BEERG

August 8th 2012

Submission on Proposed EU General Data Protection Regulation (2012/0011) to the House of Commons' Justice Select Committee

Executive Summary

- **Business needs certainty and practicality from the legislation under which it operates. There are many varied and different personal data processing regimes across the EU.**
- **Such complexity already places the EU at a competitive disadvantage in attracting employers and encouraging job growth and economic development**
- **BEERG welcomes the idea of a Regulation – one set of clear and precise data protection laws to cover all EU and EEA members.**
- **Employee personal data is a special and distinct category of personal data. Processes and procedures that are appropriate for customer or client data are inappropriate for employee data. Multinational companies need to be able to manage multinational workforces and to be easily able to access personnel data to do this.**
- **We believe the proposed General Data Protection Regulation (GDPR) (2012/0011), as presented:**
    - **Fails to recognise the unique nature of personal employment data, and**
    - **Fails to strike a balance between the need to provide reasonable protection for the personal data of the individual with the unavoidable needs of business to be able to operate in an effective manner.**

Specifically:

- **Article 82 of the GDPR completely undermines the concept of a Regulation by allowing Member States to adopt rules additional to those already spelt out in the Regulation as regards employees' personal data.**
- **The Article 7 consent of employees provisions are overly restrictive., The consent of employees, or prospective employees, for such personal data processing as is essential to the employment relationship should be taken as a given.**
- **Requiring the appointment of data protection officers in all organisations with more than 250 employees is both unnecessary micromanagement and a major additional cost that would place the EU at an even greater competitive disadvantage.**
- **The Communication of Personal Breach requirements in the employment context are excessive and the proposed penalties proposed under the Regulation are too harsh without any element of proportionality.**
- **We are deeply concerned by the very broad powers the Regulation gives the Commission to adopt secondary acts without full, transparent democratic oversight or consultation with the social partners.**

Introduction

1. The Brussels European Employee Relations Group (BEERG) provides a forum for European employee relations specialists and in-company employment lawyers to discuss issues of mutual concern. We have over 60 major transnational corporations in membership. We work closely with the Washington DC-based HR Policy Association. Together we work with over 300 major multinational corporations employing over 25 million workers globally.

2. Business needs certainty and practicality in the legislation under which it operates. At present, there are different regimes applying to personal data processing in different European Union Member States, with differences in the rules and their policing. This is problematic and threatens to become more so as several countries revise their approach to data protection to deal with the major developments in technology and behaviour since the original Data Protection Directive.

3. Accordingly, we welcome the idea of a Regulation – one set of clear and precise data protection laws to cover all EU and EEA members.

4. The European Union is rightly concerned that personal data exported outside the jurisdiction might be misused and therefore insists on safeguards before allowing its export. However, the discussion and attention around the proposed Regulation appears to have overly centred on issues relating to social media business and not the vast number of other types of business.

5. Our concern is with the rules regarding the personal data which business is obligated to hold and process in order to employ an EU workforce. Common to all businesses, and which needs to be discussed and addressed separately within the Regulation, is the need they all have to process employee personal data. Many also transfer such data from the EU to third countries. This is increasingly the case as more and more businesses make use of the enhanced processing capacity that "cloud computing" offers.

6. Employee personal data is a special and distinct category of personal data. The proposed regulation should recognize that basic employment data must be collected and utilized, and relieve employers from the same prerequisites and restrictions imposed for collecting and using consumer data, as long as employers follow a basic set of rules. It is inequitable and impracticable to lump together the concerns relating to data privacy and new social media with the data processing that every business must do on the employment relationship: hiring people, managing them and dealing with their departure.

Article 82

7. In the area of most concern to us, employment related personal data, Article 82 completely undermines the concept of a Regulation by allowing Member States to adopt rules additional to those already spelt out in the Regulation as regards employees' personal data. For multinational enterprises operating across Europe this may mean having to eventually comply with the Regulation and 27 different sets of domestic employment related data protection laws. Such complexity already places the EU at a competitive disadvantage in attracting employers and encouraging job growth and economic development against those world areas without such difficult and complex laws. We believe that Article 82 should be dropped completely and replaced by a specific chapter on the processing of employment-related personal data.

Article 7

8. The "consent" requirements (Art. 7) for employment related personal data in the Regulation are overly restrictive. There is, or should be, an understanding in the Regulation that the gathering, processing, and retention of relevant employee personal data by the employer is an essential part of an employment relationship, and should permit employers to do so as long as such data is used responsibly and that reasonable remedies exist should that trust be broken.

9. We believe that the consent of employees, or prospective employees, for such personal data processing as is essential to the employment relationship should be taken as a given.

Management should not be required to ask for consent or file administrative registrations every time it is necessary to make changes to a company's human resource related personal data processing systems.

10. If it is felt necessary to establish some general ground rules, we would favour the development of a "model employee personal data protocol" covering basic and essential data processing which would form an (express or implied) appendix to all employment contracts. Such a "protocol" could cover not only essential employee personal data but also potential modifications to essential HR data, email and IT security initiatives. It could form an appendix to, or a separate chapter in, the proposed Regulation. There will, of course, be differing views as to what is essential and non-essential employment data, but we believe that a consensus could be found which would allow businesses to function effectively while safeguarding the rights of employees.

11. Processes and procedures that are appropriate for customer or client data are inappropriate for employee data. Multinational companies need to be able to manage multinational workforces and to be easily able to access personnel data to do this. Existing regulations and practices across Europe make this impossibly complex, with a potentially adverse impact on employment. A protocol along the lines suggested above could also cover the issue of the transfer of employee data outside the EU to other affiliates within the same company or group which is centrally managed and to outside contractors that the company may use to manage or process such data. Such a "protocol" could also relieve companies of the necessity of having to apply to the national data processing authorities every time they want to change or upgrade human resource data systems, or transfer data outside of the European Union. At present it can take several years for the national authorities to agree to such changes or transfers.

12. The protocol we suggest as a better way forward could build further on existing practices such as "binding corporate rules" and "standard contractual clauses", while still holding global organizations firmly responsible for misuse of such data. It should state broad principles, with appropriate penalties for their breach, rather than seek to micro-manage every company's processing of employee personal data. EU health and safety law, which rightly concerns workers and their families much more than personal data management, do not require companies to have prior approval from national health and safety authorities for their health and safety policies~~:~~ but employers are made subject to significant sanctions if they are found to be in breach of the law. This seems to us a better approach.

Other Areas

13. We also have concerns about the requirement to appoint data protection officers in all organisations with more than 250 employees. We believe that a requirement to appoint data protection officers would likely prove both expensive and less effective than having companies take responsibility for their obligations in whatever manner works best for their operating structure. Why not simply require compliance with the Regulation, allowing employers to take responsibility for how they achieve compliance, against a backdrop of suitable sanctions (fines) for non-compliance or breach?

14. The Communication of Personal Breach requirements in the employment context are excessive. Employers should be allowed to fulfil their communication requirements to employees with general notices to all EU employees en masse using whatever means is reasonable and on practicable timescales. Setting timescales of 24 hours for Notifications to Supervisory Authorities is not practicable, and overhasty Notification runs the risk of further error or misleading messages.

15. The penalties proposed under the Regulation are too harsh without any element of proportionality. Penalties should be calibrated to the amount of harm caused by a violation, and whether the violation was intentional. A percentage of revenue approach is wrong.

16. This is a fast-moving field and the Commission understandably wishes to be able to keep up with developments. When the Data Protection Directive was adopted in 1995 business was nowhere near as global as it is today. It is, however, important that future revisions of rules to meet new challenges should be realistic and practical. They should be subject to the same consideration by the wide range of stakeholders as normal EU legislation. In the case of changes to the provisions applying to personal data held on employees, which is effectively employment law, this means the social partners. We are particularly concerned by the very broad powers the Regulation gives the Commission to adopt secondary acts without full, transparent democratic oversight or consultation with the social partners; in the case of employment-related data.

17. In conclusion, we hold that the proposed Regulation must strike an appropriate balance between the need to provide reasonable protection for the personal data of the individual with the unavoidable needs of business to be able to operate in an effective manner that allows for business development and employment growth.

18. We do not believe that the Regulation, as presented, strikes that balance.

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