



HOTREC draft position paper Commission proposal for a Regulation on Data Protection As amended in May 2013

HOTREC welcomes the proposal issued by the Commission on “The protection of individuals with regard to the processing of personal data and free movement of such data (General Data Protection Regulation), [COM \(2012\) 9 final](#), replacing [Directive 95/46/EC](#). Technological progress and globalisation have deeply transformed the way personal data are collected, accessed, used and transferred. Moreover, Directive 95/46/EC is being implemented differently in the Member States, which leads to divergences of law enforcement. In addition, a lack of confidence could make consumers hesitant to buy online and accept new services. However, HOTREC has some important concerns explained below in this paper.

HOTREC supports the implementation of a single general EU framework on data protection across Europe, which would harmonise rules in this field. It welcomes the following changes, in particular:

- Principle of “**one-stop-shop**”, according to which a single data protection national authority (DPA) - the one where a company has its **main establishment**, would be responsible for the supervision of the processing activities of this company in several countries;
- Elimination of most of the notification obligations (applicable according to Directive 95/46/EC), which helps cutting red tape;
- The process of using **binding corporate rules** (BCRs) has been simplified¹¹. The new rules allow that BCR’s are validated by only one DPA.

In addition, HOTREC has been informed by the EU institutions that:

- **Explicit consent** is not mandatory to be given by the data subject (client) for the data to be processed, when processing is necessary for the performance of a contract to which the client is party or in order to take steps at the request of the client prior to entering into a

¹ *Explanation: a corporate group that needs to transfer personal data from affiliates based in the EU to its affiliates located in third countries might be willing to use BCRs. BCRs ensure that a single set of rules applies throughout the group instead of various internal contracts.*

contract;

- **Monitoring publicly accessible areas**, especially when using optic-electronic devices (video surveillance), **is possible** without doing an assessment of the impact of the monitoring operations, if processing is necessary in order to protect the vital interests of the data subject (art.33 + 6/1/d)

Nevertheless, HOTREC is of the opinion that a certain number of other principles could bring extra administrative burdens to companies. This might hinder one of the most important objectives of the proposal for a Regulation which is to cut red tape and eliminate administrative constraints. Moreover, they would impose economic costs, which given the current financial situation in Europe, would be difficult to implement, especially for SME's. Among those principles / measures, HOTREC would like to mention:

- **Data Protection Officer (DPO)** (art. 35/1/b of the Commission proposal + Amendment 223 of the draft report, presented by the LIBE Committee at the European Parliament (EP)²) – In the original text proposed by the Commission, enterprises employing less than 250 people were exempted from the obligation of designating a DPO, as long as their core activities do not consist of processing data operations. The text proposed by the EP rapporteur eliminates this exemption. In fact, the EP draft report stipulates that if the processing is carried out by a legal person and relates to more than 500 data subjects a year, a DPO should be designated to control the monitoring of the processing of the data. The number of data subjects proposed is clearly very low, as it would be easy even for a microenterprise to process data related to more than 500 data subjects a year. Even if the DPO is contracted only for some hours a year, the cost that such a figure would imply, would hinder SME's³.

HOTREC is aware that in Germany there is already an obligation for all companies to designate a DPO, in case they have at least 10 members of staff who deal with automated processing of private data or if they have at least 20 members of staff who deal with non-automated processing of private data or if a company specifically deals with trading data or mainly deals with sensitive data. HOTREC considers such low-threshold critical values as unnecessary burdensome and therefore disproportionate. Easily the additional costs of a fulltime employee with the necessary expertise could amount to €35,000 per year and the costs of an external DPO could mount up to €12,000 per year even for SMEs. For these reasons, HOTREC, together with

² Draft report on the General Data Protection Regulation, Committee of Civil Liberties, Justice and Home Affairs, [2012/0011 \(COD\)](#).

³ The impact assessment done by the European Commission presents that on average an external consultant would be paid €250 per hour to develop and to implement such work (page 117, Annex 6 of the Impact Assessment on the Commission proposal on a General Data Protection Regulation [SEC \(2012\) 72 final](#)).

UEAPME (the European Association of Craft, Small and Medium-Sized Enterprises) proposes to:

- Adopt the original text presented by the European Commission, which **exempts SME's from the obligation of designating a DPO (art. 35/1/b)**; or
- Ask that the European Parliament produces an **impact assessment**, so that a fair threshold can be found. For this impact assessment, it should be taken into consideration, as the Commission indicated, that not all SME's have as core activity data processing.
- **Right to be forgotten** (art.17) – For the hospitality sector it is very important that former clients can be contacted for marketing purposes (e.g.: promotions; newsletters, client loyalty programmes, etc.).
- **Notification of a personal data breach to the Supervisory Authority** (art. 31 of the Regulation and amendment 45 of draft report) – a precise deadline (24 hrs or 72 hrs) should not be included in the Regulation. Data controllers should contact the supervisory authority as soon as possible when a data breach occurs, but without a fixed timeline.
- **Administrative sanctions** (art. 79) – the level of the sanctions proposed in case of breaching the proposal for a Regulation is too high and excessive (up to 2% of the annual turnover). This might bring a risk of uncertainty and lacks proportionality.
- **Delegated acts and implementing acts** (art.86) – the Commission reserves the right in many articles of the Regulation to adopt delegated and implementing acts. The Commission would, therefore, be able to adjust non-binding aspects of the Regulation without having to negotiate the entire text. This might create uncertainty and ambiguity. HOTREC recognises that the European Parliament draft report has already decreased the number of delegated and implementing acts. Nevertheless, HOTREC believes that the remaining ones should also be eliminated. Moreover, in case the remaining delegated and implementing acts will not be deleted from the legislative proposal, HOTREC would then support the elimination of the possibility for the Commission to ask for the opinion of the European Data Protection Officer, as it has been proposed by the EP rapporteur. HOTREC believes that, if this possibility is introduced, the process would be longer and the added value of this step is questionable.

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