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Committee on Employment and Social Affairs

2012/0011(COD)

8.11.2012

DRAFT OPINION

of the Committee on Employment and Social Affairs

for the Committee on Civil Liberties, Justice and Home Affairs

on the 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 (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD))

Rapporteur: Nadja Hirsch

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SHORT JUSTIFICATION

Your rapporteur specifically welcomes the present Regulation and its purpose which is to further harmonise data protection in the European Union (EU).

This aim of this opinion is as follows: it quite obvious that European employee data protection cannot be comprehensively regulated in one article. Your rapporteur's purpose is rather to lay down a number of markers. In the context of realising a genuine European labour and the single market, further consideration may subsequently be given to regulating employment data protection at European level. This would be possible on the basis of Article 288 TFEU.

Although a large volume of data processing in the EU relates to employment, little space in the Regulation is specifically devoted to employee data protection. Furthermore the level of abstraction of the Regulation often makes it difficult to interpret the rules in an employment context.

Your rapporteur takes the view that the best way of addressing the issues facing employee data protection in this Regulation is mainly to restrict the scope of the opinion to Article 82. This will allow an in-depth analysis of the content, besides grouping together the various articles in the Regulation which have a bearing on employee data protection.

Re 82 (1) and Recital 124

In its present stage, the present Regulation can only provide a minimum level of protection, particularly as regards employee data. Each Member State must continue to be able to set standards more favourable for workers than those provided for in the Regulation. Moreover, it must be possible to set such standards in collective agreements. The phrase 'within the limits of this Regulation' should be rejected for a number of reasons. Firstly, it is incompatible with the general tenor of Article 82 - which deals with exceptions - and could, in connection with the delegated acts proposed by the Commission in Article 82, result in an extremely complex situation. Secondly, as a worst case scenario, this could mean that Member States were unable to adopt more far-reaching rules. Finally, this formulation seems to have been arbitrarily chosen here, since other opening clauses, e.g. concerning the media, do not contain this restriction.

Re 82 (1a)

Since the Commission has not so far made any specific proposal relating to employee data protection, and bearing in mind the few substantive points relating to employee data protection in the regulation, a number of Europe-wide minimum protection standards must be established. The four sub-points should not be seen as an exhaustive list, but rather as the cornerstone of comprehensive European data protection legislation.

Re 82 (1b)

The data protection officer plays a role of paramount importance. It must therefore be made absolutely clear that he or she should be able to perform his or her duties without fear of pressure or external influence and for the benefit of employees. Special protection from dismissal and the prohibition of discrimination against his or her person are therefore appropriate.

Re 82 (1c) and Recital 124 a (new)

The Commission proposal does not sufficiently specify the rules governing the transmission of data within a group of undertakings in the EU. This amendment is intended to rectify this omission, while protecting the interests of employees.

Re 82 (1d) and Recital 34

The complete exclusion of consent as a valid legal reason for the processing of personal data will not have the desired result in an employment context. Your rapporteur therefore proposes that even in situations where there is an imbalance between the parties, consent should be possible as a valid legal reason, where it is intended to have legally and financially advantageous effects for the employee.

Re 82 (3)

Delegated acts should, in your rapporteur's view, only be used where non-material elements of the existing Regulation need to be adapted rapidly and flexibly to technical and security innovations. Hitherto the Commission proposal's wording was too broad-based. Moreover, alongside paragraph 1, it should also be possible to continue to regulate the new paragraph 1c by legal acts.

Re 82 (3a)

This review clause allows a fresh evaluation.

AMENDMENTS

The Committee on Employment and Social Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1 Proposal for a regulation Recital 34

Text proposed by the Commission

(34) Consent should not provide a valid legal ground for the processing of personal data, where there is a clear imbalance

Amendment

(34) Consent should not provide a valid legal ground for the processing of personal data, where there is a clear imbalance

between the data subject and the controller. This is especially the case where the data subject is in a situation of dependence from the controller, among others, where personal data are processed by the employer of employees' personal data in the employment context. Where the controller is a public authority, there would be an imbalance only in the specific data processing operations where the public authority can impose an obligation by virtue of its relevant public powers and the consent cannot be deemed as freely given, taking into account the interest of the data subject.

between the data subject and the controller. This is especially the case where the data subject is in a situation of dependence from the controller, among others, where personal data are processed by the employer of employees' personal data in the employment context. ***In an employment context, data processing intended to have legally or financially advantageous consequences for the employee is an exception.*** Where the controller is a public authority, there would be an imbalance only in the specific data processing operations where the public authority can impose an obligation by virtue of its relevant public powers and the consent cannot be deemed as freely given, taking into account the interest of the data subject.

Or. de

Amendment 2
Proposal for a regulation
Recital 124

Text proposed by the Commission

(124) The general principles on the protection of individuals with regard to the processing of personal data should also be applicable to the employment context. ***Therefore, in order*** to regulate the processing of employees' personal data in the employment context, Member States should be able, ***within the limits of*** this Regulation, ***to adopt by law specific rules for the processing of personal data in the employment sector.***

Amendment

(124) The general principles on the protection of individuals with regard to the processing of personal data should also be applicable to the employment context. Member States should be able to regulate the processing of employees' personal data in the employment context, ***while ensuring compliance with the standards set out in this Regulation. Where a statutory basis exists in the Member State in question for the regulation of employment matters by agreement between employee representatives and the management of the undertaking or the controlling undertaking of a group of undertakings (collective agreement) or under Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the***

establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees¹, it should also be possible to regulate the processing of personal data in an employment context by such an agreement.

¹ OJ L 122, 16.5.2009, p. 28.

Or. de

Amendment 3
Proposal for a regulation
Recital 124 a (new)

Text proposed by the Commission

Amendment

(124a) In order to safeguard business interests which are directly related to employment, the processing of employee data within groups of undertakings should be permitted. The rules of this Regulation take into account the widespread practice of processing employee data in groups of undertakings.

Or. de

Amendment 4
Proposal for a regulation
Article 82 – paragraph 1

Text proposed by the Commission

Amendment

1. *Within the limits of* this Regulation, Member States may adopt by *law* specific rules regulating the processing of employees' personal data in the

1. Member States may, *in accordance with the rules set out in* this Regulation, adopt by *legal provisions* specific rules regulating the processing of employees'

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employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law *or* by collective agreements, management, planning and organisation of work, health and safety at work, and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

Member States may, *in accordance with the rules set out in* this Regulation, adopt by *legal provisions* specific rules regulating the processing of employees' personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law *and* by collective agreements, management, planning and organisation of work, health and safety at work, and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law *and* by collective agreements, *collective agreements*, management, planning and organisation of work, health and safety at work, and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

The level of protection afforded by this Regulation may not be undercut, especially where arrangements are made by agreement between employee representatives and the management of the undertaking or of the controlling undertaking of a group of undertakings.

The right of Member States to provide employees with more favourable protection provisions in respect of the processing of personal data in the employment context shall remain unaffected.

Or. de

Amendment 5
Proposal for a regulation
Article 82 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Notwithstanding the other provisions of this Regulation, the legal provisions of Member States referred to in paragraph 1 shall include at least the following minimum standards:

a) The processing of employee data without the employees' knowledge shall not be permitted. Notwithstanding sentence 1, Member States may, by law, provide for the admissibility of this practice, by setting appropriate deadlines for the deletion of data, providing there exists a suspicion based on factual indications that must be documented that the employee has committed a crime in the employment context, providing also the collection of data is necessary to clarify the matter and providing finally the nature and extent of this data collection are not disproportionate to the purpose for which it is intended. The privacy and private lives of employees shall be protected at all times.

b) The open optical-electronic and open acoustic-electronic monitoring of parts of an undertaking which are not accessible to the public and are used primarily by employees for private activities, especially in bathrooms, changing rooms, rest areas, and bedrooms, shall be prohibited. Clandestine surveillance shall be inadmissible under all circumstances.

c) Where undertakings collect and process personal data in the context of medical examinations or aptitude tests, they must explain to the applicant or employee beforehand the purpose for which these data are being used, and afterwards provide them with these data together with the results and explain their significance. Data collection for the purpose of genetic

testing and analyses shall be prohibited as a matter of principle.

d) Whether and to what extent the use of telephone, e-mail, internet and other telecommunications services shall also be permitted for private use may be regulated by collective agreement. Where there is no possibility of regulation by collective agreement, the employer shall reach an agreement on this matter directly with the employee. In so far as private use is permitted, the processing of this accumulated traffic data shall be permitted solely to ensure data security, to ensure the proper operation of telecommunications networks and telecommunications services and for billing purposes. Notwithstanding sentence 3 above, Member States may, by law, provide for the admissibility of this practice, by setting appropriate deadlines for the deletion of data, providing there exists a suspicion based on factual indications that must be documented that the employee has committed a crime in the employment context, providing also the collection of data to clarify the matter is necessary and providing finally the nature and extent of this data collection are not disproportionate to the purpose for which it is intended. The privacy and private lives of employees shall be protected at all times.

Or. de

Amendment 6
Proposal for a regulation
Article 82 – paragraph 1 b (new)

Text proposed by the Commission

Amendment

1b. In addition to the provisions of Chapter IV, Section 4, the data protection

officer shall enjoy special protection from dismissal and may not be the subject of discrimination.

Or. de

Amendment 7
Proposal for a regulation
Article 82 – paragraph 1 c (new)

Text proposed by the Commission

Amendment

1c. The transmission of personal employee data between legally independent undertakings within a group of undertakings shall be permitted, providing it serves a business interest and is used for the conduct of specific administrative procedures and is not contrary to the interests of the person concerned which are worthy of protection. Where employee data are transmitted to a third country or to an international organization, Chapter V shall apply.

Or. de

Amendment 8
Proposal for a regulation
Article 82 – paragraph 1 d (new)

Text proposed by the Commission

Amendment

1d. Article 7, paragraph 4, shall not apply where the data processing is intended to have legally or economically advantageous consequences for the employee.

Or. de

Amendment 9
Proposal for a regulation
Article 82 – paragraph 3

Text proposed by the Commission

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for **the safeguards** for the processing of personal data for the purposes referred to in **paragraph 1**.

Amendment

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 **solely** for the purpose of further specifying the criteria and requirements for **ensuring the latest technical and security standards** for the processing of personal data for the purposes referred to in **paragraphs 1 and 1c**.

Or. de

Amendment 10
Proposal for a regulation
Article 82 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. On a proposal from the Commission, the European Parliament and the Council shall review this Article no later than 2 years after the date referred to in Article 91, paragraph 2. They shall reach a decision on this proposal under the procedure laid down in Article 294 of the Treaty on the Functioning of the European Union.

Or. de