

## Europe: EESC Opinion highlights the need to 'improve' proposed EU regulation

By Asta Puraite



The European Economic and Social Committee (EESC) published - on 31 July 2012 - its Opinion on the data protection reform proposed by the EU Commission in January 2012. Although the EESC welcomed the general direction taken by the Commission and agreed in principle with the objectives of the proposal, the EESC had a number of recommendations to improve the proposed regulation. The EESC also called on the Commission to amend certain aspects of the proposal that it deems 'unacceptable', such as children's data protection, the right to object, profiling, certain restrictions to the rights granted, the threshold of 250 employees for the appointment of a Data Protection Officer (DPO) and the way in which the 'one-stop shop' is organised.

"Probably the biggest challenge is that relating to lowering the 250 worker threshold", Francesca Gaudino, Counsel at Baker & McKenzie Italy, told DataGuidance. "I agree with the EESC that too many exemptions are granted to companies with a fewer number of employees, and the reason is probably a try to favour SMEs. However, as we have experienced in Italy with recent amendments of the Italian Privacy Code, sometimes efforts to ease economic burdens for SMEs result in creating grey zones or even worse free-trade zones where privacy rules can be disregarded. This creates an unjustified unbalance if compared with the requirements that big companies are subject to, but foremost it dilutes the effectiveness of privacy protection for citizens".

However, Michael Bond, Digital Economy Policy Advisor at the International Chamber of Commerce (ICC) UK, said: "The EESC raises some very important issues for business. However, the EESC also gives cause for serious concern. For instance, the EESC remarkably suggests that the threshold for the introduction of DPOs should be lowered. That would mean more organisations would fall under the scope of the Regulation, increasing the costs for a larger number of companies. This would be an unfortunate and unnecessary outcome".

The EESC also stated that search engines, cloud computing services and software, social networks, and IP addresses should be explicitly mentioned and addressed in the text of the Regulation, while the concept of 'one stop shop' should be more balanced to allow citizens to interact with the 'closest and more accessible' national supervisory authority. "In relation to 'one stop shops', [the EESC] suggests that such a provision 'could... lead to a marked deterioration in data protection for the public in general'", said Bond. "The ICC does not consider this to be a balanced view of how one stop shops would function in practice".

The EESC further suggested improving the breach notification provisions stating that 'notification of all breaches may compromise the operation of the system and may ultimately be an obstacle to ensuring that those responsible are held to account.' The EESC also recommended to involve employee representatives at all national and European levels in drawing up 'binding corporate rules', which 'should henceforth be accepted as a prerequisite for international data transfers'.

The EESC, as well as the Article 29 Working Party (WP29) in its Opinion 1/2012, also stated there is a lack of clarity regarding the 'delegated' and 'implementing' acts of the EU Commission, which may create legal uncertainty. Bond said: "There is a lot to welcome in this Opinion, not least the recognition that there are simply too many delegated acts in the proposals; however, the EESC's Opinion is not balanced and favours tightening up the some of the proposals that are meant to reduce administrative burden on business. We have been pleased to see that discussions between Member States have already identified some key issues in the draft Regulation, such as the excessive use of so-called delegated acts. Elements of the EESC's Opinion will be a useful supplement to those ongoing negotiations."

Gaudino said: "I think the Opinion of the EESC will bring beneficial effects to the legislative process of implementation of the forthcoming Regulation on data protection. Some of the issues have already been pointed out by WP29 and therefore it is now clearer that there is room to improve the Regulation and make it the effective and fundamental tool for a new pan-European legislative framework on data protection and security that it is meant to be." Gaudino said that additional issues should have been addressed by the EESC: "For example, more emphasis should have been devoted to the issue of territorial scope, which is of essence as the starting point. The Opinion does not focus enough on the concepts of 'privacy by design' and 'privacy by default'. Companies are not familiar with these concepts, and the same may be said for lawmakers as we have few, if any, examples of European pieces of legislation specifically introducing these concepts as mandatory requirements. It follows that they should be clarified in details in order to enables controllers to understand what they have to do in practice."

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