

**IAB EUROPE COMMENTS ON THE CURRENT COUNCIL DISCUSSIONS ON CHAPTER IV -  
'RISK-BASED APPROACH'**

Brussels, 26 September 2014

IAB Europe is informed that the Council's working group of national experts on data protection is currently examining a consolidated draft text on Chapter IV of the proposed general data protection regulation, and that it is hoped that the text can be formally agreed at the upcoming Justice and Home Affairs Council, on 9<sup>th</sup> - 10<sup>th</sup> October.

In this connection, we would respectfully ask the national experts to consider the following observations, and to take account of them in their further work on the draft text.

**1. Processing of data on user preferences - Recital 60**

According to our information, the current text includes multiple references, in both recitals and legal articles, to the importance of data controllers and processors taking a graduated approach pursuant to which data processing practices reflect the actual risk to the data subject arising from the processing - both the likelihood of prejudice arising, and the nature of the potential prejudice. The importance of context is also evoked repeatedly. These references are to be welcomed as they provide good guidance to operators and incentivise investment where it is needed most, as well as encouraging enforcement authorities to focus on real harm.

This said, there are a few areas where the guidance could be clearer. An example is Recital 60, which is apparently intended to illustrate what kinds of harm may actually arise from data processing, and what types of data processing appear to pose the greatest risk of those kinds of harm arising. Amongst the different types of data processing evoked, the Recital includes both the processing of highly sensitive data (e.g. on health or criminal convictions) and the processing of data related to personal preferences or interests. The structure of the Recital suggests that these may be equally risky data processing activities. For the avoidance of confusion, we would propose that the reference to personal preferences or interests be removed, or worded in such a way as to more clearly align with Article 20 on profiling. This would ensure that only the processing of personal preferences and interests that may produce legal effects or significantly affect a natural person could be considered to pose any meaningful degree of risk.

**2. Pseudonymisation - Articles 23, 30**

We gather that that consolidated text includes references to pseudonymisation, notably in Articles 23 and 30. We find these references to be a helpful acknowledgement and endorsement of an important means of ensuring a high level of data protection for users. We would hope that when the Member States reach the stage of discussing definitions in Article 4, there will be support for introducing a definition pseudonymous data - where pseudonymous data includes both data that has never reached the point of actually identifying an individual, and the technique of rendering data less identifiable - so that this pro-privacy practice is well-reflected in, and incentivised by, the future regulation.

### 3. Treatment of the concept of "risk" in the proposed regulation

Though the apparent attempt to focus regulatory attention on higher-risk activities is welcome, the word "risk" seems to be being used in current DAPIX discussions to denote both the chances (or likelihood) that something (bad) will happen to a data subject as a result of data processing, *and* the severity of the (potential) damage. This simplistic, linear approach to characterising risk misses the fact that there may in some cases be high chances of e.g. data loss or unintended disclosure but low potential harm to the data subject (e.g. because the data being processed are not sensitive), and in others low chances of data loss or disclosure but greater potential harm (e.g. because the data being processed are indeed sensitive). The future regulation needs to distinguish between different possible scenarios, and focus the heaviest obligations on data controllers engaging in data processing where the potential harm is highest. This might be made easier by the insertion of references to low and medium risk to complement the current references to high risk.

We look forward to continuing to work with the Council on this important dossier.

Sincerely yours,

[Redacted Signature]

CEO

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