

HOTREC's position on the European Parliament's plenary vote on the proposal for a Data Protection Regulation

HOTREC followed closely the plenary session vote of the European Parliament regarding the [report](#) of MEP Jan-Philipp Albrecht focusing on a General Data Protection Regulation taking place on 12 March 2014, at the European Parliament.

HOTREC fully welcomes the need to create a set of single, harmonised and modern data protection rules that help to create a robust single market. Businesses need, indeed, clear and uniform rules that provide legal certainty and minimise administrative burden. This is essential to stimulate economic growth, create new jobs and foster innovation.

In this sense, HOTREC fully supports certain amendments approved by the European Parliament **and calls the Council to adopt them**, as they are entirely in line with [HOTREC's position paper](#):

- **Lawfulness of processing** (art.6/1/f and recital 39b) – according with HOTREC's interpretation of these articles, and provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, the processing of personal data for the purpose of direct marketing for own or similar services should be presumed as carried out for the legitimate interest of the controller. In this way, former clients could be contacted by the hospitality businesses for marketing purposes (e.g.: promotions, newsletters, client loyalty programmes, etc.), without needing to receive an explicit consent by former clients;
- **Notification of a personal data breach to the supervisory authority** (art.31) – in the case of a personal data breach the controller shall without due delay notify the supervisory authority. The deadline of 24 hours has been eliminated. Recital 67 anticipates that “undue delay” is presumed not to be later than 72 hours. HOTREC believes that this proposal is sufficient to allocate consumers and businesses interests;
- **Deletion of the right to data portability** (art.18) – the proposal from the Commission was likely to bring costs to entrepreneurs if the electronic systems of the hospitality sector establishments would need to be upgraded to produce electronic forms for data subjects, so that the electronic data could be transferred;
- **Most of the delegated and implementing acts** (art.86) have been eliminated, which brings more certainty to the application of the proposed Regulation.

Nevertheless, HOTREC is seriously concerned about the content of other amendments approved by the European Parliament that will 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.

Above all, **HOTREC strongly disagrees with the idea that the threshold of 5,000 data subjects should be the reference that obliges a company to follow or not certain obligations foreseen in the proposed Regulation.** In fact:

- No justification has been provided with regard to the chosen threshold;
- The threshold is still clearly too low, as the vast majority of SMEs, including micro-enterprises, already process data related to more than 5,000 data subjects a year. In fact, **with an occupancy rate of 55%, any small hotel with only 25 rooms would fall under this category;**
- It is difficult for a company to anticipate the number of clients whose data will be processed per year;
- According to the Commission Recommendation ([2003/361/EC](#)), enterprises are distinguished by size. This categorisation is known and accepted all over Europe and should be considered as the pillar of the proposed Regulation, as it was the case in the original Commission proposal ([COM \(2012\) 11 final](#));

In general, HOTREC considers the threshold of **5,000 data subjects' critical value as unnecessary burdensome (in economic and administrative terms)** and, therefore, **disproportionate**.

In particular, HOTREC disagrees with the following compromise amendments:

I - Designation of a Data Protection Officer (DPO) (art.35) - 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 voted at the European Parliament eliminates this exemption. In fact, the European Parliament position stipulates that if the processing is carried out by a legal person and relates to more than 5,000 data subjects a year, a DPO should be designated to control the monitoring of the processing of the data. Even though HOTREC recognises that the threshold has substantially increased when compared with the original threshold proposed by Mr. Albrecht in his original report (500 data subjects)¹, the current number of data subjects proposed is still clearly too low and directly affects SME's.

Moreover, even if the DPO is contracted only for some hours a year, the cost that such a figure would imply, would have a direct impact on SME's. HOTREC would like to highlight the following estimates:

- According to information provided by TÜV (Technical Supervisory Association) in Germany, the cost of an external DPO for SMEs could come to about 12.000 EUR in the first year (= 150 EUR per working hour, 10 working days needed per year, 8 hours per working day).
- According to the impact assessment done by the European Commission an external consultant would be paid on average €250 per hour to develop and to implement his/her work²;
- The UK Ministry of Justice's impact assessment regarding the EU Data Protection Regulation proposal estimates that a DPO could cost anywhere between £30–£180 million per annum (in 2012–13 earnings terms) depending on the contractual hours of the DPO³;

Finally, even if the company delegates the DPO tasks to an internal employee, there is no guarantee that this person will have developed the level of expertise that is required to prevent a breach of the Data Protection Law.

For all these reasons, **HOTREC calls the Council of the European Union 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) if enterprises have less than 250 employees and if their core business is not data processing.**

¹Draft report on the General Data Protection Regulation, Committee of Civil Liberties, Justice and Home Affairs, [2012/0011 \(COD\)](#).

²Page 117, Annex 6 of the Impact Assessment on the Commission proposal on a General Data Protection Regulation [SEC \(2012\) 72 final](#).

³UK Minister of Justice [impact assessment](#).

II - Respect to Risk (art.32a/2/a) – **HOTREC strongly opposes the presumption that processing personal data related to a fixed threshold (more than 5,000 data subjects a year) is an activity likely to present specific risks. A one-size-fit all approach shall not apply in this case.** The proportionality principle should be applied as a basic rule whenever SME's policies are concerned. In fact, HOTREC insists that a small hotel or restaurant, whose processing activities are limited to certain contact details of the data subjects, must not be considered to present specific risks.

For all these reasons, **HOTREC calls the Council to suppress article 32a/2/a**: “(...) processing of personal data relating to more than 5000 data subjects during any consecutive 12-month period”.

III - Data protection Impact Assessment (art.33) – Once again, the obligation of developing an impact assessment shall not be based on a threshold, and especially not on one that affects SME's (like the threshold of 5,000 data subjects). HOTREC is of the opinion that **a case by case risk analysis** needs to be developed by the controller in order for him/her to access whether the impact assessment should be carried out or not.

Furthermore, HOTREC calls the attention of the Council to the fact that the current wording of the article implies the implementation of several administrative procedures by the controller, which will obviously be extremely difficult to implement by SME's (e.g.: description of measures envisaged to address risk; systematic descriptions of the envisaged processing operations, etc.).

Therefore, HOTREC **calls the Council to follow the Commission original proposal** ([COM \(2012\) 11 final](#)) where a data protection impact assessment is only necessary when processing operations by virtue of their nature, scope or purposes might present risks to the rights and freedoms of the data subjects. In fact, HOTREC considers that the processing activities developed by the hospitality sector, where hotels and restaurants are limited to store some contact details of the data subjects' in their respective data bases do not imply any risk.

HOTREC trusts that these important comments will be taken into account by the Council of the European Union while adopting its general position on the proposal for a General Data Protection Regulation.
