



**EMOTA**

The European eCommerce  
& Omni-Channel Trade  
Association

*Lessons From Europe on  
Data Protection*

- EMOTA is the European umbrella federation representing online and omni-channel traders across Europe
- Our mission is promote e-commerce and work with EU decision-makers to remove any barriers or impediments to cross-border trade.
- Our membership includes associations and companies from over 19 different European markets; both large (Germany, UK) and small (Estonia)



# Members



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- Decades spent developing a data protection framework which is still ongoing.
- **Data Protection Directive 1995**
- General Data Protection Regulation (Applicable from 25 May 2018, but in transposition from 2016) - Horizontal
- **E-Privacy Directive 2002, Updated in 2009 (focuses on electronic communications & electronic marketing)**
- Specific Data Protection Directive concerning prevention, investigation, detection or prosecution of criminal offences and criminal penalties... (Applicable from 6 May 2018)

# Data Protection Directive –

- Adopted in 1995, with two goals in mind:
- To protect the fundamental right to data protection
- To guarantee the free flow of personal data between Member States

## It Applies to:

- Personal data – meaning everything that identifies an individual: from photographs, a personal telephone number to address etc.
- Processed – by automatic means (computer databases of customers) and data contained in or intended to be part of a non-automated filing systems
- To economic operators that are established or operate within the EU, or whenever the controller of the data uses equipment located inside the EU to process personal data i.e. third country operators

Lays down Specific Criteria for Data Quality, which the Controller must Comply With:



**Notice:** subjects whose data is being collected should be given notice of such collection)



**Purpose:** Data collected should be used only for state purpose(s) and for no other purposes



**Consent:** Personal data should not be disclosed or shared with third parties without consent for its subject.



**Security:** Once collected, personal data should be kept safe and secure from potential abuse, theft or loss.



**Disclosure:** subjects whose personal data is being collected should be informed as to the party or parties collecting such data.



**Access:** subjects should be granted access to their personal data and allowed to correct any inaccuracies.



**Accountability:** subjects should be able to hold personal data collectors accountable



....Sellers Cannot Process Data unless the following conditions have been met:

- They have collected consent and the processing is in line with the law
- When the processing is necessary to enter into a contract with the data subject
- When the processing is necessary for the seller's legal obligations (guarantees, after sale services, tax rules).
- The seller or a third party has a legitimate interest to process the personal data and this is not overruled by the fundamental rights of the data subject

- As it was adopted as a Directive, this led to **significant divergence** in the 28 Member States.
- **Enforcement Issues** – due to resource issues and responsibilities of the national data protection authorities in the EU i.e. powers to fine
- **Lack of Compliance** – leading to unlevel playing field between compliant & non-compliant companies
- **Controller & Processor** – Unclear on definitions, roles and responsibilities, as technology and the market developed
- **Legal Grounds for Processing** – issues with legitimate interest
- **Scope** – No enforcement mechanism for international processing.
- **Forum Shopping**

- **Lack of Awareness** – rules were too complicated to understand (domestically)
- **Lack of Confidence** for Cross-Border Shopping – due to linguistic issues and different rules for MS (consent interpreted differently)
- **Lack of Enforcement** – Due to consumer not knowing where to enforce their rights in cross-border context.
- **Consent Fatigue** – led to automatic consent i.e. not specific, explicit and informed and meaningful
- **Log-in Model** – Due to burden of proof for controllers & processors & high-cost of data.

- **High Compliance Costs** – Need to design complex terms and conditions i.e. have specialized professional.
- **High Administrative Burdens**– due to notification requirements, documentation etc.
- **Unlevel Playing Field** – between compliant & non compliant companies due to weak enforcement
- **Barrier to Innovation** – rules too complex, too prescriptive, especially for new tech i.e. I.O.T.
- **Complexity**– 20 page directive with numerous lengthy guidance document. New GDPR is over 100 pages, with lengthy binding guidance to follow-up
- **Accurate Data** – Became costly to access high-quality data, but less so today due to innovation.

## Key Messages



Avoid a 'Prohibition Model' i.e. need to be able to promote competition in data & innovation



Avoid a 'Prescriptive Approach' – i.e. not process driven but principle based, otherwise creates administrative burdens



Future Proof– technology moves too fast to regulate effectively. Keep it principle based.



Global Framework for Global Supply Chains i.e. E-Commerce is a global industry and data is borderless.



Data Protection Authorities Should Focus on Correcting Compliance Issues, as opposed to focusing on issuing penalties. i.e. led to forum shopping.

- Harmonized framework i.e. Regulation instead of a Directive
- Larger territorial scope to cover third country operators that process EU data subjects
- Enhanced Rights for Data Subject: Right to be forgotten, data portability rights, right to object
- Increased Obligation for companies:
  - Obligation to appoint a data protection officer for certain types of processing
  - Data Protection by Design & Accountability
- Increased Complexity i.e. over 100 page regulation and lengthy guidance documents.

# Questions?

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