



EUROPEAN COMMISSION
Impact Assessment Board

Brussels,
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Opinion

Title **DG JUST - Impact Assessment on Reform of Personal Data Protection in the EU**

(draft version of 5 August 2011)

(A) Context

Directive 95/46/EC, was adopted in 1995 with the two-fold objective of protecting the fundamental right to data protection and guaranteeing the free flow of personal data between Member States. 16 years later, rapid technological developments have brought new challenges for the protection of personal data. The current framework has not prevented fragmentation in the way data protection is implemented across the Union, legal uncertainty and a widespread public perception that there are significant privacy risks associated notably with online activity. The Charter of Fundamental Rights enshrines data protection as a fundamental right and the Lisbon Treaty introduces a specific legal basis for the adoption of rules on the protection of personal data that also applies to police and judicial cooperation in criminal matters. This presents an opportunity to build a stronger and more coherent data protection framework in the EU, backed with strong enforcement that will allow for the digital economy to develop across the internal market and will put individuals in control of their own data and reinforce legal certainty for economic operators and public authorities.

(B) Overall assessment

The report needs to be strengthened in several important respects. First, it should provide more evidence of the problems, such as fragmentation and inconsistent enforcement of data protection rules, identifying clearly where the gaps in the current framework and enforcement procedures are. Second, the case for EU intervention should be strengthened considerably from a subsidiarity and proportionality perspective by showing clearly how the proposals achieve the correct balance between necessary harmonisation and flexibility. Third, the basis for the estimates of costs and benefits should be clear and robust. Fourth, the analysis of the impacts on stakeholders should be enhanced, particularly relating to SMEs and micro enterprises and a deeper analysis of the impact of the proposals on competitiveness should be included. Finally the arrangements for monitoring and evaluation should be stated clearly.

(C) Main recommendations for improvements

(1) Strengthen the analysis of the problem. The report would benefit from a brief outline of what was hoped to be achieved by the current data protection framework, to what extent these objectives were achieved and what is hoped to be achieved by the revision of the framework. The IA should provide more evidence of the problems such as fragmentation and inconsistent enforcement of data protection rules, identifying where the gaps are, including in the relevant Member States and showing clearly how existing enforcement procedures are inadequate. The report should much better explain why, and how, the lack of a harmonised approach to data protection is a problem for EU citizens and businesses. The report should also better explain why the current structures at EU level for ensuring consistency need to be changed. The estimates provided for the calculation of total administrative burden and the annual costs of fragmentation should also be better explained and their robustness ensured. The report should better explain problems related to the transfer of data to third countries as well as how these problems will be addressed. The relationship with other relevant legislation such as the ePrivacy Directive and the Data Retention Directive should be clarified.

(2) Subsidiarity and proportionality. The necessity and added value of requiring greater harmonisation of data protection rules across the EU should be more clearly demonstrated. The report should fully justify the proportionality of the proposed measures, making a clear distinction between the extent to which a harmonised approach is necessary and where an appropriate level of flexibility can be left to Member States to tailor implementation of rules to their own needs. The report should better explain how the proposed new structures, such as the European Data Protection Advisory Board, will work in practice as well as what its remit will be. The circumstances and basis under which the Commission may intervene to ensure compliance with EU law should also be explained in greater depth.

(3) Assessment of impacts. The report should clarify the precise elements of the preferred option and outline clearly what the expected costs and benefits are. The extent of the impact on SMEs should be clarified in particular by clearly showing how the proposal to exempt micro enterprises and SMEs (from the proposed requirements to designate a Data Protection Officer) would be implemented and enforced. The report should also clarify the position of micro enterprises and SMEs in relation to the proposed requirement to carry out data protection impact assessments. The analysis of the impact on competitiveness should be strengthened. The report should also better explain how the measures proposed under the various options would apply in the case of potentially imbalanced relationships between data controllers and data subjects (such as employment relationships or company-client relations). The report should also better present the impact of the proposal to abolish notifications on all stakeholders including Member States' authorities.

(D) Procedure and presentation

The report should be clearer on the sequencing and timing of the expected implementation of the proposed new measures. The structure and presentation of the options and the assessment of impacts should be aligned so as to improve the readability of the document. The report should provide more information on when and how evaluations will be carried out. This should be explicitly linked to decision-making needs.

(E) IAB scrutiny process

Reference number	2010/JUST/279
External expertise used	No
Date of IAB meeting	7 September 2011