

Decision
Of the Bundesrat

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) 11 final; Council document 5853/12**

In its 895th session on 30th March 2012, the Bundesrat adopted the following Decision pursuant to Article 12, Point b, TEU:

1. The Bundesrat considers that the proposal does not comply with the subsidiarity principle. Pursuant to Article 5, Sub-section 3, TEU, the EU may only adopt measures in areas that do not fall within the exclusive competence of the EU inasmuch and insofar as the objectives of the envisaged measures could not be achieved sufficiently by the Member States at the central, regional or local level, but instead could be better achieved at the European Union level, due to the scope or impact of such measures.

The Bundesrat finds it regrettable that the Commission has not taken into account its reservations concerning clear demarcation of legislative competences and respect for the subsidiarity principle, which were already expressed by the Bundesrat in its Opinion of 11th February 2011 on the Commission Communication on the overall concept for data protection in the EU (BR Official Document 707/10 (Decision)). The proposals now tabled for comprehensive modernisation of protection of personal data by means of a Directive on data protection law regarding the police and judicial authorities (c.f. BR Official Document 51/12) and the transformation of the existing Data Protection Directive into a General Data Protection Regulation, along with the simultaneous amendment of data protection provisions in the Directive on Electronic Communications (Directive 2002/58/EC), confirms that these reservations were justified. The Bundesrat therefore takes the view that there

continues to be a need for an overall concept that takes greater account of the principles of subsidiarity and proportionality than the model proposed.

The proposed General Data Protection Regulation does not satisfy the requirements of Article 5, Sub-section 3, TEU for the following reasons:

2. The draft Regulation does not demonstrate sufficiently that it is necessary to introduce binding comprehensive regulation at the European level for data protection in the public and private realm through a Regulation. In contrast to the existing Data Protection Directive, which already aims to achieve full harmonisation of national data protection guarantees, dealing with this policy area by means of a comprehensive, binding Regulation would lead to an almost complete sidelining of Member States' data protection provisions. Particularly in respect of data protection laws in the public sector, but also to a large extent in the private sector, there are already, both in Germany and in other Member States, nuanced data protection guarantees, which are more readily enforceable and offer a higher degree of legal security than the highly abstract individual provisions of the draft Regulation. As the General Data Protection Regulation would enjoy primacy over such national provisions, it would call into question the continued existence of core areas of German data protection law, which are indisputably also core areas with regard to the Single Market. This would be the case, for example, for data protection of social security data, and for national and federal state (*Länder*) provisions on video surveillance, which are subject to the proviso that all the essential aspects of such provisions must be determined by the legislator (*Wesentlichkeitsvorbehalt*).
3. Insofar as Member States' powers at least to adopt concrete measures are also recognised within the framework of European Regulations, corresponding explicit empowerments of national legislators are missing in this text. Conversely the Regulation contains a very high number of empowerments to adopt delegated acts, extending far beyond the objective of comprehensive regulation of all European data protection law exclusively by the European legislator and the associated allocation of competences in Article 16, Sub-section 2, TFEU. A harmonised level of data protection right across the European Union could however continue to be attained by further developing the existing Data Protection Directive. This also aims to ensure full harmonisation of data protection law but would afford Member States the

possibility of adopting concrete measures in national legislation where there is scope for interpretation in respect of the elements constituting an offence; such scope for interpretation in respect of the elements constituting an offence is also found throughout the proposed Regulation.

4. The Commission's proposal of binding comprehensive regulation of data protection law in the public and private domain extends far beyond the objectives of guaranteeing a high level of data protection in these areas and ensuring equal competitive conditions. Due to its open and unspecific wording regarding the scope of application to specific subject areas, the proposed Regulation, which would apply almost across the board as directly applicable legislation (with exceptions solely for media, health sector and employee data protection as envisaged in Articles 80 ff. of the proposal) would sideline virtually all areas of existing national data protection law. It thus also encompasses purely local policy areas, such as the activity of authorities involved in maintaining public security at the local level, as the scope of application affords a waiver solely for "the field of national security" but for questions of "public security" only accords an authorisation to derogate from these provisions as stipulated in Article 21. As the scope of the proposed Regulation extends to encompass all activities within the scope of European Union law (Article 2, Sub-section 2, Letter a of the proposal), the Commission is thus also claiming competences to adopt binding provisions pertaining to data protection in policy areas, for example the education system, in which EU competence to harmonise legal and administrative provisions is even explicitly excluded (e.g. Article 165 Sub-section 4 TFEU). This also applies to legislation on non-crime-related security measures: competence to introduce legislation in this realm continues to lie exclusively with Member States (c.f. Articles 72, 87, 276, TFEU).
5. Furthermore, the Bundesrat takes the view that processing of personal data by the public administrations in the Member States does not as a general rule fall within the legislative competences of the EU and should therefore be excluded from the scope of application of the Regulation to avoid a breach of the subsidiarity principle. In the field of processing of personal data by public administrations, and processing of such data in order to carry out tasks which are in the public interest, Article 6, Sub-section 3, Sentence 1, Letter b in conjunction with Sub-section 1, Letter e of the draft Regulation does comprise

an authorisation for Member States to adopt provisions. However the scope of these provisions is limited by specific requirements pertaining to EU law (Article 6, Sub-section 3, Sentence 2 of the draft Regulation), and as a consequence the Member States do not retain any independent powers to legislate in the field of data processing by public administrations.

6. A further aspect that runs contrary to the principles of subsidiarity and proportionality is to be found, in particular in respect of data processing by public administrations, in the provisions of Article 1, Sub-section 3 of the draft Regulation, which forbids any national data protection guarantees over and above those envisaged in the Regulation, with a view to ensuring free transfer of data: in particular in the case of data processing by public administrations e.g. in social security data protection law, with its restrictive procedural provisions (such as the precept that data processing must be handled by a separate organisational unit), higher standards of national data protection are conceivable, without this having a negative effect on Single Market considerations.
7. The proposed General Data Protection Regulation is not a suitable means of regulating data protection in virtually all areas and therefore also violates the principles of subsidiarity and proportionality. As a consequence of the Regulation's highly abstract approach, comprising generalised requirements and rendering the nuanced protective rights of general and sector-specific data protection more uniform, the proposed Regulation, with a view to attaining the objective of full harmonisation, refers to delegated acts of the Commission in respect of many essential questions pertaining to protection of privacy and exercise of other fundamental rights by citizens. However, until detailed provisions are adopted by means of delegated European acts, this approach would encumber practical enforcement of data protection law with a wide range of legal uncertainties, as the currently valid national provisions are no longer to be applicable after a merely two-year transitional period. As a consequence, the objective emphasised by the Commission, namely increasing legal security for business and the public sector regarding processing of personal data, is not attained. In contrast, incorporating the provisions proposed in the Regulation into a recast of the existing Data Protection Directive would give rise merely to an obligation to adapt national data protection legislation, but would allow national provisions to continue to exist in the interest of legal security and

enforceability

8. The proposed Regulation is contrary to the principles of subsidiarity and proportionality, as the provisions on the rights of the Commission to intervene under the aegis of the consistency mechanism (Article 57 ff., in particular Article 60 f. of the draft Regulation) are not compatible with the independence of data protection authorities as stipulated in Article 16, Sub-section 2, Sentence 2, TFEU. Pursuant to European Court of Justice case law, the need for data protection control bodies to be fully independent makes it necessary to preclude any risk that decisions taken by these control bodies might be subject to political influence. The powers to suspend data protection supervisory procedures indicated in the proposed Regulation would however open up direct scope to exert influence: despite the Commission's formal independence, it cannot be excluded that exercise of these powers might be affected by the comprehensive executive tasks outside the field of data protection that are incumbent on the Commission.

9. By deciding to regulate European data protection standards by means of a Regulation, the Commission creates legal uncertainties in respect of the data protection provisions in force for the field of electronic communication services pursuant to Directive 2002/58/EC. The existing obligations for the Member States to transpose these provisions regulating data protection for the field of electronic communication services are amended by Article 88, Sub-section 2 of the draft Regulation; this would modify the references to the Data Protection Directive made in the Directive on Electronic Communication Services and would refer instead to the proposed General Data Protection Regulation. The Member States would thus be confronted with the task of formulating new specific national data protection standards for electronic communication services, yet would not retain any legislative competences in the field of general data protection law as the proposed Regulation would enjoy primacy of application in this field. Opting to adopt a General Data Protection Regulation rather than updating the Data Protection Directive would give rise to considerable legal uncertainties for data protection for the field of electronic communication services, which is a particularly key area in the information society: these uncertainties would not be offset by any additional advantages that might facilitate fulfilment of the tasks of protecting such data stipulated in Article 16, Sub-section 1 TFEU.

10. Opting to adopt a General Data Protection Regulation whilst simultaneously regulating data protection for police and judicial authorities through a Directive creates difficulties in determining which provisions are applicable in specific cases, providing further evidence of breaches of the principles of subsidiarity and proportionality. The Bundesrat notes that the current concept for a re-organisation of EU data protection law would mean that the police and law enforcement authorities would be obliged to respect different legal provisions on processing of personal data in the exercise of their duties. The objective of the Directive on data protection in respect of police and judicial authorities (see Article 1, Sub-section 1 and the substantiation in Point 3.4.1, BR Official Document 51/12) is to adopt provisions on processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences. The proposed General Data Protection Regulation would not be applicable in this area (Article 2, Sub-section 2, Letter e of the proposal). Police forces in the federal states (*Länder*) are however responsible both for preventing crime and for the field of general security, which, with the exception of limited exceptions as stipulated in Article 21 of the proposal, would be subject to the binding requirements of the proposed General Data Protection Regulation. This fragmentation demonstrates that a higher degree of protection of personal data within the ambit of the EU's legislative competences could be attained by further developing the Data Protection Directive, and not by means of three legislative acts which would be binding to a varying degree on the Member States – the proposed General Data Protection Regulation, the proposed Directive on data protection in the field of the police and judicial authorities and the existing Directive 2002/58/EC.