



EUROPEAN PARLIAMENT

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*Committee on Employment and Social Affairs*

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**2012/0011(COD)**

4.3.2013

## **OPINION**

of the Committee on Employment and Social Affairs

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a regulation of the European Parliament and of the Council 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) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD))

Rapporteur: Nadja Hirsch

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## SHORT JUSTIFICATION

Your rapporteur specifically welcomes the present Regulation and its purpose which is to further harmonise data protection in the European Union (EU).

This aim of this opinion is as follows: it quite obvious that European employee data protection cannot be comprehensively regulated in one article. Your rapporteur's purpose is rather to lay down a number of markers. In the context of realising a genuine European labour and the single market, further consideration may subsequently be given to regulating employment data protection at European level. This would be possible on the basis of Article 288 TFEU.

Although a large volume of data processing in the EU relates to employment, little space in the Regulation is specifically devoted to employee data protection. Furthermore the level of abstraction of the Regulation often makes it difficult to interpret the rules in an employment context.

Your rapporteur takes the view that the best way of addressing the issues facing employee data protection in this Regulation is mainly to restrict the scope of the opinion to Article 82. This will allow an in-depth analysis of the content, besides grouping together the various articles in the Regulation which have a bearing on employee data protection.

### **Re 82 (1) and Recital 124**

In its present stage, the present Regulation can only provide a minimum level of protection, particularly as regards employee data. Each Member State must continue to be able to set standards more favourable for workers than those provided for in the Regulation. Moreover, it must be possible to set such standards in collective agreements. The phrase 'within the limits of this Regulation' should be rejected for a number of reasons. Firstly, it is incompatible with the general tenor of Article 82 - which deals with exceptions - and could, in connection with the delegated acts proposed by the Commission in Article 82, result in an extremely complex situation. Secondly, as a worst case scenario, this could mean that Member States were unable to adopt more far-reaching rules. Finally, this formulation seems to have been arbitrarily chosen here, since other opening clauses, e.g. concerning the media, do not contain this restriction.

### **Re 82 (1b)**

Since the Commission has not so far made any specific proposal relating to employee data protection, and bearing in mind the few substantive points relating to employee data protection in the regulation, a number of Europe-wide minimum protection standards must be established. The four sub-points should not be seen as an exhaustive list, but rather as the cornerstone of comprehensive European data protection legislation.

### **Re 82 (1c)**

The data protection officer plays a role of paramount importance. It must therefore be made absolutely clear that he or she should be able to perform his or her duties without fear of pressure or external influence and for the benefit of employees. Special protection from dismissal and the prohibition of discrimination against his or her person are therefore appropriate.

#### **Re 82 (1e) and Recital 124 a**

The Commission proposal does not sufficiently specify the rules governing the transmission of data within a group of undertakings in the EU. This amendment is intended to rectify this omission, while protecting the interests of employees.

#### **Re 82 (1f) and Recital 34**

The complete exclusion of consent as a valid legal reason for the processing of personal data will not have the desired result in an employment context. Your rapporteur therefore proposes that even in situations where there is an imbalance between the parties, consent should be possible as a valid legal reason, where it is intended to have legally and financially advantageous effects for the employee.

#### **Re 82 (3)**

Delegated acts should, in your rapporteur's view, only be used where non-material elements of the existing Regulation need to be adapted rapidly and flexibly to technical and security innovations. Hitherto the Commission proposal's wording was too broad-based. Moreover, alongside paragraph 1, it should also be possible to continue to regulate the new paragraph 1c by legal acts.

#### **Re 82 (3a)**

This review clause allows a fresh evaluation.

## **AMENDMENTS**

The Committee on Employment and Social Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

### **Amendment 1**

#### **Proposal for a regulation Recital 34**

*Text proposed by the Commission*

*Amendment*

(34) Consent should not provide a valid

(34) Consent should not provide a valid

legal ground for the processing of personal data, where there is a clear imbalance between the data subject and the controller. This is especially the case where the data subject is in a situation of dependence from the controller, among others, where personal data are processed by the employer of employees' personal data in the employment context. Where the controller is a public authority, there would be an imbalance only in the specific data processing operations where the public authority can impose an obligation by virtue of its relevant public powers and the consent cannot be deemed as freely given, taking into account the interest of the data subject.

legal ground for the processing of personal data, where there is a clear imbalance *of power* between the data subject and the controller. This is especially the case where the data subject is in a situation of dependence from the controller, among others, where personal data are processed by the employer of employees' personal data in the employment context. ***In an employment context, data processing intended to have primarily legally or financially advantageous consequences for the employee is an exception.*** Where the controller is a public authority, there would be an imbalance only in the specific data processing operations where the public authority can impose an obligation by virtue of its relevant public powers and the consent cannot be deemed as freely given, taking into account the interest of the data subject.

## Amendment 2

### Proposal for a regulation Recital 75

#### *Text proposed by the Commission*

(75) Where the processing is carried out in the public sector or where, in the private sector, processing is carried out by ***a large*** enterprise, or where its core activities, regardless of the size of the enterprise, involve processing operations which require regular and systematic monitoring, a person should assist the controller or processor to monitor internal compliance with this Regulation. Such data protection officers, whether or not an employee of the controller, should be in a position to perform their duties and tasks independently.

#### *Amendment*

(75) Where the processing is carried out in the public sector or where, in the private sector, processing is carried out by ***an*** enterprise, or where its core activities, regardless of the size of the enterprise, involve processing operations which require regular and systematic monitoring, a person should assist the controller or processor to monitor internal compliance with this Regulation. Such data protection officers, whether or not an employee of the controller, should be in a position to perform their duties and tasks independently. ***Processing should be carried out by a legal person and relate to more than 250 data subjects per year.***

**Amendment 3**  
**Proposal for a regulation**  
**Recital 124**

*Text proposed by the Commission*

(124) The general principles on the protection of individuals with regard to the processing of personal data should also be applicable to the employment context.

***Therefore, in order*** to regulate the processing of employees' personal data in the employment context, ***Member States should be able, within the limits of this Regulation, to adopt by law specific rules for the processing of personal data in the employment sector.***

*Amendment*

(124) The general principles on the protection of individuals with regard to the processing of personal data should also be applicable to the employment context. ***Member States should be able*** to regulate the processing of employees' personal data in the employment context ***in accordance with the rules and minimum standards set out in this Regulation. Where a statutory basis is provided in the Member State in question for the regulation of employment matters by agreement between employee representatives and the management of the undertaking or the controlling undertaking of a group of undertakings (collective agreement) or under Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees<sup>1</sup>, the processing of personal data in an employment context may also be regulated by such an agreement; in this particular case there is the possibility for derogations and exceptions in accordance with national law and practices.***

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<sup>1</sup> OJ L 122, 16.5.2009, p. 28.

**Amendment 4**  
**Proposal for a regulation**  
**Recital 124 a (new)**

*Text proposed by the Commission*

*Amendment*

***(124a) In order to safeguard business***

*interests which are directly related to employment, the transmission and processing of employee data within groups of undertakings is permitted. This should not be affected by interests of the person concerned which are worthy of protection. Employee data includes all types of personal data of the person concerned which are directly related to employment. The rules laid down in Article 82(1e) take into account the widespread practice of processing employee data in groups of undertakings.*

## **Amendment 5**

### **Proposal for a regulation Article 3 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

*1 a. This Regulation applies to the processing of personal data of data subjects not residing in the Union by a controller or processor established in the Union, through their economic activities in a third country(ies).*

## **Amendment 6**

### **Proposal for a regulation Article 6 – paragraph 1 – point f**

*Text proposed by the Commission*

*Amendment*

(f) processing is necessary for the purposes of the legitimate interests pursued by a controller, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. This shall not apply to processing carried out by public authorities in the performance of their tasks.

(f) processing is necessary for the purposes of the legitimate interests pursued by a controller, ***or by the third party or parties to whom the data are disclosed***, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. This shall not apply to processing carried out by public authorities in the performance of

their tasks.

### *Justification*

*In order for the collective bargaining system to function properly the unions must have the possibility to monitor the observance of collective agreements. Today this is carried out within the framework of Article 7 (f) of directive 95/46/EC. Article 7 (f) recognizes the legitimate interest of a third party to process personal data. The employer is mostly regarded as the controller and the labour union as the third party.*

## **Amendment 7**

### **Proposal for a regulation Article 6 – paragraph 5**

*Text proposed by the Commission*

*Amendment*

**5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the conditions referred to in point (f) of paragraph 1 for various sectors and data processing situations, including as regards the processing of personal data related to a child.** **deleted**

### *Justification*

*Provisions on lawfulness of processing form the core of the rules on data protection. As provisions on delegated acts must be limited only to non-essential elements of the Regulation paragraph 5 should be deleted.*

## **Amendment 8**

### **Proposal for a regulation Article 9 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. The processing of personal data, revealing race or ethnic origin, political opinions, religion or beliefs, trade-union membership, and the processing of genetic data or data concerning health or sex life or criminal convictions or related security measures shall be prohibited.

1. The processing of personal data, revealing race or ethnic origin, political opinions, religion or beliefs, trade-union membership **and activities**, and the processing of genetic data or data concerning health or sex life or criminal convictions or related security measures



shall be prohibited.

## Amendment 9

### Proposal for a regulation Article 14 – paragraph 3

*Text proposed by the Commission*

3. Where the personal data are not collected from the data subject, the controller shall inform the data subject, in addition to the information referred to in paragraph 1, from which source the personal data originate.

*Amendment*

3. Where the personal data are not collected from the data subject, the controller shall inform the data subject, in addition to the information referred to in paragraph 1, from which source the personal data originate. ***This would include data sourced from a third party illegally and passed on to the controller.***

## Amendment 10

### Proposal for a regulation Article 17 – paragraph 6 a (new)

*Text proposed by the Commission*

*Amendment*

***6 a. While complying with the data requirements of this Regulation, especially privacy by design, the provisions in paragraph 4 and 6 of this Article do not change the right of public authorities to store data for documentary evidence of a given case history.***

## Amendment 11

### Proposal for a regulation Article 28 – paragraph 4 – point b

*Text proposed by the Commission*

(b) an enterprise or an organisation ***employing fewer than 250 persons*** that is processing personal data only as an activity ancillary to its main activities.

*Amendment*

(b) an enterprise or an organisation that is processing personal data only as an activity ancillary to its main activities.

## Justification

*The limit of 250 employee's places employers in an unequal position, is discriminatory against larger enter-prises and is by no means necessary for reaching the aim. The number of employees doesn't correlate with the amount or type of personal data kept by the organization. A small organization with just a few employees can control a huge amount of delegate personal data and vice versa. Furthermore, the limit is not in all aspects easily interpreted.*

### Amendment 12

#### Proposal for a regulation

##### Article 35 – paragraph 1 – introductory part

*Text proposed by the Commission*

1. The controller and the processor shall designate a data protection officer in any case where:

*Amendment*

1. The controller and the processor, ***after obtaining the consent of the workplace representation***, shall designate a data protection officer in any case where:

### Amendment 13

#### Proposal for a regulation

##### Article 35 – paragraph 1 – point a

*Text proposed by the Commission*

(a) the processing is carried out by a public authority or body; or

*Amendment*

(a) the processing is carried out by a public authority or body ***or on their behalf***; or

### Amendment 14

#### Proposal for a regulation

##### Article 35 – paragraph 1 – point b

*Text proposed by the Commission*

(b) the processing is carried out by ***an enterprise employing 250 persons or more***; or

*Amendment*

(b) the processing is carried out by ***a legal person and relates to more than 250 data subjects per year***; or

### Amendment 15

**Proposal for a regulation**  
**Article 35 – paragraph 1 – point b a (new)**

*Text proposed by the Commission*

*Amendment*

***(b a) the data processed is of particularly sensitive nature e.g. medical; or***

**Amendment 16**

**Proposal for a regulation**  
**Article 35 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

2. ***In the case*** referred to in point (b) of paragraph 1, ***a group of undertakings*** may appoint a single data protection officer.

2. ***A group of organizations*** referred to in point (a) ***and*** (b) of paragraph 1 may appoint a single data protection officer ***where this applies to a single jurisdiction.***

*Justification*

*Public authorities today act in the form of quasi-enterprises in many fields. The regulation should not prohibit the possibility to appoint a single data protection officer for a group consisting of both public and private sector entities.*

**Amendment 17**

**Proposal for a regulation**  
**Article 82 – title**

*Text proposed by the Commission*

*Amendment*

Processing in the employment context

***Minimum standards for*** processing ***data*** in the employment context

**Amendment 18**

**Proposal for a regulation**  
**Article 82 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. ***Within the limits of this Regulation,*** Member States may adopt by ***law*** specific

1. Member States may, ***in accordance with the rules set out in this Regulation, and***

rules regulating the processing of employees' personal data in the employment context, in particular *for* the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law *or* by collective agreements, management, planning and organisation of work, health and safety at work, and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

*taking into account the principle of proportionality*, adopt by *legal provisions* specific rules regulating the processing of employees' personal data in the employment context, in particular *but not limited to* the purposes of the recruitment *and job applications within the group of undertakings*, the performance of the contract of employment, including discharge of obligations laid down by law *and* by collective agreements, *company agreements and collective agreements in accordance with national law and practice*, management, planning and organisation of work, health and safety at work, and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

*The level of protection afforded by this Regulation may not be undercut. Notwithstanding the previous sentence, where arrangements are made by agreement between employee representatives and the management of the undertaking or of the controlling undertaking of a group of undertakings the level of protection afforded by this Regulation may not be significantly undercut.*

*The right of Member States, or the social partners via collective agreements, to provide employees with more favourable protection provisions in respect of the processing of personal data in the employment context shall remain unaffected.*

## **Amendment 19**

### **Proposal for a regulation Article 82 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***1 a. The purpose of processing such data must be directly linked to the reason it was collected for and stay within the context of employment. Profiling or use for secondary purposes shall not be allowed.***

## **Amendment 20**

### **Proposal for a regulation Article 82 – paragraph 1 b (new)**

*Text proposed by the Commission*

*Amendment*

***1b. Notwithstanding the other provisions of this Regulation, the legal provisions of Member States referred to in paragraph 1 shall include at least the following minimum standards:***

***(a) the processing of employee data without the employees' knowledge shall not be permitted. Notwithstanding sentence 1, Member States may, by law, provide for the admissibility of this practice, by setting appropriate deadlines for the deletion of data, providing there exists a suspicion based on factual indications that must be documented that the employee has committed a crime or serious dereliction of duty in the employment context, providing also the collection of data is necessary to clarify the matter and providing finally the nature and extent of this data collection are not disproportionate to the purpose for which it is intended. The privacy and private lives of employees shall be protected at all times. The investigation shall be carried out by the competent authority;***

***(b) the open optical-electronic and/or open acoustic-electronic monitoring of parts of an undertaking which are not***

*accessible to the public and are used primarily by employees for private activities, especially in bathrooms, changing rooms, rest areas, and bedrooms, shall be prohibited. Clandestine surveillance shall be inadmissible under all circumstances;*

*(c) where undertakings or authorities collect and process personal data in the context of medical examinations and/or aptitude tests, they must explain to the applicant or employee beforehand the purpose for which these data are being used, and ensure that afterwards they are provided with these data together with the results, and that they receive an explanation of their significance on request. Data collection for the purpose of genetic testing and analyses shall be prohibited as a matter of principle;*

*(d) whether and to what extent the use of telephone, e-mail, internet and other telecommunications services shall also be permitted for private use may be regulated by collective agreement. Where there is no possibility of regulation by collective agreement, the employer shall reach an agreement on this matter directly with the employee. In so far as private use is permitted, the processing of this accumulated traffic data shall be permitted in particular to ensure data security, to ensure the proper operation of telecommunications networks and telecommunications services and for billing purposes. Notwithstanding sentence 3, Member States may, by law, provide for the admissibility of this practice, by setting appropriate deadlines for the deletion of data, providing there exists a suspicion based on factual indications that must be documented that the employee has committed a crime or serious dereliction of duty in the employment context, providing also the collection of data is necessary to clarify the matter and providing finally the*

*nature and extent of this data collection are not disproportionate to the purpose for which it is intended. The privacy and private lives of employees shall be protected at all times. The investigation shall be carried out by the competent authority;*

*(e) workers' personal data, especially sensitive data such as political orientation and membership of and activities in trade unions, may under no circumstances be used to put workers on so-called 'blacklists', and to vet or bar them from future employment. The processing, the use in the employment context, the drawing-up and passing-on of blacklists of employees shall be prohibited. Member States shall conduct checks and adopt adequate sanctions to ensure effective implementation of this point.*

**Amendment 21**  
**Proposal for a regulation**  
**Article 82 – paragraph 1 c (new)**

*Text proposed by the Commission*

*Amendment*

*1c. In addition to the provisions of Chapter IV, Section 4, the data protection officer shall enjoy special protection from dismissal in the performance of his/her duties and may not be the subject of discrimination. Authorities and companies shall also ensure that the data protection officer can carry out all activities independently in accordance with Article 36(2) and has access to training, whereby the corresponding costs will be borne by the controller and/or processor. If undertakings are located in more than one Member State, a data protection officer shall be easily accessible for all its workers in each of these Member States.*

*In addition to the provisions of Chapter IV, Section 4, the data protection officer*

*shall be afforded due time to fulfil relevant duties, where they are in addition to their general tasks. National and European Works Councils shall be consulted in the appointment of the data protection officer and shall be afforded the continuous right of consultation with them.*

## **Amendment 22**

### **Proposal for a regulation Article 82 – paragraph 1 d (new)**

*Text proposed by the Commission*

*Amendment*

*1d. Without prejudice to the information and codetermination rights guaranteed by national labour law, the workplace representation and the European Works Council shall enjoy the following rights:*

*(a) right to codetermination with regard to the appointment of the workplace data protection officer (Article 35 et seq.);*

*(b) right to be consulted and receive information from the workplace data protection officer on a regular basis;*

*(c) right to represent affected employees in a normal national court (Article 73) and possibility of bringing class actions (Article 75);*

*(d) right to codetermination with regard to the drawing-up of binding corporate rules (Article 43).*

## **Amendment 23**

### **Proposal for a regulation Article 82 – paragraph 1 e (new)**

*Text proposed by the Commission*

*Amendment*

*1e. The transmission and processing of personal employee data between legally*



*independent undertakings within a group of undertakings and with professionals providing legal and tax advice shall be permitted, providing it is relevant to the operation of the business and is used for the conduct of specific operations or administrative procedures and is not contrary to the interests of the person concerned which are worthy of protection. Where employee data are transmitted to a third country and/or to an international organization, Chapter V shall apply.*

**Amendment 24**  
**Proposal for a regulation**  
**Article 82 – paragraph 1 f (new)**

*Text proposed by the Commission*

*Amendment*

*If Article 7, paragraph 4, shall not apply where the data processing is intended to have legally or economically advantageous consequences for the employee.*

**Amendment 25**  
**Proposal for a regulation**  
**Article 82 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

2. Each Member State shall notify to the Commission those *provisions of its law* which it adopts pursuant to *paragraph 1*, by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them.

2. Each Member State shall notify to the Commission those *legal provisions* which it adopts pursuant to *paragraphs 1 and 1b*, by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them.

**Amendment 26**  
**Proposal for a regulation**  
**Article 82 – paragraph 3**

*Text proposed by the Commission*

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the *safeguards* for the processing of personal data for the purposes referred to in *paragraph 1*.

*Amendment*

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 *exclusively* for the purpose of further specifying the criteria and requirements for *ensuring the latest technical and security standards* for the processing of personal data *with respect to* the purposes referred to in *paragraphs 1 and 1e*. *Account shall be taken of the costs and benefits of implementation, the risks represented by the processing and the corresponding need to protect the data.*

**Amendment 27**

**Proposal for a regulation  
Article 82 – paragraph 3 a (new)**

*Text proposed by the Commission*

*Amendment*

***3a. On a proposal from the Commission, the European Parliament and the Council shall review Article 82 no later than 2 years after the date referred to in Article 91, paragraph 2. They shall reach a decision on this proposal under the procedure laid down in Article 294 of the Treaty on the Functioning of the European Union.***

## PROCEDURE

<b>Title</b>	Protection of individuals with regard to the processing of personal data, and the free movement of such data (General Data Protection Regulation)		
<b>References</b>	COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)		
<b>Committee responsible</b> Date announced in plenary	LIBE 16.2.2012		
<b>Opinion by</b> Date announced in plenary	EMPL 24.5.2012		
<b>Rapporteur</b> Date appointed	Nadja Hirsch 20.4.2012		
<b>Discussed in committee</b>	28.11.2012	23.1.2013	20.2.2013
<b>Date adopted</b>	21.2.2013		
<b>Result of final vote</b>	+: 35	–: 3	0: 6
<b>Members present for the final vote</b>	Regina Bastos, Edit Bauer, Heinz K. Becker, Jean-Luc Bennahmias, Phil Bennion, Pervenche Berès, Philippe Boulland, Alejandro Cercas, Ole Christensen, Derek Roland Clark, Minodora Cliveti, Emer Costello, Frédéric Daerden, Sari Essayah, Richard Falbr, Thomas Händel, Marian Harkin, Nadja Hirsch, Stephen Hughes, Danuta Jazłowiecka, Jean Lambert, Patrick Le Hyaric, Verónica Lope Fontagné, Olle Ludvigsson, Thomas Mann, Elisabeth Morin-Chartier, Csaba Óry, Konstantinos Poupakis, Sylvana Rapti, Licia Ronzulli, Elisabeth Schroedter, Nicole Sinclair, Joanna Katarzyna Skrzydlewska, Jutta Steinruck, Traian Ungureanu, Inês Cristina Zuber		
<b>Substitute(s) present for the final vote</b>	Georges Bach, Sergio Gutiérrez Prieto, Ria Oomen-Ruijten, Antigoni Papadopoulou, Csaba Sógor		
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Alexander Alvaro, Nirj Deva, Pat the Cope Gallagher		