

MBB Policy Briefing

The Malta Business Bureau is the EU-Business advisory office of the Malta Chamber of Commerce, Enterprise and Industry, and the Malta Hotels and Restaurants Association.

General Data Protection Regulation (2012/0011(COD))

The European Institutions are currently conducting a review of the EU's Data Protection legislation, known as the General Data Protection Regulation.

It is crucial that the new regulation avoids the introduction of disproportionate burdens for local businesses. The European Parliament had approved amendments to Article 35 of the proposed regulation refers to the obligation to appoint a Data Protection Officer, which remove the degree of flexibility according to the size and core activities of companies. We believe that a mandatory appointment of a Data Protection Officer across all classes and sizes of companies to be extremely excessive.

This is particularly true in Malta's case. Due to the nature of Malta's demographics, the majority of businesses tend to be considered as small and medium enterprises. In fact, according to the 2014 SBA fact sheet by the European Commission, 99.8% of Malta's enterprises are SME's, providing 73.2% of value added. In addition, most of these operate in the services and tourism industry, operations which require the handling of large amounts of data subjects, disproportional to company-size.

The business community supports the original Commission proposal, whereby Data Protection Officers would have to be engaged by enterprises employing 250 persons or more. This was changed with the report of MEP Jan Philipp Albrecht, also known as the Albrecht Report, in March 2014 (T7-0212/2014). The report proposed that Section 4, Article 35 (1) be amended to reflect that any legal person with more than 5000 data subjects be required to engage a Data Protection Officer. Given the low threshold, and the estimated exceedingly high number of Maltese as well as European businesses falling within this category, the business community finds this an unacceptable and unnecessary administrative and financial burden that businesses not involved in data processing operations would be forced to bear. This is especially so when such valuable resources could be dedicated towards increasing the capacity of a business' human resources through training and/or employment.

The JHA (Justice and Home Affairs) Council agreed a general approach on Article 35, including a degree of flexibility in the application of the regulation, and deleting points (a), (b), and (c). The reason for the deletion is that points (a) and (b), which covers who should appoint a data

protection officer, is clearly stipulated in Recital 75, whereas point (c), which covers the duties of the data protection officer, is covered in great depth elsewhere throughout the draft regulation. The progression of Article 35 and Recital 75 can be seen here:

	Commission Proposal	Albrecht Report T7-0212/2014	Council Common Position
Recital 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...	Where the processing is carried out in the public sector or where, in the private sector, processing <i>relates to more than 5000 data subjects within 12 months</i> , or where its core activities, regardless of the size of the enterprise, involve processing operations <i>on sensitive data, or processing operations</i> which require regular and systematic monitoring, a person should assist the controller or processor to monitor internal compliance with this Regulation...	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 <u>with expert knowledge of data protection law and practices may</u> assist the controller or processor to monitor internal compliance with this Regulation...
Sec4. Art. 35.(1)	1. The controller and the processor shall designate a data protection officer in any case, where:	1. The controller and the processor shall designate a data protection officer in any case where:	1. The controller <u>or</u> the processor <u>may, or where required by Union or Member State law shall,</u> designate a data protection office.
	(b) the processing is carried out by an enterprise employing 250 persons or more;	(b) the processing is carried out by <u>a legal person and relates to more than 5000 data subjects in any consecutive 12-month period</u>	<u>Deleted</u>

The Council has opted to use company size (for large enterprises) and nature of core activities (for all other enterprises) as the determining factor for the engagement of a Data Protection Officer.

The Malta Business Bureau considers this development from the Council to be very positive, as it looks to ensure that the regulation does not undertake a one-size fits all approach, effectively ensuring that any large enterprise, and any other enterprise that deals in data processing operations would be required to engage the services of a data protection office, and thus conforming to the European Commission's efforts of smart regulation.

The MBB will now be focusing its efforts in lobbying MEPs to put pressure on the Rapporteur in order to soften his stance with regards to factoring in data subjects as a determining factor rather than company size and core activities, and follow the Council position as closely as possible once the trialogue comes around.

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