Position Paper

UEAPME[1] position paper on the European Commission's consultation on the legal framework for fundamental rights to protection of personal data

General remark

UEAPME, the European Association of Craft, Small and Medium-sized Enterprises, welcomes the European Commission's initiative to launch a consultation on the legal framework for fundamental rights to protection of personal data. Furthermore UEAPME appreciate the endeavour of the European Commission for giving an appropriate long time for consultation period.

Specific remarks

With respect to the questions asked by the European Commission, after a detailed consultation with our member organisations, UEAPME points out the following:

1) **The new challenges for personal data protection, in particular in the light of new technologies and globalisation**

   New technologies are more than significant for the European Single Market as they are the basis of the modern communication and interaction between enterprises and consumers. Using new technologies ensure general advantages to all participants in the commercial sector. These are also fundamental condition for cross-border commerce. The needs of modern market circumstances require a minimum standard of exchange of personal data. In this connection the increasingly exchange of personal data requires to tackle cross-border obstacles to reach the goal of a common market.

   Apart from the new technologies the main challenge for the protection of personal data is the increasing deposition of data by the consumer themselves. Information and personal data given voluntary by individuals hold a high danger for personal data. Through the increase of social networks established via internet also the attitude of the data protection has been changing. Furthermore in respect of this has to be mentioned when consumers are giving banking and credit card data without any doubt to pay via internet. With these respects it is necessary to **improve individuals' and consumers' information and especially education** about the risks by participating platforms with relevance to personal data.

[1] UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is 55820581197-35.

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The effects of new technologies are twofold: on the one side they are from general advantage for all participants of business activities but on the other side new technologies are from particular danger for consumers. Therefore UEAPME calls for actions for more active and improved consumer education on data.

2) The challenges within the current legal framework

The current framework ensures a high level of protection. The basic principle of data protection includes all kinds of technologies and is not bound, dependent or reduced to any special technology. The current legal framework – especially the Directive 95/46/EC – is basically a capable instrument of data protection concerning new technologies and refers – concerning to its purpose and measures – to all aspects of the scope of protection. Nevertheless the prohibitions of the Directive led to far too complex and expensive practices without ensuring a certainty. The lack of harmonisation has led to legal inequality and unfair competition within the Internal Market.

According to UEAPMEs view the main uncertainty is caused by unsecured data transfers outside the EU and this is the main point which has to be tackled. *In this respect the EC proposal to introduce a European certification scheme for "privacy aware" technologies, products and services rests an inside instrument.* There are already experiences with this discussion in Member States (Germany) which show that a practicable implementation of a European Certification scheme is not able to appropriate to all necessary exigencies. According to our view a general qualification of privacy awareness referring to technologies, products and services is not possible. It has to be taken into consideration that because of the wide range of different technologies, products and services every single one has to be qualified and certified individually. Furthermore the qualification has to be permanent to guarantee the validity of the certification, which requires a personal and bureaucratic effort. The introduction of this kind of certification scheme can be only a voluntary instrument. In case of a comprehensive duty for all new technologies, products and services would lead to commercial damages like market entries of new products or innovative services could not be performed in time. Therefore we suggest that the scope should not contain those new technologies, products and services which do not have special or high data relevance. Everything else would mean more bureaucratic obstacles, which are especially burdensome for SMEs. For this reason the European Certification scheme should meet the "think small first" fundamental principle introduced by the Small Business Act.

The current legal framework ensures a high level of data protection within the European Union although the text is far too complex and not in accordance with the state of the new technologies and services. The main uncertainties concerning unsecured data transfers existing outside of the EU. Therefore it is highly questionable whether the introduction of a European Certification Scheme is necessary and would not put more burdens on SMEs in respect of personal and bureaucratic effort. UEAPME can support such a solution only as a voluntary instrument which takes into account the principles of the Small Business Act. Furthermore processes like authorizations are far too costly instead of investing in real protections, consumer confidence and education.

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3) Needed future action in order to address the identified challenges

As already mentioned to prevent the increase of uncertainty and to achieve more confidence it requires to strengthen consumers' risk minded behaviour. Therefore it is necessary to ensure and to improve technical skills of the consumers in general.

With respect to needed future actions has to be mentioned again that in relation to other countries there is still a lack of harmonisation at European level referring to the level of data protection. The security of data transfers out of the EU is an important factor for consumers as well as for business engagement. Therefore the adjustment of data protection in relation to other countries is more important than to raise the protection level within the EU with the help of not appropriate measures and to enlarge the gap between the EU and other countries.

The sending, storage and reception of all official documents, accounting documents, minutes, statutes and all other declarations should be made possible in an electronic way in all Member States without imposing any requirements concerning data format or the technology to be used. (E.g. for the set-up of a subsidiary in another Member State, set-up of a daughter company,...)

Future rules, regulations have to be short and practical, with clear definitions and according to the languages applicable in the relevant fields. Furthermore regulations should be the basis of proportionate enforcement.
The following main challenges have been identified by UEAPME:

- **The need for an integrated vision on data protection in the networked society**: there is a need for rethinking the data protection in the network society where ICT widespread and personal data is processed for all kind of pubic, commercial, non-commercial and personal reasons.

- **Globalization**: the economic, social and technological changes seriously challenge the existing legislation. Regional solutions should be avoided as they create more uncertainties to data subjects and are too costly for businesses. The globalization of the digital economy requires a harmonization of the various data protection frameworks around the word. As already mentioned before the data protection outside the European Union in countries like China and India has been becoming more and more crucial. Therefore the globalization of the digital economy requires a harmonization of the various data protection frameworks around the word. These can be only than successful achieved if **all stakeholders are involved** in an appropriate way.

- **Communication problems**: it is more than important to create understandable law. It has to be kept short, simple and practical. Controllers and data subjects need to be able to understand the main targets of data protection, thus providing room for balanced investments and solutions.

- **Problems at the conceptual level**: beside of the 'legislation', as a single solution, other policy steering instruments such as education and positive rewards are left unused. There the European Commission should focus on fighting abuse of personal data instead of regulating legitimate use.

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- **Quality of law**: although data protection is also regulated at international level, it has to borne in mind that abstract international law cannot apply in the reality of the everyday life.

- **Definition problems:** clear and consistent use of definition is crucial as they are the basis for interpretation, investments, compliance and effective data protection.

- **Inefficiencies due to lack of true harmonization:** there are still differences have been considered in implementation within the EU. This is especially problematic in the case of multiple jurisdiction of the Member States law. Other problems are experienced in notification and prior checking requirements and international data transfer requirements. This means that data protection is still experienced as a significant barrier in the European Internal Market and the right balance between data protection and free flow of information has not been achieved yet. Through mutual recognition within the internal market could be the situation improved.

- **Lack of understanding of 'balanced approach':** experiences show that privacy discussions easily shift towards discussion on fundamental rights although the European Commission tried to find a balance with other legitimate issues through the Directive 95/46/EC facilitating economic, social and technological process. Furthermore supervisory authorities have become fundamental rights defenders which put their judgments into question. For these reasons there is a need for better separation of powers, as supervisory authorities should not act as EU policy makers and they should limit themselves to law enforcement concerning the national implementation of the Directive 95/46/EC. Furthermore there is a need for better public education and for the improvement of the education and professionalization of data protection professionals. The establishment of a sectoral public/ private advisory board of Controllers at EU level should be taken into consideration as well.

- **Red tape:** in several Member States are prohibitions related to data protection recognised as regulation creating administrative burdens. Resources are spent on getting the required paperwork (e.g. permits, notifications, prior checks, authorizations etc), instead of on real privacy and data protection and creation of consumer trust. It is often the case that highly specialized legal expertise is needed to sort out a company's data protection obligations.
  Pro-active governance/compliance management based on Privacy Impact Analysis/Business Impact Analysis would be more efficient and proportional.

- **Ineffective law enforcement:** the currently existing centralised law enforcement solutions through National Supervisory Authorities are quite inefficient. A decentralised redress mechanism would be a possible solution. Furthermore the so called "one-size-fits-all approach" ignores the existing risk mitigations and dispute resolution mechanisms in the market. The expectations in respect of the data subject are various depending from sector to sector and from situation to situation. The law enforcement coordination should happen through EU policy making and the Court of Justice.

- **Outdated transparency solution:** instead of using notification procedure, using the internet and publishing transparency information directly would be a better solution. Information which is already published through the company website should be excluded from the notification obligations of the National Supervisory Authorities.

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- **New solution for exercising access rights:** personal websites combine transparency solutions with easy access to personal data and the possibility to directly correct data by the data subjects themselves, in accordance with the basic principle of individual empowerment. Because of this, concerning e-access services used by individuals should be paper based obligations excluded.

One of the main future actions should be to raise the consumers' awareness concerning their own data provided via internet. Furthermore while rethink the date protection within the European Union the legislator should keep in mind the word wide dimensions of this issue as well. Law has to be drafted in an understandable way avoiding to put more burdens on small and medium sized-enterprises. In addition there is a need to improve the currently existing law enforcement mechanism.

Summarising the aforementioned with respect of the rapid development in the field of technology which has been changing the communication among people, private and public bodies increased attention shall be paid to certain data processing principles, such as purpose, proportionality, legality, limited keeping time, security and confidentiality, respect to individual rights and its control by an independent authority. The interconnection of certain national registers (e.g. register of insolvent/bankrupt physical and/or legal person) made in compliance with data protection rules is considered as a rational step forward. As certain formalities associated with the authentication of acts and documents are also felt as obstructions and are far too burdensome. For these reasons UEAPME supports revocation of all formalities related to official document authentication among the Member States, employing available new technologies, digital signatures inclusive.

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