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‘The European single market proposal for the electronic communication sector as an area of tension between data protection, net neutrality and economic freedom’

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Keynote address

Ladies and Gentlemen,

I would like to thank you very much for inviting me to this event. Hardly any place could be more fitting than **Bonn** for a discussion about **net neutrality**.

As the home of several independent supervisory authorities which, in one way or another, will be involved in the implementation of any legal regulations on this subject, the **engine room** of the **German part** of the ‘**Connected Continent**’ will - to a certain extent - be here.

The subject of ‘net neutrality’ has been discussed in the European institutions for a long time, and it took the European Commission a very long time to decide to present a draft regulation.

In the last review of the European legal framework for electronic communications in the period from 2007 to 2009, the question of net neutrality was discussed, but only a few small amendments were made to the provisions of the Directive on universal services and users’ rights.

At that time, the widely-held view was that the **underlying problem** only existed in the context of the US market, which was strongly characterised by monopolistic structures, while

Europe had a market with a lot of competing service providers, so it would not be possible to impose **far-reaching restrictions** on users.

The version of the Directive adopted by the European Parliament and the Council only included provisions which were aimed at, on the one hand, ensuring **transparency** for users about any ‘procedures to measure and shape traffic’ and, on the other hand, giving the national regulatory authorities the ability to intervene in the event of **abuse**.

However, the discussion went further. Both the champions of the **open internet** and the end-to-end principle and the proponents of more leeway for the **network operators** tried to muster political and legislative support for their positions.

Some network operators were accused of **violations** of net neutrality, e.g. mobile network operators did not permit the use of Voice-over-IP services such as Skype on their networks and prevented them through technical measures.

At the same time, new providers appeared offering **new services** which could be used in place of traditional electronic communications services but which were significantly **cheaper** for users. Network operators saw this as a threat to their traditional business model through the diversion of revenue to the new providers.

In some Member States there also were **initiatives** to enshrine net neutrality in law. The Netherlands, for example, established the principle of net neutrality for both mobile and landline networks in national law.

Between 2010 and 2013 the European Commission conducted several **public consultations**. In 2011 it published a Communication on net neutrality, which was followed in 2013 by the present **proposal for a Regulation** laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent.

In principle, it is both **right and necessary** to deal with this subject at the European level because the internet is one of the most important means of **cross-border** economic and social exchange. Having different framework conditions in the Member States would be **counterproductive**.

As European Data Protection Supervisor, I have taken part in **every stage** of the discussion on net neutrality. My office contributed to the various consultations and I published **Opinions** on both the Communication in 2011 and the proposal for a Regulation last year. My colleagues,

staff and I are also, of course, in dialogue with the Members of the European Parliament and the other EU institutions in order to explain our position.

We do **not** take positions on the many **economic** issues of the debate, such as the division of the revenues and investments in the internet, the promotion or blocking of innovation through the shaping of network traffic or the impact on the fundamental openness of the media and the resulting opportunities for many groups to participate in society.

The focus of our Opinions is on the **impact** of the various procedures for measuring and shaping network traffic on the **fundamental rights** to **privacy** and the **protection** of personal data. Both of these fundamental rights are established at the European level in the Charter of Fundamental Rights of the European Union and are recognised explicitly or implicitly in the constitutions of many Member States.

The importance of the **confidentiality of communications**, also known as postal and telecommunications secrecy, has always been a **cornerstone** of any democratic society. Communications secrecy is, of course, also of crucial importance to economic activity.

The European legal framework and corresponding national laws take into account the importance of these fundamental rights. The Data Protection Directive (95/46/EC) and the Directive on privacy and electronic communications (2002/58/EC) protect not only the **content** of the communications, but also the associated **traffic and location data** as well as other personal data of those participating in the communication.

The **importance** of the protection of **traffic data** was again made particularly clear last year when details became known about the US security services' programme for the mass collection of such data, referred to as '**metadata**' in this context.

Most procedures for measuring and shaping network traffic have in common the fact that they have to collect and process **more information** about the transmitted communications than is **necessary** for simple, undifferentiated transmission under the internet standard according to the 'best-effort principle'.

This may, for example, consist in the **observation** of traffic characteristics, such as the frequency and size of the packets in a connection, or a more or less detailed **inspection** of the packets, going as far as identifying the precise **content** of a communication.

Thus the network operator would harvest and process far **more information** than would be **lawful** under the **current** legal framework. For users, this represents a **restriction** of fundamental rights to privacy and data protection, the ultimate extent of which is **almost impossible to estimate** at the present time.

It is not only **processing** by the **operator** that we must bear in mind, but also the possibility of further lawful (or, indeed, unlawful) processing by **third parties**. Examples of this include data retention measures and hacking of networks by the security services of third countries.

Last but not least, the increased **complexity** of the network infrastructure which would be required in order to measure and shape traffic would provide a bigger **target** for criminal attacks and thus potentially compromise the **security** of the data and the communications.

Overall, in my view an implementation of the Commission proposals would pose the **risk** of serious **restrictions** of important fundamental rights of communications users.

Of course, the protection of fundamental rights is **not absolute**. Even in the European legal system it is possible to restrict individual fundamental rights in order to achieve certain aims, particularly in the areas of national security and law enforcement.

However, the legislators, including the Member States by agreeing to the EU treaties, and the courts, in particular the Court of Justice in Luxembourg, have defined the **criteria and practices** for such restrictions and given very clear guidance.

The CJEU requires, for example, a careful and precise **analysis of the necessity and proportionality** of intrusions into fundamental rights to be conducted specifically for the intended measures. We are all looking forward to seeing how the CJEU will apply this principle in its judgment on the legality of the **Data Retention Directive**.

In the light of this, I find it particularly regrettable that, in its proposal for a Regulation to achieve a Connected Continent, the Commission has described the **aims** for which **traffic management** is to be permitted in rather vague and broad terms and has barely taken into account the **impact** on communications secrecy and data protection.

The Regulation could therefore become a **gateway** to far-reaching **restrictions** of these fundamental rights.

In my Opinion of 15 November last year, I listed the **weaknesses** of the draft Regulation and made specific **proposals** for improvements which the European Parliament and the Council should introduce in the course of the legislative process. These concerned, in particular:

- **Broadly-based permits** for the use of traffic management for unspecified statutory requirements or for unspecified measures to prevent serious crime should be removed because they could serve as a basis for **traffic monitoring** which is subject to far less strict rules than under existing legislation and take absolutely no account of necessity and proportionality.
- The Regulation should clearly establish that at all times only the **least intrusive** procedures which are suitable for the particular purpose are allowed to be used for the **inspection** of communications, and it should specify what procedures are permissible. **Inspection of the content** of communications should be **excluded** insofar as possible.
- It is, of course, necessary for **users** to be fully **informed** at an early stage about intrusions into their communications and the impact on privacy so that, where applicable, they are able to compare offers from competitors.
- Last but not least, in the supervision of the activities of network operators, the role of the **data protection authorities**, which have to **cooperate** with the regulatory authorities in the area of electronic communications, should be taken into account.

Ladies and Gentlemen, the protection of the **fundamental rights to privacy** and **data protection** in electronic communications is of key importance in today's **networked world** in order to maintain and further develop **liberal democracy**. However, this sector-based approach must be embedded in a **comprehensive** system for the protection of these fundamental rights covering all areas of the economy and society.

With the Lisbon Treaties, the Member States imposed on the European Union an **obligation** to have such a **comprehensive** data protection regime. It is now almost two years since the Commission presented proposals for a **General Data Protection Regulation** and a Data Protection Directive in the area of justice and policing.

As you know, I would have liked a much more comprehensive and uniform scheme which would also replace the still existing special provisions for the various systems of the former third pillar.

In spite of these and other criticisms which I have made clear in my Opinion on the data protection reform and in further discussions, these reforms would lead to a **clear improvement** in the EU as a whole from which all citizens would benefit.

These improvements include stronger **rights** for data subjects, clearer **responsibilities** for the organisations processing personal data, and improved **supervision** and **enforcement** by the data protection authorities.

The proposed Regulation will provide for far more **consistency** in data protection in the EU. Moreover, it will cover all the organisations offering their goods or services in the **European market** and create a much larger **scope** with **uniform** rules.

These improvements are also important for German nationals who make use not only of services produced in Germany but also of services based in other Member States which are therefore not subject to German supervision and jurisdiction.

On the basis of the Regulation, it will be possible to establish a **uniform level of protection** throughout the EU realised through **cooperation** between the national data protection authorities.

In spite of strong pressure from economic interests, the European Parliament was able to reach agreement on a **compromise position** across all party lines which was adopted by a very **large majority** on 21 October in the competent committee. The Parliament is thus able to enter the negotiating stage with the Council of Ministers with an **agreed position**.

Unfortunately, there has been **no comparable progress on the Council**. Some Member States are still causing delays through general reservations. Germany claims a special **responsibility** and **role** in the area of **data protection**, as the Chancellor also made clear several times before the election.

Of course, I fully support the goal of realising a high level of data protection. However, I believe that the **realisation** of this requires a **constructive** and **proactive** approach in the European debate, including in the Council.

The new German Government can tackle this subject with drive and energy and thereby gain acceptance of the German position at the **European level** and lead Europe as a whole to a **higher** level of data protection. I wish it every success in this endeavour.

The fundamental rights to privacy and data protection are among the **core elements** of democracy and are **essential** to the exercise of many other fundamental rights, such as freedom of expression and freedom of association.

Philosophers and psychologists argue that people who do not have space in which they can be unobserved and discover their own opinions, are incapable of **developing** their personality and are thus deprived of the **key fundamental right** of the German Constitution.

Fundamental rights have always been in danger, which is precisely why they were **codified**. Even now **attempts** are being made to restrict them to serve political and economic interests. We must be **vigilant**, and must not give in to these attempts for the sake of convenience or through neglect.

The legislative process relating to the market for electronic communications and for the reform of data protection, concerns key **components** of the European **value system** and our understanding of freedom and democracy.

European politics must demonstrate **consistency** and **credibility** in this regard and thus continue to serve as an example to the rest of the world.

Thank you very much for your attention.