

Comments on the Draft proposal of the Act for the implementation of the General Data Protection Regulation

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American Chamber of Commerce in Croatia *Američka gospodarska komora u Hrvatskoj*

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Contested provisions of the Act

In this document, the American Chamber of Commerce in Croatia (AmCham) presents its position on the Draft proposal of the Act for the implementation of the General Data Protection Regulation (Act).

AmCham proposes the following amendments to the provisions of the Act:

General comments on the Act

- The name “General Personal Data Protection Regulation” is mentioned in several instances in the Act and AmCham proposes the word “personal” to be deleted since the correct name is “General Data Protection Regulation”. Also, the term “personal data protection officer” should be defined as “data protection officer”.
- The Act does not regulate the processing of personal data relating to criminal convictions and offences (Article 10 of the General Data Protection Regulation) and AmCham believes that it is important to regulate this. A certificate of no criminal record is required in various cases in Croatia, including, for example, for the appointment of the director of the Agency in accordance with the Draft proposal of this Act. AmCham believes that a general solution that would be contained in this Act is necessary, in addition to the specific solutions that already exist in other acts, which have to comply with this Act.
- **AmCham proposes the following Article to be included in the Act:**

Child’s consent in relation to information society services, Article XX

1. Where point (a) of Article 6(1), in relation to the offer of information society services, applies directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 15 years old.

(2) The provision of paragraph 1 of this Article shall apply to a child with a permanent residence in the Republic of Croatia.

Comments on specific provisions of the Act

Subject-matter, Article 1

2. This Act does not relate to data processing performed by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, as well as data in the area of national security and defense.

AmCham proposes the following formulation of Article 1(2):

2. *The scope of this Act is equivalent to the scope of the General Data Protection Regulation.*

Explanation of the proposed amendment:

Article 1(2) of the General Data Protection Regulation defines four cases in which the Regulation itself does not apply, specifically when it does not relate to the processing of personal data.

Powers of the Agency, Article 6

1. *In addition to the powers established in the General Data Protection Regulation, the Agency shall carry out the following tasks:*

– *if it is prescribed by a separate act, it can initiate and has the right to participate in criminal, misdemeanor, administrative and other judicial or extrajudicial proceedings due to infringement of the General Data Protection Regulation and this Act;*

– *adopt the Criteria for setting the amount of the fees for administrative costs referred to in Article 41(2) of this Act and the Criteria for setting the amount of the fees referred to in Article 41(3) of this Act;*

– *publish individual decisions in accordance with Articles 18 and 46 of this Act on the webpages of the Agency, that is, in the Official Gazette of the Republic of Croatia;*

– *initiate and participate in proceedings against responsible persons due to infringement of the General Data Protection Regulation and this Act;*

– *perform the tasks of an independent supervisory authority for monitoring the application of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, unless otherwise stipulated in special regulations;*

– *perform other tasks laid down by law.*

AmCham proposes adding the following additional indents to Article 6(1):

– *actively promote knowledge on the protection of personal data, raise the level of awareness and information on the role of personal data protection;*

– *give opinions and expert positions in the area of the right to personal data protection;*

– *keep a register of data protection officers and publish the following data from that register: the controllers or processors and contact details, which includes the e-mail address of the data protection officer.*

Conditions for appointing the director and the deputy director, Article 8

1. A person fulfilling the following conditions may be appointed director or deputy director:

- the person has Croatian citizenship and permanent residency in the Republic of Croatia;
- the person has completed undergraduate and graduate university study program or integrated undergraduate and graduate university study program or specialist undergraduate and graduate expert study program;
- the person has at least 10 years of work experience in the profession;
- the person is a renowned expert of recognized professional reputation with expert knowledge and experience in the area of personal data protection;
- the person has no prior convictions nor ongoing proceedings for criminal offences for which the procedure is initiated *ex officio*;
- the person is not a member of any political party.

AmCham proposes amendments of the first, third and fourth indent of Article 8(1):

- the person has Croatian citizenship;
- the person has at least 10 years of experience in the legal profession or in the area of information security;
- the person is a renowned expert of recognized professional reputation with expert knowledge and experience of data protection law and practices.

Explanation of the proposed amendment:

Deleting the phrase “permanent residency in the Republic of Croatia” from the first indent is proposed since this condition represents discrimination based on permanent residency and infringes EU law.

Determining the relevant profession, that is the legal profession or a profession in the area of information security, is proposed in the third indent.

In order to ensure consistency, in the fourth indent it is proposed to use the formulation adopted in the General Regulation: “*expert knowledge and experience of data protection law and practices*”.

Dismissal of the director and the deputy director, Article 9

1. The Croatian Parliament shall dismiss the director and the deputy director prior to the end of their term in the following cases:

- upon the request of the director or the deputy director;
- in the event of circumstances due to which the director or the deputy director no longer meets the conditions for appointment;

– if the director or the deputy director is guilty of serious misconduct. It shall be considered that the director or the deputy director is guilty of serious misconduct if they are not performing their duties in accordance with the law.

AmCham proposes adding the following additional indent to Article 9(1):

– if the director or the deputy director are unable to perform their duties for a period exceeding six months.

Professional service, Article 10

5. The ordinance laying down the principles for internal organization of state administrative bodies, in the part pertaining to state administrative institutions, shall be applied appropriately to the internal organization of the Agency's professional service.

AmCham proposes the following amendment of Article 10(1):

5. The regulation laying down the principles for internal organization of state administrative bodies, in the part pertaining to state administrative institutions, shall be applied appropriately to the internal organization of the Agency's professional service.

Explanation of the proposed amendment:

The use of the term "regulation" is proposed instead of the term "ordinance" in order to ensure legal security.

Cooperation with state administrative bodies and other bodies, Article 14

Central state administrative bodies and other state bodies shall deliver draft proposals of acts and proposals of other regulations regulating issues regarding the processing of personal data to the Agency in order for the Agency to provide professional opinions in relation to the area of personal data protection.

AmCham proposes the following formulation of Article 14:

Public authorities shall deliver draft proposals of acts and proposals of other regulations regulating issues regarding the processing of personal data to the Agency in order for the Agency to provide professional opinions in relation to the area of personal data protection.

Explanation of the proposed amendment:

AmCham proposes to replace the term "central state administrative bodies and other state bodies" with "public authorities" since this term is defined, which would eliminate potential ambiguities.

Annual work report, Article 17

1. The Agency shall submit an annual report on its work to the Croatian Parliament no later than 31 March of the current year for the previous year. The annual report must include:

— the number of controller's notifications on the breach of personal data referred to in Article 35 of the General Data Protection Regulation and on the supervisory activities undertaken following these notifications;

AmCham proposes an amendment of the formulation of the third indent of Article 17(1):

— the number of controller's notifications on the breach of personal data referred to in Article 33 of the General Data Protection Regulation and on the supervisory activities undertaken following these notifications;

Explanation of the proposed amendment:

This provisions refers to the wrong Article of the General Data Protection Regulation as it refers to Article 35, whereas it should refer to Article 33.

Furthermore, AmCham proposes adding the following additional indent to Article 17(1):

— a list and description of the undertaken supervisory activities by industries, including the information on the supervision undertaken within public authorities.

Publication of opinions and decisions of the Agency, Article 18

1. Decisions and opinions of the Agency that relate to the types of processing that can pose high risk for the rights and freedoms of individuals, taking into account the nature, scope and purpose of the processing, shall be published on the webpages of the Agency.

2. Opinions and decisions referred to in paragraph 1 of this Article shall be anonymized and pseudonymized using appropriate techniques.

3. By way of derogation from paragraph 2 of this Article, when opinions and decisions of the Agency referred to in paragraph 1 of this Article relate to minors, the technique of anonymization and pseudonymization of the information relating to the minors shall be used in order to ensure a high level of protection of their privacy.

AmCham proposes an amendment of Article 18:

1. Decisions and opinions of the Agency that are relevant for the practice of data protection shall be published on the webpages of the Agency.

2. The Agency shall always publish decisions and opinions that change the present practice or decide on a particular legal issue for the first time.

3. Opinions and decisions referred to in this Article shall be published in an anonymized form.

Processing of personal data using video surveillance, Article 26

2. The notification referred to in paragraph 1 of this Article shall contain all relevant information in accordance with the provision of Article 13 of the General Data Protection Regulation, and in particular a simple and easily comprehensible image accompanied by text that provides the data subjects with the following information:

- that the premises are under video surveillance;*
- information on the controller;*
- contact details using which the data subjects can exercise their rights.*

AmCham proposes the following formulation of Article 26(2):

2. The mark referred to in paragraph 1 of this Article shall contain a graphical representation accompanied by text that provides the data subjects with the following information:

- that the premises are under video surveillance;*
- information on the controller;*
- contact details using which the data subjects can exercise their rights.*

Explanation of the proposed amendment:

Article 13 of the General Data Protection Regulation has 12 points containing the information to be provided to the data subject when collecting personal data (in this case at the moment of recording). Only three pieces of information are pointed out in Article 26(2): that the premises are under video surveillance, information on the controller and contact details. In addition, paragraph 2 refers to “the notification referred to in paragraph 1”, while paragraph 1 mentions a “mark” and not a “notification”. AmCham believes that this formulation is contradictory and confusing. Also, the part of the sentence reading “in particular a simple and easily comprehensible image” is very debatable—interpretation of what constitutes “simple and easily comprehensible” can cause disputes in practice.

Video surveillance of the working area, Article 29

1. Processing of employees’ personal data using a video surveillance system can be performed only if, in addition to the conditions laid down in this Act, the conditions laid down in regulations on occupational safety are also met and if the employees were previously informed about this measure on an individual basis and if the controller informed the employees before reaching the decision on the installation of a video surveillance system.

AmCham proposes the following formulation of Article 29(1):

1. Processing of employees’ personal data using a video surveillance system can be performed only if, in addition to the conditions laid down in this Act, the conditions laid down in regulations on occupational safety are also met and if the employees were previously informed about this processing.

V. Proceedings covered by the competence of the Agency and legal remedies, Article 33

1. If a decision ordering the deletion or other irreversible removal of personal data is issued, the dissatisfied party may request the competent administrative court to delay the deletion or other irreversible removal of personal data if that party proves that it would recollect the personal data whose deletion or irreversible removal is requested by taking disproportionate effort.

2. If the competent administrative court accepts the request referred to in paragraph 1 of this Article, the party that was ordered to delete or otherwise irreversibly remove personal data shall block all processing of the personal data at issue, except keeping the data, until a final judicial decision has been made.

AmCham proposes the following formulation of Article 33:

1. If a decision ordering the deletion or other irreversible removal of personal data is issued, the dissatisfied party may request the competent administrative court to delay the deletion or other irreversible removal of personal data.

2. If the competent administrative court grants the request referred to in paragraph 1 of this Article, the party that was ordered to delete or otherwise irreversibly remove personal data shall block all processing of the personal data at issue, except keeping the data, until a final judicial decision has been made.

Exercise of supervision, Article 34

1. Authorized officials of the Agency may exercise supervision with or without prior notice independently and, in certain cases, with the participation of representatives of a seconding supervisory authority (hereinafter referred to as "the authorized persons"). The supervised person, that is, the controller or the processor, shall be informed of the exercise of supervision without prior notice at the place and at the time of supervision.

2. Before starting the supervision referred to in paragraph 1 of this Article, the authorized persons shall identify themselves by presenting an official accreditation card and a supervision order.

3. If the Agency is expecting interference of the supervision in the form of resistance of the supervised entity, it shall submit a written request to the ministry responsible for interior affairs, requesting its assistance in undertaking these supervisory activities.

4. Based on the request of the Agency, the ministry responsible for interior affairs shall, in accordance with special regulations, assist in exercising the supervision referred to in paragraph 2 of this Article.

(5) The supervision order referred to in paragraph 1 of this Article shall be issued by the director of the Agency.

AmCham proposes that the last sentence of paragraph 1 of Article 34 and paragraphs 2 and 3 of that Article should be moved to the following Article 35, while the remaining sentence of paragraph 1 of Article 34 should be supplemented. Furthermore, paragraph 1 of Article 35 should be

added to Article 34 as paragraph 3, while paragraph 5 of Article 34 should become paragraph 4 and be amended as follows:

- 1. Authorized officials of the Agency may exercise supervision with or without prior notice at the business premises of the controller or processor independently and, in certain cases, with the participation of representatives of a seconding supervisory authority (hereinafter referred to as "the authorized persons").*
- 2. Before starting the supervision referred to in paragraph 1 of this Article, the authorized officials of the Agency shall identify themselves to the controller or the processor by presenting an official accreditation card and a supervision order. The form and content of the official accreditation card shall be laid down in the ordinance on the official accreditation card of the Agency. If other authorized persons referred to in paragraph 1 of this Article participate in the supervision, they shall present a written authorization of the Agency for participating in the supervision.*
- 3. Authorized officials of the Agency may, where appropriate, make copies of the available documents, record all of the content of the filing systems and collect other relevant information.*
- 4. The supervision order for supervision with prior notice referred to in paragraph 1 of this Article shall be issued by the director of the Agency.*

Explanation of the proposed amendment:

Article 34(1) of the Act provides for supervision both with and without prior notice. AmCham proposes that the general provisions on supervision should be separated, that is, the provisions that apply to both types of supervision (with and without prior notice) should be separated from the provisions on supervision without prior notice. Supervision without prior notice represents a significant interference with the rights of the undertaking and it can represent a significant operational disruption, which is why it should be regulated more carefully and modeled after similar provisions of the Competition Act.

Article 35

- 1. Where appropriate, authorized persons may make copies of the available documents, record all of the content of filing systems and collect other relevant information.*
- 2. If it is not possible to make copies of the necessary documentation during supervision due to technical reasons, the authorized persons shall, where appropriate, confiscate the necessary filing systems and the equipment that contains other relevant information and documentation, and it shall keep them for the period required to make copies of the documentation.*
- 3. The authorized persons may seal the room, the filing systems or the equipment during supervision and within the scope necessary to undertake supervisory activities if there is a risk of evidence being destroyed or altered.*

4. *The authorized person shall draw up an official note on copying, seals and temporary confiscation of the filing systems and equipment and this note shall contain all relevant information on the data or the equipment covered by the activity; a copy of this note shall be given to the supervised commercial entity.*

AmCham proposes that a new subtitle reading “Supervision without prior notice” should be added above Article 35 and, in accordance with the previous comment to Article 34, that paragraph 1 of Article 35 should be deleted and added to Article 34 as paragraph 3. Furthermore, the provisions of the last sentence of paragraph 1 of Article 34 and paragraphs 2 and 3 of that Article should be added to this Article 35, as well as new paragraphs, as follows:

Supervision without prior notice, Article 35

1. *Before exercising supervision without prior notice at the business premises of the controller or processor, the Agency shall apply to the High Administrative Court of the Republic of Croatia for a supervision order for supervision without prior notice and for searching the premises, filing systems and accompanying documents and objects found at the premises, as well as for sealing and temporarily confiscating rooms, filing systems, equipment and other objects for the duration of the supervision and within the scope necessary for undertaking supervisory activities, in particular if there is a risk of concealing or destroying evidence that are necessary for determining an infringement of valid legal regulations on personal data protection and it is reasonable to assume that they can be found at particular premises or with a particular person.*

2. *The High Administrative Court of the Republic of Croatia shall:*

(1) *decide on issuing an order for supervision without prior notice within two days from receiving the application of the Agency referred to in paragraph 1 of this Article; and*

(2) *a supervision order for supervision without prior notice must contain:*

– *the reference of the subject of the search referred to in paragraph 1 of this Article;*

– *the legal basis for conducting the search;*

– *authorized officials of the Agency and other authorized persons that will carry out supervision and the search; and*

– *the deadline for carrying out supervision without prior notice.*

3. *The controller or the processor shall be informed of the exercise of supervision without prior notice at the place and at the time of supervision.*

4. *If coercion needs to be used when exercising the supervision referred to in paragraph 1 of this Article or if physical resistance is expected when carrying out the search, as well as if certain expert examinations need to be performed or other*

professional assistance provided, the Agency shall submit a written request to the ministry responsible for interior affairs, requesting its assistance in undertaking these supervisory activities.

5. Based on the request of the Agency, the ministry responsible for interior affairs shall, in accordance with special regulations, assist the Agency in exercising supervision and/or carrying out the search referred to in paragraph 1 of this Article.

6. In case of supervision and search without prior notice referred to in paragraph 1 of this Article, the authorized persons may:

(1) enter and search all business premises (hereinafter referred to as "the premises") at the seat of the controller or processor being supervised, as well as the premises at other addresses where the undertaking conducts business;

(2) inspect the filing systems and the corresponding equipment and other documentation and objects that relate to personal data processing, regardless of the medium on which the data are stored (for example, computers, servers, telephone devices);

(3) make copies of the filing systems and other relevant documentation in electronic or other form and seal or confiscate the corresponding equipment and/or other objects on which personal data are stored, that is, the filing systems and other relevant documentation;

(4) confiscate the filing systems and other necessary documentation and keep them as long as it is necessary to make copies if, due to technical reasons, copies could not be made during supervision; the authorized official of the Agency shall draw up an official note on confiscation;

(5) seal a room and/or a filing system or other relevant documentation during the search and within the scope necessary for carrying out the search;

(6) request an oral statement on the facts or documents relating to the objective and the subject of supervision from a representative or an employee of the controller or the processor and record the answers obtained;

(7) request the delivery of a written statement on the facts or documents relating to the objective and the subject of supervision from a representative or an employee of the controller or the processor and set a deadline for delivering that statement;

(8) perform other activities necessary for achieving the objective of supervision.

7. If equipment, other objects, filing systems and other relevant documentation are temporarily confiscated during supervision and search without prior notice referred to in paragraph 1 of this Article, the Agency shall draw up an official note on this, in which it shall state, in particular, where the temporarily confiscated objects or documentation were found and provide their description. An authorized official of

the Agency shall give the controller or the processor a confirmation of temporary confiscation of objects or documentation without delay. Equipment, other objects, filing systems and other relevant documentation that are temporarily confiscated shall be kept until all relevant facts and circumstances contained in them are established, and at most until the Agency issues a decision on concluding supervision.

(8) The provisions of Article 34 and Articles 36 through 38 of this Act shall also apply accordingly to the exercise of supervision without prior notice.

Explanation of the proposed amendment:

In accordance with the previous comment on Article 34 of the Act, AmCham proposes that the way in which provisions on supervision without prior notice are carried out should be regulated separately and in more detail. Supervision without prior notice represents a significant interference with the rights of the undertaking and it can represent a significant operational disruption, which is why it should be regulated more carefully and modeled after similar provisions of the Competition Act. In particular, the supervisory authority should not be allowed to independently issue warrants to search the premises and IT systems of the controllers or the processors during supervision without prior notice since this would represent a direct interference with their business and a limitation of their rights and freedoms guaranteed by the Constitution. For example, in criminal or misdemeanor proceedings, the police also need a separate court-issued warrant to search business premises and a separate warrant to search IT (computer) systems on those premises. Finally, a decision by which the High Administrative Court of the Republic of Croatia issues this warrant is provided for in the similar case of supervision without prior notice in accordance with the Competition Act, whose provisions were taken as a model for drawing up this proposal of Article 35.

Report on supervision, Article 38

3. If the report referred to in paragraph 1 of this Article is drawn up immediately at the place of supervision, the supervised person may raise objections to the report, which the authorized person will enter in the report.

AmCham proposes the following formulation of Article 38:

3. If the report referred to in paragraph 1 of this Article is drawn up immediately at the place of supervision, the supervised person may raise objections to the report during supervision, that is, while the report is being drawn up, and the authorized person will enter these objections in the report, as well as in written form within the deadline referred to in paragraph 4 of this Article.

Explanation of the proposed amendment:

Since a report can also be drawn up on the spot in case of supervision without prior notice, the supervised person may not be able to notice or react in a timely manner in case of potential objections to that record. Moreover, this person would also be subject to less favorable treatment in comparison to the supervised person referred

to in paragraph 4 of this Article since they would not have the same deadline for providing their statement.

Provision of expert opinions, Article 40

2. If providing an expert opinion requires the inclusion of other national or foreign bodies for the purpose of obtaining data or information relevant for the expert opinion, the deadline for providing an opinion referred to in paragraph 1 of this Article can be extended for another 30 days.

AmCham proposes the following formulation of Article 40:

2. If providing an expert opinion requires the inclusion of other national or foreign bodies for the purpose of obtaining data or information relevant for the expert opinion, the deadline for providing an opinion referred to in paragraph 1 of this Article can be extended for another 30 days. The Agency shall inform the legal or natural person that requested the expert opinion of this extension of the deadline within 15 days after the day on which the person submitted the request.

Fee for acting on a request, Article 41

3. The Agency shall charge a fee for providing opinions to commercial entities (law firms, consultants, etc.) that the commercial entities requested for the purpose of performing their regular activities, that is, providing services.

AmCham proposes to delete Article 41, paragraph 3:

AmCham believes that the charging of fee for providing opinions to commercial entities should not be introduced in this Act. Taking into account the efforts of the Government in general unburdening of the economy and making it easier to do business which does not include additional fees, AmCham considers that the proposal of introducing a fee is against the Government's efforts.

Furthermore, AmCham believes that businesses should have a possibility to seek and receive an opinion of the Agency without fees which would enable better compliance of businesses with the Act and the General Data Protection Regulation with the goal of protection of personal data in Croatia.