

**BRE-JBZ**

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**From:** Kaai, Geran  
**Sent:** vrijdag 3 april 2015 15:58  
**To:** Verweij, Ellen  
**Subject:** FW: data protection  
**Attachments:** ECOMM-position-paper-Data Protection-recommendations DEF.pdf

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**From:** [redacted] [mailto:[redacted]]  
**Sent:** maandag 28 oktober 2013 09:59  
**To:** Kaai, Geran  
**Subject:** FW: data protection

Beste Geran,

Je contactgegevens kreeg ik van je collega Jeroen Westerink.

Ik benader je of ik donderdagmiddag aanstaande met je zou kunnen afspreken over de Data Protection Regulation en de op handen zijnde triloog.

Voor webwinkels is dit één van de allerbelangrijkste dossiers nu en van de komende jaren.

Bijgaand de positionpaper van Thuiswinkel.org en Ecommerce Europe over dit onderwerp. Ik stuur je de verkorte versie;)

Ik verneem het graag. Hartelijke groet,

Met vriendelijke groet,

[redacted]  
manager beleid & belangen

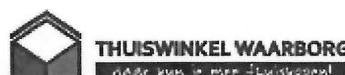


PS Heeft u zich al aangemeld voor onze nieuwsbrief?

**FASHION  
FORUM**

**29 10 2013**  
Locatie:  
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Vianen

Hét event voor fashion retailers en fabrikanten  
Thema  
**"klanten gezocht!"**  
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F: [redacted] E: [redacted]

[REDACTED]

[REDACTED]

[REDACTED]

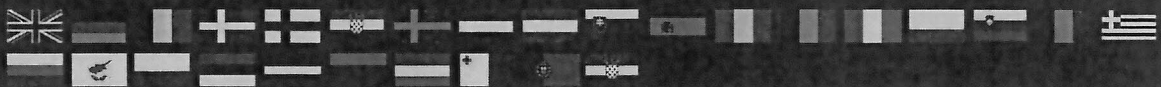
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# 10 Recommendations for a Data Protection Regulation

Processing and Free Movement of Data



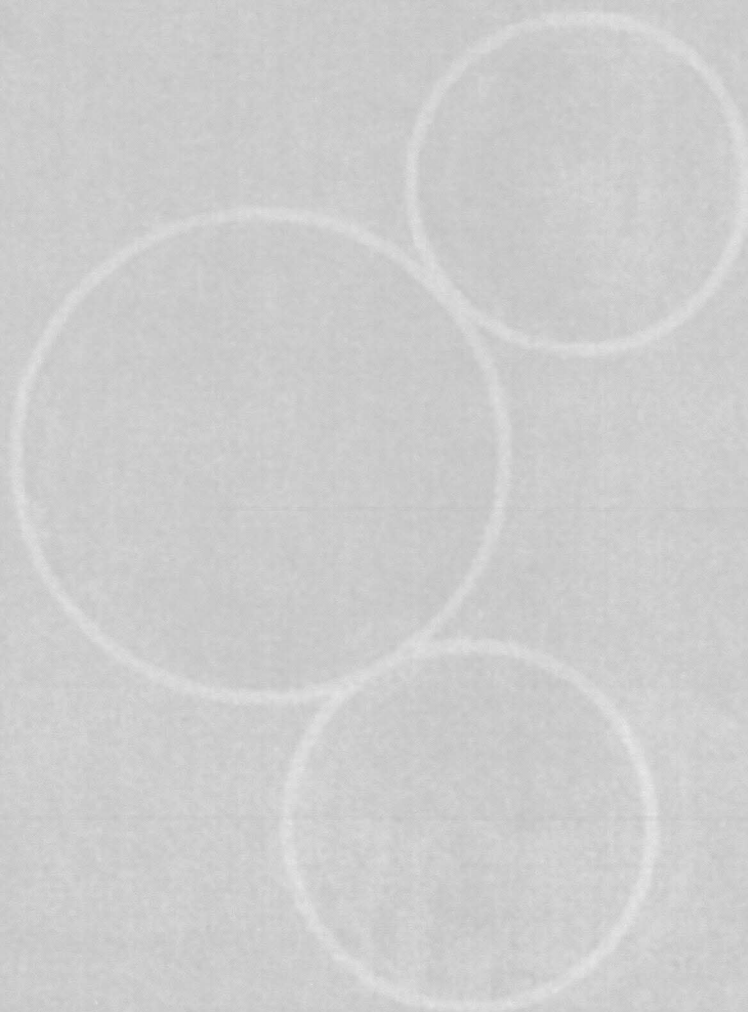
[www.ecommerce-europe.eu](http://www.ecommerce-europe.eu)





# Processing and Free Movement of Data

Processing and Free Movement of Data





## Ecommerce Europe

**Ecommerce Europe is the association representing companies selling products and/or services online to consumers in Europe.**

Ecommerce Europe seeks for an effective, flexible and efficient regulatory framework on privacy and data protection that stimulates growth and trust in (cross-border) e-commerce and states 10 recommendations.

### General vision

The key to reaching a safe and effective e-commerce industry is a fair balance between personal data protection interests, and the interest of free flow of information for the e-commerce industry.

### Data Protection Legislation

In essence, the current Privacy regulatory framework causes lack of consumer trust, lack of legal certainty, and lack of confidence for merchants to provide cross-border services. Also, the abundance of differing national requirements have slowed down growth in e-commerce.

Ecommerce Europe supports the proposal for a General Data protection Regulation as a suitable instrument, as such, contributing to harmonisation of the data protection framework throughout Europe.

## 10 Recommendations

To strengthen the single digital market and cross-border e-commerce, Ecommerce Europe emphasizes that ten adjustments are required. To arrive at a pragmatic and practicable processing of personal data for reasonable costs is crucial for the existence and growth of the e-commerce industry. Profiling serves as a key element for the market supply to meet the expectations and demands of the consumers, and thus proves to be beneficiary for both the industry and the consumers. At the same time, the responsible use of personal data is a key element for data subjects to maintain trust in e-commerce.

**Recommendation 1:** Further clarification on the concepts and definitions of 'personal data' and 'data subject' which should imply a context- and risk based approach towards personal data processing.

**Recommendation 2:** Ensure that a separate provision in Article 4 explicitly states that the concepts of 'pseudonymous data', 'encrypted data', and 'anonymous data' will NOT be considered personal data as such, and shall therefore fall outside the scope and the requirements as set out by the General Data Protection Regulation.

**Recommendation 3:** Change the requirement for 'explicit consent' (as proposed in Article 4.1(8) draft General Data Protection Regulation) into 'unambiguous consent'.

**Recommendation 4:** Leave open the possibility for data subjects to give their consent by appropriate device settings, pre-ticked boxes and clearly communicated default options.

**Recommendation 5:** The exception of 'legitimate interests pursued by a controller' is an open norm, which should not be fixed by limitative enumerations of possible overriding interests in a legally binding article.

**Recommendation 6:** Extend Article 6.1(f) by taking into account the "legitimate interests pursued by, or on behalf of a controller or a processor, or by a third party or parties in whose interest the data is processed".

**Recommendation 7:** The supervisory authorities and the courts should be authorized/equipped to balance out the interests of the data controller against fundamental rights and freedoms of the data subject.

**Recommendation 8:** Remove the proposal for a 'right to be forgotten' and strengthen the effectiveness of the existing right for individuals to have their data deleted or to withdraw their consent as laid down in Directive 95/46/EC.

**Recommendation 9:** Replace the 'right to data portability' by 'the right to obtain data', and limit its scope to user generated content, and thus, to social networks in particular.

**Recommendation 10:** Narrow the scope of Article 20 in the draft General Data Protection Regulation to profiling with negative/adverse effects on privacy of the data subject only, and clarify (through a recital) that profiling carried out for direct and digital marketing purposes, falls outside its scope.

## Personal Data

European rules applicable to the processing of personal data must meet the dual objective of both ensuring an adequate level of protection for personal data and ensuring the free movement of data within the EU.

The very broad definition of "personal data" as established in Article 4.1 may lead to unnecessarily high compliance costs and additional administrative burdens for merchants. Also, it could lead to a legal framework which is much too rigid for the fast pace of technological developments.

Ecommerce Europe emphasizes the importance of giving notion to the fact that not all data processing has the same privacy impact. Before data is to be considered as 'private personal data', the level of impact that processing has on the privacy of the data subject should be taken into account. The definition currently proposed in Article 4.1 of the draft Regulation does not allow for this distinction and therefore does not imply a context- and risk based approach towards personal data.

Therefore, Ecommerce Europe suggests the following definition in Article 4.1 of the Regulation, stating;

*"personal data means any information to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, by **technically available** means reasonably likely to be used by the controller where the use of such means does not entail excessive costs, disproportionate amount of time and does not require complex actions to be taken, in particular by reference to an identification number, location data, **unique** identifier or to one or more factors specific to the physical, psychological, genetic, mental, economic, cultural or social identity of that person".*

Naturally, a high level of consumer confidence should be maintained. The introduction of concepts and definitions to further promote business use of data while providing high level user protection should be encouraged.

**Recommendation 1:** Further clarification on the concepts and definitions of 'personal data' and 'data subject' which should



imply a context- and risk based approach towards personal data processing.

**Recommendation 2:** Ensure that a separate provision in article 4, explicitly states that the concepts of '*pseudonymous data*', '*encrypted data*', and '*anonymous data*' will NOT be considered personal data as such, and shall therefore fall outside the scope and the requirements as set out by the General Data Protection Regulation.

## Consent

The requirement for 'explicit consent' proposed in the Commission's draft Data Protection Regulation places unnecessary burdens on both consumers and merchants. Ecommerce Europe fears a significant imbalance for businesses in terms of security requirements and additional costs. This strict requirement will impede the pragmatic, balanced and fair use of personal data and the free flow of information, which are crucial interests for the e-commerce industry. Moreover, adding the 'explicit'-requirement, will result in user-unfriendly solutions for acceptance, placing unnecessary burdens on the consumer. A context-based approach to consent requirements, depending on the sensitivity of the data processing activities, is preferable.

Ecommerce Europe would like to emphasize that the privacy impact of personal data processing is context-dependant. Therefore, a risk based consent rule, depending on the specific circumstances and the context, is a more suitable approach.

The responsible use of personal data builds on the idea of transparency to create consumer trust and awareness. The data subject should be fully aware of what is going to happen, and have the ability to make a free and informed decision about the processing of its data for a specified purpose. In this sense, the principles as proposed in Article 4 of the draft regulation requiring "freely given, specific, and informed consent", prove to provide sufficient protection for the data subject. Therefore, unambiguous consent ensures a fair balance between the interests of data subjects and the e-commerce industry.

In addition, Ecommerce Europe supports leaving open the

possibility of consent by appropriate device settings. Under certain circumstances, clearly communicated default options or pre-ticked boxes should be deemed as valid means to acquire consent. This idea will do justice to both consumers' interests regarding user friendly solutions and legal certainty, as well as businesses' interests with regard to keeping additional costs to a minimum by means of a uniform technical standard. The requirement for 'explicit consent' hampers the possibility for the industry to introduce such systems.

As proposed, '*pseudonymous data*', '*encrypted data*', and '*anonymous data*' shall fall outside the scope and the requirements as set out by the General Data Protection Regulation and therefore require no consent before being processed.

**Recommendation 3:** Change the requirement for 'explicit consent' (as proposed in article 4.1(8) draft General Data Protection Regulation) into '*unambiguous consent*'.

**Recommendation 4:** Leave open the possibility for data subjects to consent by appropriate device settings, pre-ticked boxes and clearly communicated default options.

## Legitimate interests

Article 6.1(f) allows for the processing of personal data if the legitimate interests of a controller supersede the fundamental rights and freedoms of the data subject. Both, legitimate interests of the controller and the fundamental rights and freedoms of the data subject, are open norms that leave much room for interpretation. Ecommerce Europe emphasizes the importance of open norms and generally objects to amending more strict requirements for the processing of personal data.

In e-commerce, direct marketing and profiling in particular are crucial interests for data controllers. These interests should not be excluded as a rule, but should always be balanced against the fundamental rights and freedoms of the data subject. Therefore, amendments specifying conditions for superseding legitimate interests are welcomed, as far as they serve as guidance for both parties (controller and data subject) for a better understanding of the interpretation of these norms, or if they would serve as a contribution to the burden of proof of the data controller.

Administrative burdens and costs of mandatory consumer information should be kept to a minimum. It is therefore undesirable for data controllers to publish the reasons for believing their interests are superseding the fundamental rights and freedoms of the data subject at all times.

Ecommerce Europe stresses the importance of third-party processing in e-commerce. Not only can the legitimate interest of the controller provide a legal basis for processing, but also for the legitimate interests of a third party to which the data have been transferred.

**Recommendation 5:** The exception of 'legitimate interests pursued by a controller' is an open norm, which should not be fixed by limitative enumerations of possible superseding interests in a legally binding article.

**Recommendation 6:** Extend article 6.1(f) by taking into account the "legitimate interests pursued by, **or on behalf of a controller or a processor, or by a third party or parties in whose interest the data is processed**".

**Recommendation 7:** The supervisory authorities and the court should be authorized/equipped to balance the interests of the data controller against fundamental rights and freedoms of the data subject.

## Right to be forgotten

The ability to withdraw personal information is laid down in Directive 95/46/EC. The rule that private data may only be stored for a limited time supplemented by the right of individuals to have their data deleted and / or withdraw their consent, already forms, strictly speaking, a "right to be forgotten". Ecommerce Europe believes that the introduction of a new "right to be forgotten" is therefore unnecessary and could create redundancy with these provisions.

The right to be forgotten as proposed in Article 17 of the draft Regulation seems to be more in line within a context of social networks, assuming that data subject should be able to erase user generated content, which is content that is generated by the data subject itself.

Traders have a wide range of obligations to keep data on transactions for the sake of bookkeeping, customer warranty, tax-obligations, and more. Imposing a right to be forgotten in the e-commerce sector can lead to serious and unwanted consequences, such as additional costs and barriers by technical impossibilities.

**Recommendation 8:** Remove the proposal for a 'Right to be Forgotten' and strengthen the effectiveness of the existing right for individuals to have their data deleted or to withdraw their consent as laid down in Directive 95/46/EC.

## Data Portability

Ecommerce Europe questions the usefulness of the "right to data portability" in the e-commerce sector as laid down in Article 18 of the draft Regulation. In stead, it rather welcomes the strengthening of existing rights, such as the right of access, rectification and erasure and the newly proposed right to obtain data.

Imposing a right to portability or the right to obtain data in the e-commerce sector can lead to additional costs for businesses. For example, companies will have to develop new systems for data management and provide structured electronic formats only containing the data subject's "personal" data. It is also expected that this right will discourage companies from implementing innovative services, because sensitive commercial information is allowed to be transmitted to competitors.

Moreover, the value of this provision for data-protection interests to data subjects in the e-commerce sector is questionable.

**Recommendation 9:** Replace the right to data portability by the right to obtain data and limit its scope to user generated content, and thus, to social networks in particular.

## Profiling

Taking into account the real practice of profiling in ecommerce activities, Ecommerce Europe believes that the current definition of profiling in the draft Regulation leads to an unjustified and misleading tendency. It unjustly implies that all automated



decisions are profiling decisions, which are interchangeable and have a huge privacy impact.

Ecommerce Europe would like to highlight the benefits and value of profiling for marketing purposes for both the controller and the data subject. In the current information society, profiling is a fundamental part of commercial, political and charitable business processes and is essential for the functioning of the internal market.

Legitimate profiling is not a harmful activity. It is used to identify loyal customers and provide them with relevant information, special promotions and discounts. It is a tool used by organizations in every market segment, including commercial and non-profit, in pursuit of a legitimate business interest.

The legitimate interests to carry out profiling have been recognized by the Council of Europe in its Recommendation (2010)<sup>13</sup>. Ecommerce Europe considers it is important that the balance found in the Council of Europe Recommendation be reflected in the proposed Article 20. It therefore strongly advocates changing the title of Article 20.

**Recommendation 10:** Narrow the scope of Article 20 draft General Data Protection Regulation to profiling with negative/ adverse effects on privacy of the data subject only, and clarify (through a recital, potentially) that profiling carried out for direct and digital marketing purposes falls outside its scope.



## POSITION PAPER

European Commission  
Directorate-General for Economic and Financial Affairs

The Commission and Member States have agreed to support the initiative to create a common framework for the development of a digital single market. This initiative is part of the Commission's Digital Agenda for Europe, which aims to create a single digital market for goods and services across the EU.

The Commission will continue to work closely with Member States to ensure the successful implementation of the Digital Agenda for Europe. This includes supporting the development of a common framework for the digital single market, which will enable businesses to operate seamlessly across the EU. The Commission will also continue to support the development of digital infrastructure, such as high-speed broadband, and will continue to work on digital skills training for citizens and workers.

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# EUROPE 2013 Key data at a glance



ecommercenews



## El comercio electrónico crece en Europa un 19%, hasta los 311.600 MME

El comercio electrónico avanza imparable en el viejo continente. Muestra de ello son los resultados del estudio sobre ecommerce B2C realizado por la asociación Ecommerce Europe, la organización europea para los retailers online, en colaboración con



## Southern Europe catching up on e-commerce boom

Europe continued to hold the world's largest share of the business-to-consumer e-commerce market, increasing its total revenue by almost one-fifth to €311.6 billion during 2012, according to a new survey seen by EurActiv.



Daniel Marco  
@dmarco

"@Ecommerce\_EU: European E-commerce to reach € 312 billion in 2012, 19% growth [ow.ly/ljmjR](http://ow.ly/ljmjR)" @tic #idigital #ecommerce



Martí Manent  
@martimanent

España, cuarto país europeo en comercio electrónico European E-commerce to reach €312 billion in 2012 [ecommerce-europe.eu/press/2013/05/...](http://ecommerce-europe.eu/press/2013/05/...)



Andres Ponce  
@andresponce

PRESS RELEASE: European E-commerce to reach € 312 billion in 2012, 19% growth... [ow.ly/ljrtN](http://ow.ly/ljrtN)

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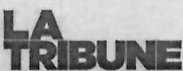


UK,  
Germany, France  
61% of total  
e-commerce sales  
in Europe



## Les ventes de e-commerce en Europe ont atteint 311 milliards d'euros en 2012

La progression est de 19% selon le rapport d'Ecommerce Europe, qui regroupe les acteurs européens du secteur.



## L'activité du e-commerce européen a bondi de près de 20 % en 2012

L'an dernier, les ventes en ligne ont permis de réaliser 311,6 milliards d'euros de chiffre d'affaires en Europe. Les marchés les plus importants sont le Royaume-Uni suivi de l'Allemagne et de la France, qui comptent à eux trois pour plus de 60% des ventes totales.



## E-Commerce: Umsatz in Deutschland knackt Marke von 50 Milliarden Euro (Infografik)

Jochen Kirsch irrit. Doch ganz so unrecht dürfte ihm das nicht sein. Denn der E-Commerce-Markt in Deutschland erreicht schon jetzt die Marke von 50 Milliarden-Euro. Diese Zahl nennt der European B2C Ecommerce Report des europäischen E-Commerce Verbands „Ecommerce Europe“.



820 million  
people live in Europe.

529 million  
people use the internet.

250 million  
people are e-shoppers.

## Top 5 E-commerce countries in turnover (EUR million)

UK	96,193
German	50,000
France	45,000
Spain	12,969
Russia	10,302

ECOMMERCE EUROPE RELEASE REPORT:  
Some facts 22 May till 26 May:  
143 tweets with Ecommerce Europe in it  
38 news items / blogposts  
25.000 estimate of the range of impressions

\*stats from Tracebuzz





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