provide for adequate protection of individuals' personal data. It is however not more and stricter legislation what is needed, but proper enforcement at national level.

EMOTA strongly believes that the Data Protection Directive 1995/46/EC with its technology-neutral principles is an adequate framework also for the new digitalised and globalised environment. It is written in a way that allows regulators and legislators to interpret the rules with regard to new technologies, and to apply them accordingly.

The Data Protection Directive recognises that the establishment and functioning of an internal market in which the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded. Hence, it strikes a careful balance between the legitimate interest of organisations to process personal data, and the protection of the fundamental rights and freedoms of citizens.

There would be no benefit in disrupting this balance.

### **3. EMOTA's views on future action to address the identified challenges:**

- As said before, we see the problems in the lack of coherence in the application of European data protection legislation and the differences in the interpretation of data protection laws in the different Member States. They hinder international and cross-border business activities. Hence, it is of utmost importance to eliminate those differences.

- Further, we should point again to the existing shortcomings regarding adequate enforcement measures. It is rather because of significant shortcomings in the application and the enforcement of existing rules at national level if some data security breaches and abuses of consumers' personal data go unsanctioned, and not because of a lack of sufficiently strict rules.

This problem could be addressed as well by ensuring a more common approach to implementation and application of the Data Protection Directive.

- In view of the greatly increased amount of data processing operations, EMOTA should further suggest a reduction of administrative burdens for processing.

As the rules stand, a data controller must assess whether the data relate to a "data subject" (an identified or identifiable natural person) and whether an individual can be identified from those data and other information which is in the possession of or is likely to come into the possession of the data controller, so as to determine how the data should be treated.

We believe that the key factor for determining the conditions and obligations for the data processing should be the risk of harm that could result from the processing. Where the processing does not include any risk to the privacy of consumers or another kind of harm, there should be reduced obligations on businesses to register with the Data Protection Authorities; to notify processing; or to collect consent.

Such an approach could also be helpful to clarify the debate over IP addresses and when they should be considered personal data.

- The Directive recognises, in recital 56, that cross-border flows of personal data are necessary to the expansion of international trade.  
This would require that the data transfer is subject to favourable and uncomplicated conditions which make it as easy as possible for companies to comply with them.  
EMOTA is however afraid that the existing rules for cross-border data transfers are not suited for today's business realities. Nowadays, larger amounts of data are transferred more frequently and more rapidly between different locations, in- and outside the EU. The present complex and time-intensive approval process for data transfers to third countries forms a prohibitive trade barrier, especially for SMEs, because of the high costs it implies, and the significant element of uncertainty.  
The rules on data transfers should therefore be overhauled.
  
- Finally, we would like to point to Chapter 5 of the Directive which stipulates that Member States and the European Commission should encourage the drawing up of codes of conduct intended to contribute to the proper implementation of the national provisions adopted by the Member States, taking account of the specific features of the various sectors.  
This is an important element in order to ensure that the Data Protection Directive is applied flexibly and can easily be adapted to changes, such as new technological developments.

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Annex: List of EMOTA members

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## EMOTA Members:

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| <p><b>Austria</b><br/>HANDELSVERBAND<br/>(Retail Association Austria)</p>  | <p><b>Belgium</b><br/>BeCommerce</p>  |
| <p><b>Czech Republic</b><br/>ASOCIACE DIREKT MARKETINGU A<br/>ZÁSILKOVÉHO OBCHODU (ADMAZ)<br/>(The Direct Marketing<br/>and Mail Order Business Association)</p> | <p><b>Denmark</b><br/>FORENINGEN FOR DISTANCE - OG<br/>INTERNETHANDEL (FDIH)<br/>(The Danish Distance Selling and eBusiness<br/>Association)</p>                                |
| <p><b>Finland</b><br/>SUOMEN ASIAKKIISMARKKINOINTILIITTO RY<br/>(The Finish Direct Marketing Association)</p>  | <p><b>France</b><br/>FÉDÉRATION DU E-COMMERCE ET DE LA<br/>VENTE À DISTANCE (FEVAD)<br/>(E-Commerce and Distance Selling Federation)</p>  |
| <p><b>Germany</b><br/>BUNDESVERBAND DES DEUTSCHEN<br/>VERSANDHANDELS e.V. (bvh)<br/>(German E-Commerce and Distance Selling<br/>Trade Association)</p>           | <p><b>Germany</b><br/>BUNDESVERBAND DER DEUTSCHEN<br/>VERSANDBUCHHÄNDLER e.V<br/>(Association of German Mail Order Booksellers)</p>   |
| <p><b>Great Britain</b><br/>BRITISH RETAIL CONSORTIUM (BRC)</p>  | <p><b>Greece</b><br/>Ενωση Επιχειρήσεων Πωλήσεων Από Απόσταση<br/>Και Αμέσου Marketing (ΕΠΑΜ)<br/>(Union of Hellenic Distance Selling and Direct<br/>Marketing Enterprises)</p> |
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| <p><b>The Netherlands</b><br/>THUISWINKEL.ORG<br/>(Dutch Home-shopping Association)</p>  | <p><b>Norway</b><br/>DISTANSEHANDEL NORGE (DN)<br/>(Norwegian Distance Sellers )</p>  |
| <p><b>Poland</b><br/>STOWARZYSZENIE MARKETINGU<br/>BEZPOSREDNIEGO (SMB)<br/>(Direct Marketing Association)</p>   | <p><b>Romania</b><br/>ASOCIATIA ROMANA DE MARKETING DIRECT<br/>(ARMAD)<br/>(Romanian Direct Marketing Association)</p>  |
| <p><b>Russia</b><br/>Национальная Ассоциация<br/>Дистанционной Торговли (НАДТ)<br/>(National Association of Mail Order and Distance<br/>Selling (NAMO))</p>      | <p><b>Slovakia</b><br/>ASOCIÁCIA ZÁSIELKOVÉHO OBCHODU (AZO)<br/>(Slovak Mail Order Association)</p>   |
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