

MBB Advocacy 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.

Regulation (EU) 2016/679 on General Data Protection

The European Institutions have conducted a review of the EU's Data Protection legislation, known as the General Data Protection Regulation.

The initial Commission's proposal included the obligation to appoint a Data Protection Officer and the European Parliament proposed to make such appointment across all classes and sizes of companies.

The business community supported 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 found 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.

In fact, the EP amendment looked to be extremely excessive, 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. Indeed, 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, where most of these operate in the services and tourism industry that require the handling of large amounts of data subjects, disproportional to company-size.

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

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 <i>with expert knowledge of data protection law and practices</i> <i>may</i> 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 <i>may, or where required by Union or Member State law shall</i> , 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 <i>a legal person and relates to more than 5000 data subjects in any consecutive 12-month period</i>	<i>Deleted</i>

The Malta Business Bureau considered this development from the Council to be very positive, as it looked to ensure that the regulation did 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 have required to engage the services of a data protection office, and thus conforming to the European Commission's efforts of smart regulation.

Following trialogue’s discussions for a common position, the Institutions have agreed to make the mandatory designation of a data protection officer taking into account the nature of enterprises’ core activities as well as the protection of consumers’ privacy.

Regulation 2016/679	
Recital 97 (ex Recital 75)	(...) where, in the private sector, processing is carried out by a controller whose core activities consist of processing operations that require regular and systematic monitoring of the data subjects on a large scale, or where the core activities of the controller or the processor consist of processing on a large scale of special categories of personal data and data relating to criminal convictions and offences, a person with expert knowledge of data protection law and practices should assist the controller or processor to monitor internal compliance with this Regulation.
Art. 37 (ex Art 35)	<p>1. The controller and the processor shall designate a data protection officer in any case, where: (...)</p> <p>(b) the core activities of the controller or the processor consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of data subjects on a large scale; or</p> <p>(c) the core activities of the controller or the processor consist of processing on a large scale of special categories of data (...) and personal data relating to criminal convictions and offences (...).</p>

MBB welcomes the reached agreement on the new data protection regulation since it does not constitute an excessive burden for business and focuses on companies that are not SME’s and those using large amounts of personal data. It shall apply from 25 May 2018.

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