Brussels, 11 April 2013

FENCA (Federation of European National Collection Associations) Position paper on the Data Protection-Recast

Dear Member of the European Parliament,

Following the reports from the LIBE and IMCO-Committee published in January 2013, FENCA and its members feel the need to express serious concerns. We are especially concerned that Rapporteur JP Albrecht has given little consideration to the effects the Commission proposal, together with his amendments will have for the majority of businesses outside of global e-commerce, the so-called "dot.coms" and, in particular, for our members, the overwhelming majority, some 90% of which, are small to medium sized enterprises (SMEs).

Rapporteur JP Albrecht has tabled a total of 350 amendments to the proposed Regulation. In summary and worryingly, the amendments propose a further strengthening of the rights of individuals and supervisory authorities and reinforce existing, or impose additional obligations on companies. The LIBE-report seems to follow what we can only describe as the 'hype' of the previous online-world discussions. We feel strongly that the focus on regulating global e-commerce is dominating this revision of the Data Protection legislation as continues to do so in this latest report from the Rapporteur. **The cost, which will ultimately be borne by consumers, caused by the unintended consequences of these proposals is likely to be something in the region of double the savings estimated by the EU from a single regulation across Europe.**

We fully support the need for modern, effective and sustainable legislation, defending individual rights, however we believe much needs to be done to correct the proposed bill to ensure that this is balanced with a realistic cost to business, the continuation of free enterprise and innovation and to ensure that jobs are created and not lost as a result.

The recent discussions within the Greens workshop, entitled, 'What is wrong with data protection' further provided evidence that the focus of this proposed Regulation is on the online and dot.com businesses, such as e-commerce brands; Google, Facebook and in general, cloud computing. Consequently the groups representing consumers' concerns are also focused in this area, which in reality is only on a fraction of businesses likely to be affected. The concerns of more than 80% of the entrepreneurs in Europe seem to be falling on deaf ears.

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The original proposal and the recently suggested amendments from the LIBE-Committee will have a disastrous effect across all businesses but, we believe, in particular, on the 20 million or so SMEs, which includes our membership. The sum total of the increased burden these proposals will put on SMEs in Europe, will at worst cause many to cease to trade and at best cause an increase in the cost of services to consumers.

The IMCO-report from Lara Comi appears to shows more consideration for business stakeholders in general, but, in essence, probably due to domination of the online-world mainstream discussions, similar effects as described before are involved. However one of the most relevant improvements within those proposed amendments is the provision for implicit consent regarding contracts for goods and services.

Our concerns now are focused amongst others on the proposals concerning the **giving of consent, legitimate interest, the right to be forgotten, profiling and data protection compliance**, i.e. data protection officers, notification procedures and sanctions.

1) The Commission proposal and the LIBE-amendments remove the current principle of implicit consent and instead introduce the term **legitimate interest**. However the current proposal is not insufficient to avoid the unintended consequence of removing the ability to share data to combat fraud or measure creditworthiness, ensuring those in financial difficulty are not allowed to become further indebted. The legitimate interest of "Third Parties", should be explicitly mentioned and clearly defined.

We urge the Members of the European Parliament to seriously consider our detailed comments to the referred Articles hereto attached.

2) Ironically, the provisions on the **'right to be forgotten'** may actually be more difficult to administer in the area it was probably originally intended; namely the internet and global eCommerce. Instead the burden of this proposal will be carried by SMEs, who are least likely to be equipped to deal with it, leading to confusion as data subjects or consumers will have heightened expectations that cannot be delivered.
We urge the Members of the European Parliament to seriously consider our detailed comments to the referred Articles hereto attached.

3) The restrictions relating to **profiling** remove the ability for this to be automated (and give the consumer the right not be profiled at all) and remove a vital and cost effective tool used by SMEs which cannot be easily replaced by manual means. Profiling is a key tool some member states regulators demand tales place to stop those in financial difficulty getting further into debt.

We urge the Members of the European Parliament to seriously consider our detailed comments to the referred Articles hereto attached.

4) The scrapping of the **SME definition in Art 25**, as foreseen in the LIBE-amendments is a serious issue for all SMEs. Indeed the smaller SMEs only process data as a relatively minor,

secondary activity. The actual provision, defining that a set of 500 personal data records shall be the threshold will lead to consequences, which in the future even small crafts may need to engage a data protection officer in a firm with less than 10 employees. The threshold appears to be arbitrary and does not consider the context nor the quality with which personal data are processed. Those provisions need to be revised.

We urge the Members of the European Parliament to seriously consider our detailed comments to the referred Articles hereto attached.

5) In as much as the **sanctions for breaches of the regulation** and timescales to notify of a breach are concerned we see an urgent need for clarification and limitation. This, coupled with the additional administrative burden brought about by these proposed regulations will lead to massive additional cost and disruption for businesses. We cannot imagine that the EP wishes to associate with such a result.

We urge the Members of the European Parliament to seriously consider our detailed comments to the referred Articles hereto attached.

Draft amendments to the proposal for a

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on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)

Amendment n°1

Article 7 – Conditions for consent - Paragraph 1 - 4

Text proposed by the Commission	*Amendment*
1.The controller shall bear the burden of proof for the data subject's consent to the processing of their personal data for specified purposes.	***[delete:]***
2. If the data subject's consent is to be given in the context of a written declaration which also concerns another matter, the requirement to give consent must be presented distinguishable in its	***[delete:]***

appearance from this other matter.	
3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal.	3. The data subject shall have the right to withdraw his or her consent at any time, ***provided a legitimate interest prevails***. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. ***If the consent is still necessary for the execution of a contract, its withdrawal implies the willingness to terminate the contract.***
4. Consent shall not provide a legal basis for the processing, where there is a significant imbalance between the position of the data subject and the controller.	***[delete:]***

Justification:

The rigid unilateral attribution of burden of proof to the data subject is not justified. If there was any real, "significant imbalance" between the data subject and the controller per se according to the disposition in Paragraph 4, consent could not provide a legal basis for processing. There is no economic or legal justification for such a rule.

The draft Regulation not only requires request of consent in situations where it is not required under the present Directive, but also increases the bureaucratic burden to gain and document such consent. Under these requirements, it becomes very difficult or even impossible for normal businesses to gain valid and reliable from most of their customers and contacts.

To withdraw consent "at any time" can have especially consequences if third party interests are concerned. If those third parties have legitimate interests, then one of the data subjects must prevail in order to withdraw consent. In addition, most of the contracts (e.g.: life insurance) might not be executable if the consent is withdrawn. The inserted wording is necessary for the data subject to be aware of the consequences of his choice.

The wording "significant imbalance" between the position of the data subject and the controller is too broad and even misleading. For example, it may be assumed that in cases of treatments by a Physician or services by a Lawyer there is regularly a "significant imbalance". In these cases, consent would no longer be a possibility to lay the basis for legal processing of data in credit granting processes. For the sake of legal certainty, paragraph 4 should be deleted.

Amendment n°2

Article 17 – Title: *Right to erasure*

Text proposed by the Commission	*Amendment*
"Right to be forgotten and to erasure"	***Right to erasure***

Justification:

The title proposed by the Commission is misleading.

Amendment n°3

Article 17 - *Right to erasure*- Paragraph 1 - 3

Text proposed by the Commission	*Amendment*
1. The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, especially in relation to personal data which are made available by the data subject while he or she was a child, where one of the following grounds applies:	1. The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, especially in relation to personal data which are made available by the data subject while he or she was a child, where one of the following grounds applies: ***Unless it would require a disproportionate effort by the controller to ensure deletion of all data.***
(a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;	a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed, ***unless, the data are required in order to enforce existing legal claims.***

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(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or when the storage period consented to has expired, and where there is no other legal ground for the processing of the data; (c) the data subject objects to the processing of personal data pursuant to Article 19; (d) the processing of the data does not comply with this Regulation for other reasons.	
2. Where the controller referred to in paragraph 1 has made the personal data public, it shall take all reasonable steps, including technical measures, in relation to data for the publication of which the controller is responsible, to inform third parties which are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data. Where the controller has authorised a third party publication of personal data, the controller shall be considered responsible for that publication.	
3. The controller shall carry out the erasure without delay, except to the extent that the retention of the personal data is necessary: (a) for exercising the right of freedom of expression in accordance with Article 80; (b) for reasons of public interest in the area of public health in accordance with Article 81;	3. The controller shall carry out the erasure without delay, ***under the condition of paragraph1 and to the extent technically or practically feasible for the controller,*** except to the extent that the retention of the personal data is necessary:

(c) for historical, statistical and scientific research purposes in accordance with Article 83; (d) for compliance with a legal obligation to retain the personal data by Union or Member State law to which the controller is subject; Member State laws shall meet an objective of public interest, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued; (e) in the cases referred to in paragraph 4.	

Justification:

The additional condition introduced is necessary to ensure the proportionality of any request for erasure.

Depending on the definition of "change of purpose" enforcements of justified contractual claims could generally be torpedoed if not mentioned explicitly in the provision.

The provisions are necessary to align the provisions in paragraph 1 and paragraph 3.

Amendment n°4

Article 20 – Title: Measures based on ***automated processing***

Text proposed by the Commission	*Amendment*
Measures based on ***profiling***	Measures based on ***automated processing***

Justification

Art. 20 concerns automated processing. The title of this article should therefore be amended to "Measures based on automated processing." Profiling is a different activity.

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Amendment n°5

Article 20 – Measures based on ***automated processing*** **- Paragraph 1 - 5**

Text proposed by the Commission	*Amendment*
1. Every natural person shall have the right not to be subject to a measure which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict in particular the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour.	
2. Subject to the other provisions of this Regulation, a person may be subjected to a measure of the kind referred to in paragraph 1 only if the processing:	
(a) is carried out in the course of the entering into, or performance of, a contract, where the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or where suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the right to obtain human intervention; or	
(b) is expressly authorized by a Union or Member State law ***which also lays down suitable measures to safeguard the data subject's legitimate interests;*** or	b) is expressly authorized by a Union or Member State law; or
(c) is based on the data subject's consent, subject to the conditions laid down in Article 7 and to suitable safeguards.	(c) is based on the data subject's consent, subject to the conditions laid down in Article 7 and to suitable safeguards ***as well as on the lawfulness conditions provided in Article 6.***

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3. Automated processing of personal data intended to evaluate certain personal aspects relating to a natural person shall not be based solely on the special categories of personal data referred to in Article 9.	
4. In the cases referred to in paragraph 2, the information to be provided by the controller under Article 14 shall include information as to the existence of processing for a measure of the kind referred to in paragraph 1 ***and the envisaged effects of such processing on the data subject.***	4. In the cases referred to in paragraph 2, the information to be provided by the controller under Article 14 shall include information as to the existence of processing for a measure of the kind referred to in paragraph 1.
5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and conditions for suitable measures to safeguard the data subject's legitimate interests referred to in paragraph 2.	***[delete:]***

Justification

Re-naming of the Article into "Measures based on automated processing"- Article 20 obviously concerns automated processing. The naming of this article should reflect this and therefore the Article should be re re-named into "Measures based on automated processing".

(b) It cannot be the task of firms to check, whether the Member State law "lays down suitable measures to safeguard the data subject's legitimate interests". On the contrary, firms have to be able to rely on the law.

Subject to further evaluations, we deem important to provide for a different wording in letter c) for the lawful automated processing. We think important to include not only the consent of the data subject but also the other lawfulness conditions provided in article 6 as a legitimate basis for this processing. Otherwise, we think problems could arise in connection, for instance, with rating or scoring systems processing "public data" or other data available for legitimate interests and not "covered" since the beginning by the explicit consent of the data subject. The regulation does not fit however in the legitimate activity of credit information agencies within the range of credit examination. In this area it is usual and indispensable to represent the creditworthiness of a person or a company e.g. in a numerical value in order to give to the information user a first and fast to seize overview of the creditworthiness classification.

To allow this procedure also in future, however, the permission regulation in paragraph 2 a) applying only for the conclusion or the fulfilment of a contract is perceived to be too narrow, because the customers of credit reporting agencies perform credit ratings also outside of existing or intended contractual relations. This regulation must be extended so that the function of the credit reporting agencies remains possible to the past extent.

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