



**OBSERVATIONS ON THE COMMISSION'S 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 (COM (2012) 11 final)**

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## **About Leaseurope**

Leaseurope brings together 44 member associations representing the leasing, long term and/or short term automotive rental industries in the 32 European countries in which they are present. The scope of products covered by Leaseurope members' ranges from hire purchase and finance leases to operating leases of all asset categories (automotive, equipment and real estate). It also includes the short term rental of cars, vans and trucks.

The Federation's mission is to represent the European leasing and automotive rental industry, ensuring the sector's voice is heard by European and international policy makers.

## INTRODUCTORY OBSERVATIONS

Leaseurope, the voice of leasing and automotive rental at European level, takes note of the publication of the European Commission's 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 (COM(2012) 11 final). (Released in January 2012)

We believe the European Commission Proposal provides a good starting point to further discussions and debate on the EU framework for the protection of personal data. Although we appreciate that this proposed Regulation is a horizontal instrument applicable across sectors, we feel that a number of aspects are ill-suited for financial services, and in particular for the leasing industry.

1. The Regulation lays down the rules relating to the protection of **individuals** with regard to the processing of personal data and the rules relating to the free movement of that data. **Hence the Regulation will impact on B2C leasing transactions** and this document contains analysis of the projected impact.
2. It has also come to the attention of Leaseurope that **this Regulation will also be applicable in some B2B commercial dealings by virtue** of the fact that as part of its general checks, a leasing company will run checks on company directors to ensure that the company applying to obtain the lease is not insolvent. In addition, when a vehicle is leased to a company, the leasing company will handle personal driver data related to the individual that drives the vehicle. (Currently Data Protection legislation at national level in Austria, Italy, Denmark and Luxembourg protects legal entities as well as natural persons.)

## SPECIFIC OBSERVATIONS

### 1. Chapter I – Article 3 – Territorial scope

#### Companies outside the EU

The proposed Regulation applies to companies that process the personal data of individuals residing in the EU, even if the company is established outside the EU. This may have implications for companies that work within the framework of multiple jurisdictions and lead to possible legal uncertainty as data protection laws are not at the same rate of development worldwide. Leaseurope feels that it is vital to avoid overlapping provisions which could lead to conflicting rules and result in major inefficiencies.

### 2. Chapter I – Article 4 – Definitions

#### Data subject – natural person

The scope of the proposed Regulation is explicitly aimed at the “protection of individuals with regard to the processing of personal data and rules relating to the free movement of personal data” (*Article 1(1)*). In *Article 4* which relays the definitions for the purposes of this proposed Regulation, it states that “personal data means any information relating to the data subject”, and the data subject is further defined as a natural person. **This provision raises much uncertainty as to whether a small and medium size enterprise (SME) could be considered as a natural person, and if so then SMEs would come within the scope of the proposed Regulation.** It is inevitable that this would lead to much administrative burden. Therefore clarity is required as to whom the scope of the proposed Regulation is intended to cover.

### 3. Chapter II – Article 5 – Principles relating to personal data processing

#### Data minimisation

*Article 5* of the Proposal introduces the principle of ‘data minimisation’, whereby personal data must be limited to the minimum that is necessary.

Leasing companies *may* use many different types of data out of necessity on a daily basis.

Leasing companies need to use personal data in order to:

- i) Assess objectively the creditworthiness of their customers in a B2C leasing transaction by virtue of the Consumer Credit Directive;
- ii) Minimise the risk of fraud; and
- iii) Check if the customer is solvent in a B2B capacity.

Legislation currently in force, such as the Third Anti-Money Laundering Directive<sup>1</sup>, places an obligation upon the leasing company to use data when conducting risk analysis and for identification purposes (*know your customer*). National legislation often also provides extensive detail on what data must be collected.

We believe that without further clarification, the introduction and subsequent interpretation of the principle of **data minimisation** would present an obstacle to leasing companies in their capacity of complying with the aforementioned legislation.

This provision would also cause companies globally to completely overhaul their internal systems in order to ensure compliance, due to the territorial application provision contained in *Article 3*. Is this really feasible in practice? Or be subject to the onerous administrative sanctions mentioned in *Article 79*.

#### Further processing

*Article 5(b)* and *Article 6(4)*, as they are currently worded, appear to be contradictory with regard to further processing of data for purposes incompatible with the actual purpose for which the data was

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<sup>1</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

collected. To clarify the relation between the two *Articles* and to increase legal certainty, Leaseurope considers that *Article 5(b)* should be rephrased so as to specify that personal data must not be further processed in a way incompatible with the purposes for which it has been collected, **unless specific provisions of the Regulation provide otherwise.**

#### **4. Chapter II – Article 6 - Lawfulness of processing**

##### **Criteria for lawfulness**

*Article 6* of the proposed Regulation broadly retains the provision contained in the 1995 Data Protection Directive, which lists the requirements under which data processing is to be considered lawful. However, there is a concern that these requirements listed in *Article 6* would not permit the processing of data for fraud prevention and detection purposes. Leaseurope therefore takes the view that fraud prevention and detection should be explicitly recognised as a legitimate purpose for data processing.

#### **5. Chapter II – Article 7 – Conditions for consent**

##### **Specified purposes**

The introduction of explicit consent (*Article 4(8)*) for “specified purposes” (*Article 7(1)*) could constitute a procedural or administrative change for the leasing industry, depending on how these aspects are to be interpreted in practice. If explicit consent were to be required for each separate purpose, this would be time-consuming, resource-intensive and costly. So to facilitate efficiency Leaseurope would like tacit consent to also be relied upon as a form of consent giving.

##### **Significant imbalance**

With regard to *Article 7(4)* we would like to remark that the proposed wording may create uncertainty as to what could be understood by “a significant imbalance”. This could result in differing national interpretations.

This could to some extent be resolved by explicitly clarifying that where consent cannot provide a legal basis due to an imbalance, and that the controller may process the data if this is subject to another legal basis, in accordance with *Article 6* of the proposed Regulation.

##### **Withdrawal of consent**

*Article 7(3)* provides that consumers may withdraw their consent at any time. This provision could have a detrimental impact on the data which leasing companies need to have in order to prevent fraud and to lease in a responsible manner. In our view, this provision should be amended to allow, where consent has been withdrawn, for the continued processing in accordance with another legal basis, as set out in *Article 6* of the proposed Regulation. This would permit the processing of data necessary for continuing the contractual relationship that may exist between the controller and the data subject.

#### **6. Chapter II – Article 9 – Processing of special categories of personal data**

##### **Fraud databases**

In some Member States leasing companies have set up databases which contain data on fraud, with the aim of prevention and minimize risks.<sup>2</sup>

Due to the restrictions in *Article 9* of the proposed Regulation on the processing of data related to criminal convictions and similar security measures, it is unclear whether these databases, whose existence is essential to protect against fraud, can be maintained in the future. In our view, this should be addressed so that these databases can continue to exist and operate.

#### **7. Chapter II – Article 12 – Procedures and mechanisms for exercising the rights of the data subject**

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<sup>2</sup> Portuguese National leasing Association “ALF” has a database for non-compliance and litigation. The objective of which is to decrease the risk of concluding contracts with potential non-compliant lessees and to reduce levels of credit risk for lessors. They have attained special permission in Portugal to operate this due to the presence of individual’s personal data.

The first paragraph of *Article 12* is superfluous and should be deleted as the procedures to be established are outlined in the *Articles* that follow this. The conditions contained in *paragraph 2* in relation to making requests by electronic form should be deleted as safety aspects are threatened due to the fact it may not be possible to identify the person requesting the information, as they will also have requested it in an electronic manner.

#### **Format for receiving the information**

The provision of information in an electronic form involves highly advanced IT systems, hence this places further administration burdens on smaller leasing companies e.g. SMEs.

#### **Refusal of data subjects request**

Leaseurope believes that the data subject should be entitled to know the reasons for the refusal of a request that they have made for certain data. However, Leaseurope does not believe in this context that the data subject should be informed by the controller about lodging a complaint to the supervisory authorities as the controller would only be compelled to make a refusal if they have the proper grounds to do so.

#### **Provision free of charge**

Leaseurope supports the rights to access to data, rectification and completion of inaccurate and incomplete data for data subjects, as all of these actions contribute to the improved quality of the data used by leasing companies.

The proposed Regulation establishes that information and actions taken at the request of data subjects shall be free of charge. Regarding the right of access for the data subjects in *Article 15*, as well as the rectification and the completion of data in *Article 16*, Leaseurope would like to emphasise that the provision of holding data within a database comes at a cost.

Thus if leasing companies are to be obliged to allow access to data stored free of charge, this would increase administrative costs which would inevitably be passed on to the lessee.

In addition, it should also be recognised that requesting an appropriate contribution by consumers for data access is critical in deterring fraudsters from obtaining high volumes of consumers' data e.g. credit data. If data access upon request were to become free of charge then consumers would face an increased risk of fraud.

Finally, further specification of the criteria and conditions for the manifestly excessive requests and the fees should not, in our view, be transferred to the Commission, and - if necessary - should rather fall under the full-fledged legislative process. Leaseurope is also strongly opposed to standardization of forms and procedures, the development of which should remain with controllers.

### **8. Chapter III – *Article 14* – Information to the data subject**

#### **Categories of data**

*Article 14* sets out the information data controllers shall provide to data subjects. This Article has been substantially expanded compared to the provisions currently contained in the 1995 Directive. Leaseurope would like to warn against over-loading consumers with information and therefore asks that an appropriate balance be struck between the rights and duties of both parties.

In relation to the information requirements that the controller must disclose to the customer *Article 14(1)(c)* provides that the "*period for which the data will be stored*" must be provided to the data subject. Leaseurope believes this will not always be possible in practice to implement as this period can be difficult to determine depending on factors such as for example whether the lease is renewed. This provision deserves deletion as it clearly conflicts with *Article 30* of the 3<sup>rd</sup> AML Directive<sup>3</sup>.

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<sup>3</sup> Documents and information must be kept for a minimum of five years after the business relationship has ceased.

## **9. Chapter III – Article 15 – Right of access for the data subject**

### **Categories of data:**

Leaseurope believes that allowing the data subject access to this data at any time would be impossible to ensure in practice. The list of information aspects that the data subject has the right to request is too extensive and would lead to an overload for the customer. Yet again the period for which the data is to be stored is very difficult to determine as the nature of the contractual relationship can change overtime, hence this entitlement is impossible to guarantee.

### **Format for supplying/requesting the data:**

The electronic format stipulated in the proposal for requesting the data yet again goes against safety standards. An electronic request makes it very difficult for the data subject requesting the data to be identified.

### **Delegated acts:**

The presence of delegated acts in this article would provide conditions that would be too rigorous and a one-size-fits all approach would be inappropriate in this respect. A degree of flexibility must be maintained given the sectorial differences that exist.

## **10. Chapter III – Article 17 - Right to be forgotten and to erasure**

### **Right to be forgotten**

Leaseurope welcomes the fact that proposed Regulation does not introduce an absolute right to be forgotten. Access to historic data is critical for leasing companies to assess past performance in order to make sound leasing decisions, for portfolio management, for developing future underwriting strategies and for fulfilling their legal obligations in terms of Prudential Regulation and Anti-Money Laundering compliance.

In any case, the relevant provisions on the storage of data prevent data controllers from storing data for longer than required and national laws often lays down specific storage limits. Therefore, Leaseurope would like the exceptions in *Article 17(3)* to specifically include “processing of data for creditworthiness purposes” as this is a condition of the Consumer Credit Directive.

## **11. Chapter III – Article 18 – Right to data portability**

### **Credit data**

The provision of data portability is not suitable for the processing of personal data in a company's internal data base and should be inherently limited to the online sphere. Leaseurope feels that the system currently proposed in *Article 18* of the proposed Regulation would be open to abuse, as data could be easily altered in a fraudulent manner before being passed on to its intended destination. Additional difficulties could be that the data may be supplied in a different language and/or use differently defined terms.

### **Disclosure**

Careful consideration should also be given as to whether or not this provision could require organisations to disclose confidential, for example business systems and/or its customers. In this context the obligation to bank secrecy should also be taken in account.

We are also concerned that data portability may increase the risk of disclosure of personal data to third parties. This may be in conflict with other obligations of the controller, such as for example security of processing (*Article 30*).

### **Implementing acts**

We strongly oppose any standardisation of IT solutions and technical systems used by controllers to process data, as this would be very expensive to establish. The aim of the proposed Regulation is to introduce a new European framework for data protection that ensures protection of individual's rights and the free movement of data (*Article 1*), and not to standardise processing systems.

We would also like to add that the imposition of technical requirements to enable personal data to become portable comes at a significant cost for businesses, which they are likely to pass on to consumers.

## **12. Chapter III - Article 19 - Right to Object**

### **Burden of proof on controller**

Leaseurope has observed that this article has clearly been changed from its appearance in the Directive and now is adjusted in favour of the data subject. The burden of proof is now placed on the controller to prove they have compelling legitimate grounds for the processing that overrides the interests or fundamental rights and freedoms of the data subject. Leaseurope feels that this is disproportionate and could result in frivolous claims.

## **13. Chapter IV – Article 23 – Data protection by design and by default**

### **Design of systems**

Article 23 of the Proposal would require businesses to implement technical and organisational measures and procedures, so as to meet the requirements of the Regulation. In our view, this provision is unnecessary. Furthermore, the current wording is unclear, imposing an obligation to redesign internal systems to an undefined standard.

Leaseurope strongly opposes any standardisation of IT solutions and technical systems used by controllers to process data, through the adoption of implementing measures. The aim of the Proposal is to introduce a new European framework for data protection that ensures protection of individual's rights and the free movement of data (*Article 1*), not to standardise processing systems, as proposed in *Article 23(4)*.

## **14. Chapter IV - Article 28 – Documentation**

### **Maintenance of documentation**

The obligation to maintain documentation will entail a significant and unnecessary administrative burden on businesses. This is solely for the purpose of the supervisory authority performing a check, which the proposed Regulation does not confirm to be a certainty.

The Commission's empowerment to adopt delegated acts in relation specifying the criteria and requirements for the documentation is not adequate as sectorial differences must be accounted for. The retention of such documentation should in effect be limited in effect of the volume of data that is processed.

## **15. Chapter IV – Article 31 – Notification of a personal data breach to the supervisory authority**

### **Notification period**

The foreseen time period for notifying the supervisory authority (24 hours) of all the information required in *Article 31(1)* is in practice too short as it always takes time to assess what has happened, understand the amount and nature of the data, the potential risk etc.

### **Notification to supervisory authorities**

An obligation exists to notify the supervisory authorities when a data breach occurs. Leaseurope is of the opinion that this report should only be filed when the breach is likely to adversely affect the protection of the data.



## **16. Chapter IV – Article 32 – Communication of a personal data breach to the data subject**

### **Adverse effects**

With regard to the communication of personal data breaches to data subjects where this is likely to affect the personal data or privacy of the data subject, Leaseurope would like to note that the establishment by the Commission via delegated and implementing acts at a later stage for applicable circumstances is likely to create substantial legal uncertainty. Data subjects should be informed where there could be a significant impact on them and we therefore feel that the current article is disproportionate.

## **17. Chapter IV – Article 33 – Data protection impact assessments**

### **Consultation**

The impact assessments that are prescribed in the proposed Regulation cause an onerous burden and would be rather time consuming, as consultation is required with either the data subject or their representative, thus in essence external consultation is required.

### **Specific risks**

The impact assessments are only required if risky processing operations occur. It is not clear what benefit the data subject or the business would derive from conducting such assessments. Additionally, the presences of delegated acts is inappropriate for the further specifying of the criteria and processing that are likely to present specific risks, as each business sector will encounter differing risks.

## **18. Chapter IV – Article 35 – Designation of the data protection officer**

### **Appointment**

This article provides for the creation of the role of a Data Protection Officer (DPO). There are three conditions outlined, and if one is satisfied, it is necessary to appoint a DPO. According to the proposal, if the processing of data is carried out by an enterprise employing 250 people or more a data protection officer must be appointed. Nonetheless, the provision does state that for a group of undertakings a single data protection officer can be appointed.

Leaseurope would like to express its opposition to the benchmark outlined, and would like to advocate for a benchmark more related to the amount of data processing carried out, rather than one that is solely based on an employee headcount.

### **Independence**

*Article 35(8)* provides that the DPO may be employed by the controller or processor, or alternatively should provide their tasks on the basis of a service contract. The inherent independence attached to their role could mean that they could take decisions against the company and be an independent force against the company. This could be potentially problematic.

## **19. Chapter IV – Article 36 – Tasks of the data protection officer**

### **Independence**

The independence of the DPO is again reiterated in *Article 36(2)*. Leaseurope believes that this wording should be amended as the DPO should be subject to some control by the company to which he is appointed.

## **20. Chapter X – Article 79 – Administrative sanctions**

### **Level of sanctions**

The proposed Regulation introduces severe administrative sanctions which supervisory authorities can impose on data controllers. We feel that the sanctions should be proportionate to a breach of the provisions of the Regulation.

It would also be more appropriate to amend the wording of *Article 79* from the “supervisory authority **shall** impose” to the “supervisory authority **may** impose”. This is to allow each authority to take into account all the circumstances of each individual case.

As a counterbalance to the sanctions, it is crucial that the obligations and duties of controllers and processors are clearly laid out.

## **21. Chapter X – Article 86 – Exercise of the delegation**

### **Delegated acts**

Leaseurope has serious concerns regarding the extensive power for the European Commission to adopt delegated acts. This would entail that the provisions of the Regulation would be liable to substantial changes over time, as well as legal uncertainty. The limited involvement of stakeholders in this process is also a concern.

We would like to recall that in accordance with the provisions of the Lisbon Treaty delegated acts can only be applied to “non-essential” aspects of the Regulation, rather than, as in the proposed Regulation, on all essential aspects of the Regulation.

Leaseurope therefore objects to the provisions of the Regulation being altered at a later stage by delegated acts in general and in particular on the following issues:

- Lawfulness of processing (*Article 6(5)*);
- Right to be forgotten (*Article 17(9)*); Communication of personal data breach (*Article 32(5)*);  
and
- Data protection impact assessment (*Article 33(6)*).