

Considerations on Article 38 - Codes of Conduct Proposal for a Data Protection Regulation

This purpose of this document is to present the case for a bigger role for codes of conduct in the creation of an effective co-regulatory landscape for the protection of data across the Union. It also seeks to express concerns that the current wording of Article 38 on codes of conduct within the draft General Data Protection Regulation will restrict the growth of codes and hamper their ability to, in support of the Regulation, effectively protect consumer's data and facilitate digital innovation.

Executive Summary

Codes of conduct are well suited for the purpose of enhancing data protection and privacy standards in the digital world. At their best, they are dynamic, inclusive, accountable and increasingly sophisticated policy tools designed to complement legislation.

The important role that codes of conduct can play in this context was acknowledged within Article 27 of the 1995 Data Protection Directive; yet this article has not had the desired effect. Indeed, we would go so far as to say that the article, originally designed to encourage the creation of codes of conduct, has acted as an inhibitor to the emergence and growth of effective codes.

It is clear that Article 27 has failed to deliver any critical mass of self-regulatory initiatives. The FEDMA code is to-date, the only one which has formally been approved under Article 27; a process which took 5 years to complete. The RFID PIA Framework supported by a Commission-led expert group and requiring the endorsement of the Article 29 WP, still took over 3 years.

In light of the speed of change across the digital landscape, an approval process of this length seriously risks delaying the introduction of solutions and making any approved code obsolete at the point of approval. It also undermines one of the core strengths of codes of conduct; their ability to react quickly to address concerns as they evolve.

In addition, Europe's self-regulatory framework for online behavioural advertising, managed by EDAA, was never submitted to the Article 29 Working Party, partly due to the limited appreciation of the full range of purposes which codes of conduct can serve.

Unfortunately, the proposed wording of Article 38, on the drawing up of codes of conduct, in the General Data Protection Regulation is heavily based on the 95 Directive. As such, we believe this Article in its current form risks repeating the same mistakes as its predecessor.

Therefore we strongly encourage all stakeholders, to consider positive amendments to the text to:

- Explicitly acknowledge the significance of codes of conduct and the full range of purposes they can serve
- Specify the obligations of all actors to ensure legal certainty
- Provide proportionate incentives for industry to embrace codes of conduct
- Ensure the full integration of codes of conduct across relevant chapters of the Regulation

Codes as complementary not competitive

To be clear, codes of conduct are not designed to replace or compete with legislation. They are complimentary policy tools which are capable of enhancing standards in fluid, fast moving and complex environments.

This is especially the case in the digital world, where the growth of the market and the speed of technological innovation makes codes of conduct a critical component, along with legislative underpinnings, in addressing emerging policy concerns. They also place some of the resource burden required to achieve progress on industry. The sheer mass of digital activity also makes leveraging industries resources and expertise a very sensible proposition.

Codes of conduct are a voluntary framework, entered into freely. This should not undermine the value of codes as, if the code is effective, formally acknowledged and properly incentivised, participation in the code would make commercial sense.

Amending Article 38 within the GDPR

- *Explicitly acknowledge the significance of codes of conduct and the full range of purposes they can serve*

The draft Data Protection Regulation contained no explicit endorsement of codes of conduct. Without such a reference codes of conduct will continue to be received with undeserved skepticism by key actors and through them, broader society.

Currently, the only indications within the draft Regulation of the value of codes of conduct are:

- A statement that industry should be encouraged to use them (Recital 76, Article 38);
- An unclear reference to one of the value propositions of codes of conduct – namely that they can contribute to legal compliance (“facilitate the effective application of”, or “intended to contribute to the proper application of” the Regulation – Recital 76, Article 38).

We would encourage an explicit acknowledgement, similar to the Audiovisual Media Services Directive (R44), of the value of codes of conduct and the responsibility of all stakeholders in encouraging the creation of best practice codes.

We would also welcome an acknowledgement that codes of conduct can, in certain circumstances, be the most appropriate tool, whether for the effective application of the Regulation or otherwise, in order to achieve policy goals.

- *Specify the obligations of all actors to ensure legal certainty*

Industry must have legal certainty on what is expected of it and on what can be expected from other actors in the process in order to encourage the take-up of codes of conduct.

This is particularly critical in relation to the obligations of the relevant supervisory authorities regarding prompt review, response and promotion for the code. Guidance on the specific requirements from industry, such as impact assessments, number and nature of signatories, monitoring proposals, required consultations, would also be contribute to the streamlining of the process.

Conclusions:

Legislators now have the opportunity to realise the potential which codes of conduct' represent.

We encourage all stakeholders to clearly express within the Regulation:

- The important role which codes of conduct can play in finding the right mix of legislation and code of conduct in the formation of a policy landscape;
- The full range of purposes which codes of conduct can play;
- The obligations of the actors involved;
- The incentives which signatories of the code of conduct should expect.

The Parliament's adopted amendments go some way to better integrating codes of conduct into other areas of the draft Regulation and clarifying actors' obligations but a lot more can still be done to improve the effectiveness of this Regulation in creating codes which are beneficial for all parties involved.

Suggestions for article text:

The following paragraphs describe in some detail the kind of text that we believe would be an appropriate framework for codes of conduct. We do not provide actual legislative text here, because we prefer to build consensus around the principles first:

Recital 76

- The recital should mandate a wide array of authorities to explicitly recognise the important role of codes of conduct in creating consistent and effective protection of personal data throughout the Union and encourage those authorities to promote their use.
- The recital should explicitly acknowledge that codes may serve purposes other than legal compliance. For example, the implementation of protections other than those set out in the Regulation but which pertain to the protection and processing of personal data

Recital 76(a)

- The recital should clearly state the importance of offering proportionate incentives for industry to adopt codes of conduct and to submit these to the relevant authority for opinion in order to ensure critical mass of signatories and encourage harmonisation of standards through codes.

Article 38

- The first paragraph should list the various purposes that codes of conduct can serve, including legal compliance, protections outside those specified in the law, harmonization in the interests of the single market, spread of EU standards beyond the EU, and creation of consistent consumer experiences in order to build trust.
- Another paragraph, as proposed by the Commission, should list specific topics, within the Regulation, where legislators wish to see codes applied. This should be exhaustive.
- A further paragraph should set out criteria for the general validity of codes. We would propose compatibility with the law, transparency, critical mass, accountability/monitoring and dispute resolution.