EUROPEAN PARLIAMENT 2009 - 2014

Committee on Legal Affairs

26.4.2012

NOTICE TO MEMBERS

(0046/2012)

Subject: Reasoned opinion by the German Bundesrat 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))

Under Article 6 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality, any national parliament may, within eight weeks from the date of transmission of a draft legislative act, send the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

Under Parliament's Rules of Procedure the Committee on Legal Affairs is responsible for compliance with the subsidiarity principle.

Please find attached, for information, a reasoned opinion by the German Bundesrat on the above-mentioned proposal.

ANNEX

Reasoned opinion of the German Bundesrat

At its 895th sitting, on 30 March 2012, the Bundesrat, pursuant to Article 12(b) TEU, adopted the following opinion:

1. The Bundesrat is of the opinion that the proposal does not comply with the subsidiarity principle. As laid down in Article 5(3) TEU, when an area does not fall within its exclusive competence, the EU may act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

   The Bundesrat had previously expressed reservations regarding legislative powers and compliance with the subsidiarity principle when it delivered its opinion of 11 February 2011 on the Commission communication entitled 'A comprehensive approach on personal data protection in the European Union' (BR-Drucksache 707/10 (Beschluss)); and it regrets the Commission's failure to heed them. That those reservations were justified is borne out by the present proposals on thoroughgoing modernisation of personal data protection by means of a directive to regulate the area for law enforcement and justice purposes (see BR-Drucksache 51/12) and by conversion of the existing Data Protection Directive into a General Data Protection Regulation, combined with appropriate adjustment of the data protection provisions of the directive on privacy and electronic communications (Directive 2002/58/EC). The Bundesrat thus continues to take the view that the comprehensive approach to be adopted needs to take the subsidiarity and proportionality principles more faithfully into account than does the regulation model being proposed.

   The proposed General Data Protection Regulation does not meet the requirements of Article 5(3) TEU for the following reasons:

2. The proposal for a regulation fails to explain in sufficient detail why data protection in the public and private spheres needs to be bindingly regulated as a whole at European level under a regulation. Whereas the existing directive is aimed at full harmonisation of national data protection guarantees, provisions laid down by regulation, which are intended to apply across the board and with binding force, will, almost totally, supplant the data protection provisions of Member States. Especially in the public sphere and also, to a large extent, under the data protection law governing the private sphere, the data protection guarantees applying in Germany as well as in other Member States admit of differentiation and therefore make for greater enforceability and legal certainty than the individual provisions of the proposed regulation, which are couched in highly abstract terms. The fact that the General Data Protection Regulation is to take precedence will cast doubt on the continued existence of key areas of German data protection law which have hitherto not been contentious, including from a single market perspective. This point applies to, for example, data protection in social security matters or the federal and *Land*-level video surveillance rules necessitated by the reservation on grounds of materiality.

3. Even when European regulations allow Member States at least to translate provisions into

practice, they do not expressly confer any power to act on national legislatures. On the contrary, the numerous authorisations to adopt delegated acts demonstrate that the goal, going far beyond the assignment of competences under Article 16(2) TFEU, is comprehensive, binding full-blown regulation of European data protection law as a whole, a process that is to be governed solely by the European legislature. A standard Union-wide level of data protection can, however, still be achieved in the future by further development of the existing Data Protection Directive. This too is aimed at complete harmonisation of data protection law, but allows Member States to legislate in order to clarify conditions open to interpretation, on which the proposed regulation relies throughout.

4. Binding full regulation of data protection law in the public and private spheres, as proposed by the Commission, goes far beyond the aim of guaranteeing a high degree of data protection while making for a level playing field. Given its open-ended and vaguely defined material scope, the proposed regulation, which will be directly applicable, will do away with nearly all areas of current national data protection law except for protection of media-related data, data concerning health, and data processed in an employment context, as referred to in Article 80 ff. of the proposal. It thus extends to purely local matters such as the activity of local security authorities, since only ‘national security’ is excluded from its material scope, whereas ‘public security’ is subject only to the restrictions provided for in Article 21. By drafting the proposed regulation in such terms as to encompass all activities falling within the scope of Union law (Article 2(2)(a) of the proposal), the Commission is, moreover, laying claim to the power to regulate data protection law with binding effect even in areas, for example the education system, in which competence for harmonisation of laws and regulations is explicitly ruled out (e.g. under Article 165(4) TFEU). The same applies to security matters not connected with criminal offences, which continue to fall exclusively under the responsibility of the Member States (see Articles 72, 87, and 276 TFEU).

5. The Bundesrat is, in addition, of the opinion that the processing of personal data by Member States’ public authorities lies intrinsically outside the EU’s sphere of competence and should be removed from the material scope of the regulation in order to avert breaches of subsidiarity. It is true that this area, and processing for the purpose of performing tasks in the public interest, can be regulated by Member States under Article 6(3), first sentence, point (b), of the proposal for a regulation, in conjunction with paragraph 1(e). On the other hand, because the scope of any such rules is limited by specific requirements of Union law (Article 6(3), second sentence, of the proposal), Member States do not in effect have powers in their own right to regulate the processing of data by public authorities.

6. A further inconsistency with the principles of subsidiarity and proportionality, especially as regards the processing of data by public authorities, arises from the rule laid down in Article 1(3) of the proposal for a regulation, which, seeking to ensure the free movement of data, prohibits any national data protection guarantees beyond what is provided for in the regulation. However, the processing of data by public authorities, for instance in social security matters, which are subject to restrictive procedural rules (such as organisational separation of data-processing operations), is one particular area in which higher national data protection standards could be imposed without adversely affecting

internal market affairs.

7. The proposed General Data Protection Regulation is not an appropriate means of bringing comprehensive regulation to bear on practically every area of data protection law; to that extent, it infringes the principles of subsidiarity and proportionality. Its abstraction is such that requirements are couched sweepingly and the differentiated rights attaching to general and specialised data protection in Member States are levelled out; a further consequence is that the proposed regulation is falling back on Commission delegated acts in order to regulate many points of crucial importance for the right to privacy and for citizens' exercise of their basic rights and to continue moving towards full harmonisation. At any rate until such time as detailed arrangements have been laid down by European delegated acts, the enforcement of data protection law will be riddled with all manner of legal uncertainties, since the existing national provisions are to cease to apply after a transitional period of just two years. The regulation cannot, therefore, achieve the Commission's declared aim of offering greater legal certainty to the business community and public authorities where the processing of personal data is concerned. On the other hand, if the provisions proposed in the regulation were to be incorporated into the successor of the present Data Protection Directive, national data protection law would require no more than adaptation, and national arrangements could remain in existence, thus making for legal certainty and enforceability.

8. The proposal for a regulation is contrary to the subsidiarity and proportionality principles to the extent that the Commission's powers to exert influence by applying the 'consistency mechanism (Article 57 ff. and especially Article 60 et seq. of the proposal for a regulation) are incompatible with the independence of data protection authorities guaranteed under Article 16(2), second sentence, TFEU. According to the case law of the European Court of Justice, the requirement for data protection supervisory authorities to be completely independent implies a need to rule out even the risk that their decisions might be open to political interference. However, because it is empowered under the regulation to suspend measures proposed by supervisory authorities, the Commission is directly in a position to exert influence, and in that event its extensive executive responsibilities outside of data protection law might come into play, notwithstanding its formal independence.

9. By choosing to regulate European data protection standards by means of a regulation, the Commission is creating legal uncertainties as regards the data protection arrangements for electronic communications under Directive 2002/58/EC. The transposition obligations required of Member States in order to regulate data protection in electronic communication services are altered by Article 88(2) of the proposal for a regulation, which stipulates that references in the directive on electronic communications to the Data Protection Directive are to be construed as references to the proposed General Data Protection Regulation. Member States will thus be faced with the task of drawing up new specific national data protection standards for electronic communication services, but, as far as general data protection is concerned, will be deprived of legislative powers because the proposed regulation will take precedence. As a result of the decision to opt for a General Data Protection Regulation instead of further developing the Data Protection Directive, data protection in electronic communication services, a key area for the information society in particular, will therefore be burdened with considerable legal

uncertainties that will not be compensated for by other advantages serving to meet the protection requirement laid down in Article 16(1) TFEU.

10. The decision to adopt a General Data Protection Regulation and to regulate data protection in the field of law enforcement and justice by means of a directive gives rise to demarcation difficulties, providing further evidence that the principles of subsidiarity and proportionality are being infringed. The Bundesrat notes that the approach followed to date in the reform of EU data protection law would lead to a situation in which the police and law enforcement authorities, when carrying out their tasks, would have to observe different laws as regards the processing of personal data. The object of the directive on data protection in the field of law enforcement and justice (see Article 1(1) and point 3.4.1 of the explanatory memorandum, BR-Drucksache 51/12) is to lay down rules on the processing of personal data for the purposes of prevention, investigation, detection, or prosecution of criminal offences. The proposed General Data Protection Regulation is not applicable to those areas (Article 2(2)(e) of the proposal). However, the police forces of the *Länder* are responsible both for crime prevention and for general security, which, barring the limited exceptions permitted under Article 21, is covered by the binding requirements of the proposed General Data Protection Regulation. This fragmentation shows that, from the point of view of protecting personal data, the EU could legislate to more useful effect by developing the Data Protection Directive, rather than producing three acts binding to differing degrees on the Member States, namely the projected General Data Protection Regulation and the proposed directive on data protection in the field of law enforcement and justice as well as the existing Directive 2002/58/EC.