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The GDPR six years in: from harmonisation to alignment



Executive summary

Six years into the implementation of the General Data Protection Regulation (GDPR),¹ Europe's digital legal landscape has undergone significant transformations. From evolving case law from the EU's Court of Justice (CJEU) to the completely new pieces of legislation stemming from the AI Act and the European data strategy, Europe's regulatory environment has become much more complex.²

Our vision for Europe in 2030 underscores the emergence of potential internal market barriers and a fresh challenge to the unified European data market due to recent data regulations. It urges the European Commission to prioritise the implementation of the existing data strategy rather than introducing additional regulations.³

In 2020 we identified opportunities for harmonisation.⁴ As the GDPR now undergoes a second review, new challenges have arisen, particularly with the introduction of additional digital rules. The AI Act, the Data Act and other parts of the data strategy will all significantly impact organisations' data processing operations, often conflating personal and non-personal data. The impact of these new laws is yet to be determined, but the potential for overlaps and erratic enforcement is real. We have already sounded the alarm regarding the

¹ Regulation (EU) 2016/679.

² COM(2021) 206 final. The European data strategy comprises several new regulations adopted or proposed during the current Commission mandate. These include, most importantly, the Data Act (Regulation (EU) 2023/2854), the Data Governance Act (Regulation (EU) 2022/868) and the proposed European Health Data Space (EHDS) (COM(2022) 197/2).

³ See *Europe 2030: A digital powerhouse*, available at <https://cdn.digitaleurope.org/uploads/2023/11/DIGITAL-EUROPE-MANIFESTO-2024-FULL.pdf>.

⁴ See *Two years of GDPR: A report from the digital industry*, available at https://cdn.digitaleurope.org/uploads/2020/06/DIGITALEUROPE_Two-years-of-GDPR_A-report-from-the-digital-industry.pdf.

potential negative impact on data flows,⁵ but these issues permeate other aspects of data processing.

Before the impact of these new regulations is clear, a reopening of the GDPR is premature. The current GDPR review should focus on addressing interpretation issues and fostering companies' compliance:

- ▶ The review should highlight the need to prevent diverging interpretations and enforcement across legislation and Member States. It should aim to forecast and reconcile the responsibilities of data protection authorities (DPAs) and other competent authorities under new regulations like the AI and Data Acts. It should address areas of friction between the GDPR and new regulations, promoting collaboration between the Commission, competent authorities and industry stakeholders.
- ▶ The European Data Protection Board (EDPB) should prioritise practical guidance to strengthen harmonisation, and to reduce compliance burden whenever the GDPR text allows. These include guidance on anonymisation and pseudonymisation, distinguishing personal from non-personal data, research and innovation in health and AI, tools to support SMEs, joint controllership, compensation thresholds for non-material damage, and tools for data subject rights compliance.
- ▶ Work should be pursued to enhance adequacy decisions and other data transfer tools. This includes advancing work at a global level on mutual recognition of standard contractual clauses (SCCs), fostering more consistent recommendations from DPAs, facilitating binding corporate rules (BCRs), and the development of pan-European codes of conduct and certification.

Industry needs a focused GDPR review that addresses interpretation challenges and promotes compliance for companies, strengthening Europe's single market. It must prepare alignment with new regulations, promote practical guidance from the EDPB, secure international data transfers, and the full use of GDPR mechanisms. The next review in 2028 will be better able to assess the impact of recently adopted data strategy legislation, ensuring a more comprehensive evaluation of the evolving digital landscape.

⁵ See *Data transfers in the data strategy: Understanding myth and reality*, available at https://cdn.digitaleurope.org/uploads/2022/06/DIGITALEUROPE_Data-transfers-in-the-data-strategy_Understanding-myth-and-reality.pdf.



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Alignment with new regulations in the digital sector

The aspiration to establish a seamless flow of data within Europe faces a renewed challenge due to the influx of recent legislation overseeing data processing, frequently blurring the lines between personal and non-personal data. Despite their intent to enhance legal clarity, these new regulations compound the existing GDPR rules, potentially complicating data processing procedures for European companies. The introduction of diverse sets of rules for identical processing operations poses a significant risk, as it may lead to conflicting interpretations and enforcement measures from various authorities.

As the EDPB's own contribution to the GDPR evaluation notes, the GDPR's remit under new regulations remains unclear and lacks consistency.⁶ The comprehensive coverage of personal data by the Data Act and the creation of new enforcement authorities, along with the designation of potentially new competent authorities under the AI Act, underscore the urgency for a well-defined framework. The absence of effective cooperation mechanisms among these diverse laws and authorities heightens uncertainty for European companies. The existing issue of divergent interpretations from various types of authorities has already posed challenges in Member States, a situation that should not be exacerbated.⁷

It is crucial for the upcoming GDPR review to comprehensively map out areas of friction between the GDPR and these new regulations. The European Commission and competent authorities should collaborate with industry to address the complexities arising from the coexistence of these regulatory frameworks.



Areas for practical guidance from the EDPB

The EDPB's guidelines play a crucial role in supporting the practical implementation of the GDPR and establishing a standard for adherence across Member States. Despite this, there remain several areas where harmonisation and guidance from the EDPB are lacking, as highlighted in the 2020 report.⁸

Revised and more pragmatic guidelines on the concepts of personal data and anonymisation are pivotal for the successful application of the GDPR, especially in light of forthcoming legislation such as the Data Act. It is essential

⁶ P. 5, *Contribution of the EDPB to the report on the application of the GDPR under Article 97*, available at https://edpb.europa.eu/system/files/2023-12/edpb_contributiongdprevaluation_20231212_en.pdf.

⁷ For instance, Finland has seen different interpretations of the Payment Services Directive (Directive (EU) 2015/2366), the Anti-Money Laundering Directive (Directive (EU) 2015/849) and the Vehicle General Safety Regulation (Regulation (EU) 2019/2144).

⁸ COM(2020) 264 final.

that these guidelines strike a balance, offering realistic solutions without imposing additional requirements, staying true to both the spirit and explicit language of the GDPR.

Moreover, the guidelines should cater to real-world situations, providing practical and balanced interpretations of the GDPR. This approach becomes particularly vital for smaller companies without extensive legal teams, enabling them to meet legal requirements effectively.

To ensure the inclusivity of stakeholders and foster a collaborative approach, more effective consultations are necessary. This should include in-person public meetings that allow for a meaningful exchange of ideas. It is essential that these consultations go beyond passive listening and foster an active dialogue between DPAs, the EDPB and stakeholders. Such engagements would contribute to a more comprehensive understanding of practical challenges, and lead to guidelines that are not only legally sound but also feasible for diverse organisations.

The areas listed below would strongly benefit from updated guidance on the application of the GDPR, in particular for SMEs:

- ▶ Anonymisation and pseudonymisation, for instance where the risk of identifiability has been reduced to a negligible level with privacy-enhancing technologies (PETs);
- ▶ Distinguishing personal from non-personal data, notably with new legislation such as the Data Act and various upcoming data spaces, in the light of anonymisation practices;
- ▶ Research and innovation, particularly regarding health and AI;
- ▶ Tools to support SMEs, as recognised in the EDPB's contribution, such as standards for DPIA templates, documentation to ensure compliance and methods to obtain valid consent;
- ▶ Joint controllership, notably to clarify the link between determining the means and purposes and having actual and decisive influence;
- ▶ The precise threshold for compensation for non-material damage; and
- ▶ Data subject rights tools that could facilitate compliance across Europe, considering the risk of misuse of such rights (e.g. in employment relations).



Securing international data transfers

SCCs continue to be the primary method for international data transfers. The extended timelines imposed by DPAs for reviewing BCRs or other customised clauses contribute to the SCCs' prevalence. However, some DPAs perceive SCCs as insufficient, necessitating additional transfer impact assessments and costly legal advice.

The process of updating SCCs is resource-intensive, especially when confronted with new model clauses. Integrating different SCC sets into evolving agreements adds complexity, requiring constant updates as parties transition roles. A new set of SCCs applicable to importers under Art. 3(2) GDPR remain necessary. Globally, numerous SCC sets, often for low-risk transfers, complicate integration, emphasising the importance of ongoing work towards mutual recognition of SCCs.

We strongly welcome the Commission's efforts to reinforce adequacy frameworks and extend them globally.⁹ Collaborating with countries such as India, Brazil, Australia, Indonesia, Singapore, South Africa, Thailand, Malaysia, China and Hong Kong is deemed essential. This collaboration is vital for facilitating safe data flows, supporting global interconnectedness and economic growth.

Last, as described above, the necessity to align new digital regulation with the GDPR is particularly acute when it comes to data transfers and international access.¹⁰ For example, data storage requirements and other limitations proposed under the EHDS would cause adverse effects on international health research and innovation (R&I) collaborations, pan-European medical registries and ubiquitous digital health services.¹¹



Full use of other GDPR mechanisms

As mentioned earlier, the use of BCRs, codes of conduct and certification should be more actively promoted and customised to suit the diverse needs of different companies and sectors.

Codes of conduct are unfortunately underutilised due to the intricate and time-consuming process involved in their creation. The constant need for updates further limits their applicability, often restricting their focus to specific aspects of an organisation, such as HR operations.

It is crucial to recognise certifications and codes of conduct as essential instruments for facilitating GDPR compliance, offering significant potential for scalability. Encouraging efforts towards the development of pan-European codes and certifications, with active promotion and constructive engagement from DPAs, is imperative. Streamlining processes and coordination efforts should be envisaged to significantly expedite the recognition of codes of conduct.

⁹ COM(2024) 7 final.

¹⁰ See *Data transfers in the data strategy*.

¹¹ See *European Health Data Space (EHDS) key issues to address in trilogues*, available at <https://cdn.digitaleurope.org/uploads/2024/01/EHDS-trilogues-DIGITALEUROPE-position-paper-1.pdf>.

Regarding certifications, their effective use has been limited across the EU.¹² Encouraging broader adoption and recognition of certifications, particularly as tools for international transfers, is crucial for enhancing data protection measures on a wider scale.

Similarly, several mechanisms outlined in the GDPR remain underutilised. For instance, Art. 25 GDPR highlights the significance of PETs, which should be further recognised and encouraged in the implementation of the GDPR. PETs, including online tools and forms, can efficiently manage responses to data subject requests on a large scale, mitigating the risk of these requests reaching the incorrect company mailboxes.

Moreover, data protection officers (DPOs) play a pivotal role in ensuring GDPR compliance within companies. However, they often operate without adequate support and clarity from DPAs. Providing guidance and facilitating skill development for DPOs, especially in sectors where it is particularly relevant, would be highly beneficial and welcomed.

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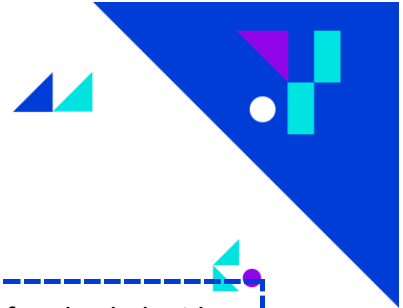


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¹² The Europrivacy seal stands out as the sole certification recognised at the EU level, with modest adoption.



About DIGITALEUROPE

DIGITALEUROPE is the leading trade association representing digitally transforming industries in Europe. We stand for a regulatory environment that enables European businesses and citizens to prosper from digital technologies. We wish Europe to grow, attract, and sustain the world's best digital talents and technology companies. Together with our members, we shape the industry policy positions on all relevant legislative matters and contribute to the development and implementation of relevant EU policies. Our membership represents over 45,000 businesses that operate and invest in Europe. It includes 108 corporations that are global leaders in their field of activity, as well as 41 national trade associations from across Europe.