



# Position Paper

## **ANEC position on the European Commission's proposal for a General Data Protection Regulation (GDPR)**

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**ANEC-ICT-2012-G-059**

**European Association for the Co-ordination of Consumer Representation in Standardisation**  
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## 1. Executive Summary

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ANEC welcomes the European Commission proposal<sup>1</sup> to strengthen the personal data protection of all consumers, including children, as it reflects many of the points that we submitted during the public consultation in December 2009<sup>2</sup>. In particular, ANEC agrees that the principles of the Data Protection Directive (45/96) such as transparency of data collection, fair and lawful processing, purpose limitation and specification, data minimisation, consent, right to access, object, correct and withdraw one's data, are fit to effectively protect consumers personal data.

However, as shown by different European Implementation Reports of the Data Protection Directive, the general level of compliance with data protection law in the EU is not very high due to insufficient enforcement effort by national competent authorities and an apparent lack of knowledge of their rights among consumers<sup>3</sup>.

It is therefore the implementation of sound and valid legal provision (greatly depending on the resources allocated to the national competent authorities) which needs to be improved in ANEC's opinion.

We also welcome the Commission's intention to consider how to ensure a coherent application of data protection rules, taking into account the impact of new technologies on individuals' rights and freedoms and the objective of ensuring the free circulation of personal data within the Internal Market. Consumers tracking and behaviour monitoring, personal data access and control, aggregation of personal information and sharing of this data with third parties constitute current example of challenges for personal data protection<sup>4</sup>. With the expected increase of deployment and use of new technologies, it is safe to assume that consumers will be facing more and more erosions of their personal sphere. However, consumers often do not know that their personal information is being collected or used as they are not properly informed about it.

Although new technologies are part of the problem in protecting consumers personal data because they allow for easy collection and processing of personal information and provide very accurate location of people or objects linked to people (eg: cars, mobile phones, RFID tags, etc), ANEC believes they can also be an element of the solution.

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<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 2012/0011 (COD)

<sup>2</sup> ANEC-ICT-2009-G-086

<sup>3</sup> COMM(2007) 87 final, COM(2003) 265 final

<sup>4</sup> ANEC R&T study on Consumer requirements for RFID standardisation (ANEC-R&T-2007-ICT-002)

ANEC has fought long and hard for the principle of 'privacy by design and by default' to be applied to the protection of personal data. We are therefore delighted to see this principle enshrined in the proposal. Systems where consumers need to take conscious decisions to maintain their privacy present greater risks than those where privacy is built-in. Moreover, we welcome the mandatory Data Protection Impact Assessments and the particular measures towards the protection of children.

ANEC also called for consumers to be given a right to data-portability and interoperability which has now become key in use of services consumers use everyday such as cloud computing. We also welcome the new provisions on the notification of personal data breaches to consumers, already mandatory in the electronic communications field<sup>5</sup>.

However, ANEC is concerned about the measures intended to encourage industry self-regulation as we are not certain self-regulation is the best way to ensure data protection rules are applied to technological developments. We note in particular that existing provisions on self-regulation have rarely been used so far.

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<sup>5</sup> ANEC statement at Computers, Privacy and Data Protection (CPDP) 2012 conference (ANEC-ICT-2012-G-002)

## 2. Introduction

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The proposal for a General Data Protection Regulation (GDPR) is based on Article 16 TFEU, which is the new legal basis for the adoption of data protection rules introduced by the Lisbon Treaty. This provision allows the adoption of rules relating to the protection of individuals with regard to the processing of personal data by Member States when carrying out activities which fall within the scope of Union law. It also allows the adoption of rules relating to the free movement of personal data, including personal data processed by Member States or private parties.

The proposal is for a Regulation instead of a Directive as the direct applicability of a Regulation in accordance with Article 288 TFEU will reduce legal fragmentation and provide greater legal certainty by introducing a harmonised set of core rules, improving the protection of fundamental rights of individuals, and contributing to the functioning of the Internal Market.

One of the main aims of the GDPR is to meet the challenges posed by on-line technologies:

- The GDPR expands the definition of personal information to reflect the new ways that data may be linked to individual consumers (Art. 4).
- The GDPR strengthens the requirement of meaningful consent (Art. 7).
- The GDPR emphasizes transparency in data practices as well as data minimization (Art. 5).
- The GDPR improves the ability for consumers to gain access to the information about them that is collected by businesses (Arts. 12, 14).
- The GDPR establishes a new right to limit profiling (Art. 19).
- The GDPR promotes Data Protection by Design and by Default, as well as Privacy Enhancing Techniques (Art. 23).
- The GDPR establishes a broad data breach notification requirement (Art. 31).
- The GDPR creates a new responsibility to undertake Data Protection Impact Assessments (Arts. 31, 33-34).

- The GDPR strengthens the independence and authority of data protection agencies (Arts. 46-54).
- The GDPR strengthens the remedies and redress rights of consumers (Arts. 73-79).
- The GDPR affirms the importance of Freedom of Expression, particularly for journalistic, artistic and literary expression (Art. 80).
- The GDPR acknowledges the importance of scientific, historical, and statistical research (Art. 83).

ANEC participated to the European Commission Public Consultation on the legal framework on the fundamental right to protection of personal data in 2009<sup>6</sup>. We also commented on the European Commission Communication "A comprehensive approach on personal data protection in the European Union" in 2010<sup>7</sup> and we welcomed the proposal for a General Data Protection Regulation (GDPR) in January 2012<sup>8</sup>.

In this position paper, we only comment on the parts of the proposed Regulation that we consider as relevant from our filed of activity (especially focused on RFID and Internet of Things). Although we concur with Recital 13 about the protection of individuals which should be technologically neutral and not depend on the techniques used, we believe that the challenges and threats posed by specific new technologies should not be neglected.

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<sup>6</sup> ANEC-ICT-2009-G-086

<sup>7</sup> ANEC-ICT-2010-G-063final

<sup>8</sup> ANEC-PR-2011-PRL-009

### 3. General Provisions (Chapter I)

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#### Definitions (art. 4)

##### *"Personal Data"*

We feel the need to further clarify the meaning of "personal data" in the context of Internet of Things applications and systems. Based on our experience in the context of RFID standardisation, the broad and flexible approach of the present definition of "personal data" creates a certain level of uncertainty which standards-makers have to deal with.

The data collected by RFID technology and other NFC technologies will most probably relate to an "identifiable" person in the sense of the current Directive 1995/46/EC, for instance through the combination of different pieces of information or because the technology itself gives the technical means that can be reasonably used by the controller or by any third party to identify a natural person. Objects, item-level tagging may lead to the direct or indirect identification and profiling of consumers through a 'constellation' of RFID tags on several items; purely goods-related data could be combined with personal information contained on credit cards, loyalty cards or even bank notes in a near future. When combined with personal data or other identifying material, non-personal data could become personal data, because it could lead to the clear or possible identification of a natural person<sup>9</sup>.

##### *"Consent"*

We welcome the Commission's clarification and strengthening the rules on consent.

In the context of RFID/IoT systems and applications, we would like to stress that this is of utmost importance. For example, in the case of RFID applications, it needs to be established when consent can be obtained "through signs" and whether this complies with the criteria of informed, free and explicit consent.<sup>10</sup>

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<sup>9</sup> Contribution to ETSI STF 396 "Consumers concerns over RFID" (ANEC-ICT-2010-G-044)

<sup>10</sup> ANEC comment on final report of first phase M436 on RFID standardisation-Consumer Information Issues (ANEC-ICT-2010-G-061 Annex 3)

## **4. Principles (Chapter II)**

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### **Principles relating to personal data processing (art. 5)**

We welcome the Commission's introduction of a general principle of transparent processing of personal data in the legal framework and drawing up one or more EU standard forms to be used by data controllers.

### **Processing of personal data of a child (art.8)**

On the introduction of specific obligations for data controllers on the type of information to be provided and on the modalities for providing it, including in relation to children, we would like to suggest to make mandatory the highest level of personal data protection settings when consumers interact with the specific technology ("privacy by default"). Consumers expect the technologies they buy and use to protect their personal data by default, especially when it concerns their children.

## **5. Rights of the data subject (Chapter III)**

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### **Right to be forgotten and to erasure (art. 17)**

In addition to the clarification of the so-called 'right to be forgotten', i.e. the right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes, we would like to suggest to also work on the so-called "right to the silence of the chip" in a RFID/IoT environment. From a consumer perspective, data protection and privacy is one of the major challenges of the IoT as the risks of identification and profiling are a real deterrent for consumers.

### **Right to data portability (art. 18)**

ANEC also called for consumers to be given a right to data-portability and interoperability which has now become key in use of services consumers use everyday, such as cloud computing. We think that technical standards should be specified to ensure seamless interoperability for consumers' transfer of personal data without undue costs and burdens.

## **6. Controller and processor (Chapter IV)**

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### **Privacy by design and by default (art. 23)**

We welcome the Commission's proposal of an obligation for data controllers to carry out a data protection impact assessment in specific cases and especially the concrete implementation of the concept of 'Privacy by Design'. Design privacy from the very beginning in the development of technologies is absolutely crucial.

In addition, the highest level of personal data protection must be ensured when consumers interact with the specific technology (eg: Internet surfing). Consumers expect the technologies they buy and use to protect their personal data by default, especially when it concerns their children<sup>11</sup>.

However, with regards to the role of PETs, we would like to stress that PET solutions must be seen as complementary to strong data protection measures and not as an alternative to robust regulation. Indeed a PET is only as good as the underlying measures in place to protect privacy and will also depend on the quality of the information consumers are given about how to use it.

As consumers often struggle with the complexity of modern life, systems where they are required to take actions to maintain their privacy will present greater brand risks due to consumer forgetfulness than those where systems design privacy in a robust manner that does not require consumer action.

### **Notification of a personal data breach to the supervisory authority (art. 31)**

We also welcome the new provisions on the notification of personal data breaches to consumers, something already mandatory in the electronic communications field.<sup>12</sup>

### **Data protection impact assessment (art. 33)**

Based on our contribution to the elaboration of the RFID Privacy Impact Assessment (PIA) Framework, endorsed in April 2011 by the EU Commissioner Kroes, the Art. 29 Working Party and ENISA, we believe that PIAs can be a useful tool in preventing consumers' personal data to be put at risk. It is however essential to ensure that enforcement mechanisms are in place. The results of such

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<sup>11</sup> ANEC R&T study "The Standards Requirements for Consumer Internet Filtering Tools" (ANEC-R&T-2006-R-003).

<sup>12</sup> ANEC statement at Computers, Privacy and Data Protection (CPDP) 2012 conference (ANEC-ICT-2012-G-002)

assessments should be reliable, comparable and made public so that the consumer can know. This is why we are contributing to the development of European Standards for common European signage which could inform consumers about the presence and use of RFID readers and tags<sup>13</sup>.

### **Encouraging self-regulatory initiatives/code of conducts and exploring EU certification schemes** (art. 38-39)

We are not convinced that self-regulation is the best way to achieve guidance on how to apply data protection rules to new technological developments. We fear that in a self-regulatory environment there is not enough pressure on industry and/or other parties to set themselves high standards. Our position is supported by the fact that the current provisions on self-regulation in the Data Protection Directive have rarely been used so far.

We feel that only the mandatory approach is required, given the possible far reaching impact on privacy both of individuals, business and all other parties.

We would also like to express our concerns with regard to the use of EU certification schemes in the field of privacy and data protection, highlighting that this would benefit consumers only if the trustworthiness of such privacy seals would be ensured. Moreover, such certification schemes would make sense only if they provide consumers with additional protection levels than the legal obligations.

### **Art. 3.3c of the EU Radio Equipment and Telecommunications Terminals** (new proposal)

ANEC thinks that Article 3.3 of the EU Radio Equipment and Telecommunications Directive (1999/5/EC), currently under revision, may contain provisions that can help defend the consumer interest in relation to threats to privacy and security relating to the use of products, such as mobile phones and RFID tags<sup>14</sup>. Article 3 sets out 'essential requirements' that are applicable to all relevant equipment. It states that the EC may 'decide that apparatus within certain equipment classes or apparatus of particular types shall be so constructed that "it incorporates safeguards to ensure that the personal data and privacy of the user and of the subscriber are protected"'.

So far, there has not been an official EC decision stating that devices must comply with Article 3.3. It is ANEC's view that the future Regulation should remain the

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<sup>13</sup> ANEC-PR-2011-PRL-009

<sup>14</sup> Article 2 defines 'apparatus'(2a) as "any equipment that is either radio equipment or telecommunications terminal equipment or both' and its definition of 'radio equipment' (2c) means a product, or relevant component thereof, capable of communication by means of the emission and/or reception of radio waves utilising the spectrum allocated to terrestrial/space radio communication."

primary tool that will protect consumer personal data, but the R&TTE Directive could be used to require suppliers to protect the personal data held within their systems.

## **7. Delegated acts and implementing acts (Chapter V)**

While the present and future regulatory frameworks shall provide a stable structure of data protection, instruments of implementation can be flexible regulatory and policy tools related to specific technology or issues. They are generally the results of cooperation between different stakeholders such as public authorities, industry, NGOs, standards bodies, etc.

The use of implementing and delegated acts is part of this implementation process. The Regulation is making a wide use of the possibilities provided for by art. 290 and 291 of the TFEU. However, it is not clear to us when reference is made to technical standards such as in art. 18.3 on the right to data portability: *"The Commission may specify the electronic format referred to in paragraph 1 and the technical standards, modalities and procedures for the transmission of personal data pursuant to paragraph 2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2)".*

We think that clarification of the meaning of "technical standards" is needed.

We would like to express our concerns about the lack of clear and specific definition in the proposed Regulation of the objectives, content, scope and duration of the delegation of power to the Commission. For example, the power to adopt the delegated acts could also be conferred on the Commission for a determined period of time and not for indeterminate period of time as in art. 86. And the Commission could be required to make a specific report in respect of the delegated powers.

## **Acknowledgements**

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This position paper has been prepared in consultation with the ANEC membership.

ANEC wishes to thank those who have actively contributed to the drafting of this position paper.

## **APPENDIX – About ANEC and other documentation**

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### **A.1 About ANEC**

*ANEC is the European consumer voice in standardisation, defending consumer interests in the processes of technical standardisation and conformity assessment as well as related legislation and public policies. ANEC was established in 1995 as an international non-profit association under Belgian law and represents consumer organisations from 31 European countries. ANEC is funded by the European Union and EFTA, with national consumer organisations contributing in kind. Its Secretariat is based in Brussels.*

*ANEC has signed the European Commission's Register of Interest Representatives and accepted its Code of Conduct: Identification Number 507800799-30.*

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