

A Clear Signal for Stronger EU Data Protection*

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On the night of 14 June 2013, the members of the German Bundestag unanimously adopted a resolution expressing support for a modernisation and strengthening of data protection law in the European Union. They also called on the Federal Government to engage constructively with the ongoing Data Protection Reform process in Brussels and to ensure that it will soon lead to a high level of protection across the EU.

This is a very important resolution for two reasons. First, of course, because of its content: a clear signal in support of stronger data protection in Europe addressing the challenges of a modern Information Society. However, the unanimous decision of the Bundestag has a second dimension. In September, elections will be held for a new Bundestag and data protection is one of the relevant themes. No political party apparently wants to be at the wrong side of the debate. The Federal Commissioner for Data Protection and Freedom of Information, in all honesty, deserves part of the credit for this remarkable result. The resolution was passed in reaction to his 23rd Annual Report of activities and also highlighted several other issues.

This clear signal of the German Bundestag in support of stronger data protection in Europe is extremely welcome. In January 2012, the European Commission presented a package of proposals for the Reform of the legal framework for Data Protection in the EU. The most important part of this package was a proposal for a General Data Protection Regulation designed to replace Directive 95/46/EC and apply directly in all the Member States. The European Parliament and the Council are now preparing their midterm positions on the proposal. Under the Irish Presidency, the Council has made great progress and will soon be ready to work with the Parliament on a common text. If such a text would be available by early next year, it would be possible to deliver a major portion of the Reform by spring 2014, just before the end of the Parliament's

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current mandate. The unanimous decision of the German Bundestag therefore comes at the right time to throw its considerable weight behind the Reform proposals.

The proposals presented by the Commission aimed to serve three objectives. First and foremost, they were designed to update and reinforce the current EU legal framework for data protection. Its most important part, Directive 95/46/EC, was adopted in an era when the Internet was barely visible, and in any case still far from its current highly dynamic reality. This means that the existing safeguards for the rights of EU citizens not only need to be modernised, but also strengthened substantially in order to provide a more effective protection against the ongoing challenges of the 21st century.

This substantial strengthening of EU data protection law will come in four main areas. The rights of data subjects will be reinforced so as to allow them more control over the collection and use of their personal data. At the same time, the responsibility of organisations - companies and authorities alike - to ensure an effective protection in practice will also be reinforced. This will include the principle of accountability - the need to demonstrate that all required measures have indeed been taken - the principle of privacy by design and the need for impact assessments before critical systems and processes are put into practice. All this will go along with the introduction of stronger safeguards for truly independent supervision with much stronger powers for effective enforcement of data protection rules across the EU. Finally, the scope of EU law will be extended. Data protection rules will not only apply in the context of the activities of an establishment of a controller in the EU, but also when, no matter from where, goods or services are offered on the European market or the behaviour of Europeans is monitored, as now frequently happens on the Internet. These four elements together will ensure that EU data protection rules will have a much greater impact, not only in the EU, but also where necessary elsewhere.

A second important objective is to make EU data protection law also more consistent across all EU member states. The current Directive 95/46/EC - although designed to ensure a greater harmonisation of national law - has resulted in a situation of many, sometimes quite different national versions of the same rights and obligations, thus creating an undue diversity of approaches across the EU. This translates not only in unnecessary costs for - private or public - cross border activities, but also in a loss of

effectiveness of protection for citizens, who also increasingly move across borders. But the problem is that most member states tend to prefer their own national version of the truth over any alternative. Ensuring greater consistency across the EU will thus also require a greater focus on a common result at a sufficiently high level. It is here where the German Bundestag has now thrown in its weight in the balance. Germany has much to lose, but also much to offer and to gain in terms of effective protection in practice, across national borders. Demonstrating leadership and engagement to ensure better outcomes is indeed by far the best strategy.

A much higher level of consistency will be provided in two ways. First, the choice of a Regulation, instead of a Directive, to be directly applicable in all member states, has moved the idea of harmonisation of national law to an entirely different level. In fact, large parts of the national laws will be replaced by the Regulation, once it enters into force. This takes great care to ensure not only a high level of protection, but also a very clear view at the interfaces between the Regulation and national law to ensure a good balance and an ongoing effective interaction between them. The discussion on the Regulation in Council has already given much attention to this critical issue. The Regulation will also ensure a greater consistency among supervisory authorities in the member states. They will cooperate more closely in cross border situations, and through a well designed consistency mechanism, together ensure consistent outcomes in critical areas.

A third objective of the Commission was to ensure a more horizontal approach in data protection across all EU policy areas. This as a result of the Lisbon Treaty providing a horizontal legal basis for effective protection in all areas. Here, the proposals which are currently on the table are, quite frankly, less comprehensive than they could and should have been. A second part of the Commission package is a separate Directive for data protection in the area of police and judicial cooperation in criminal matters. Both the substance of this second part and the consistency with the Regulation are problematic. Other elements of the current EU legal framework for data protection, including present rules for the Commission and other EU institutions and bodies, are also left untouched for a later stage. It is therefore perhaps more realistic to see the current review as a process in different stages. The Regulation will probably be the

first deliverable, but the other elements should follow very soon, including those for criminal law enforcement and the EU institutions and bodies.

The discussion in Parliament and Council has so far concentrated on a few general themes. One of these issues is whether the review of data protection law could slow down innovation. Here, the answer should be that nobody wants to stifle innovation, but innovation also requires strong safeguards to ensure acceptable results in respect of fundamental rights. Another issue is whether the rules could create an excessive burden for business, in particular for small and medium size enterprise. This issue has so far been addressed by ensuring that rules for controllers are sufficiently scalable to the privacy risks involved. However, it is crucial to carefully distinguish the notion of 'administrative burdens' from 'ensuring compliance'. Some costs are unavoidable and warranted by the need to allocate and 'internalize' costs in decision making about new activities with negative impacts on privacy and data protection.

Finally, the issue of the right balance between directly applicable EU law and national law has received much attention. Here, it is important to realise that the Regulation will build on existing national law and will also open up for additional national rules, provided that they are in line with its provisions. As a result, it will not be "one law across the EU", but rather much more consistency, at a much higher level, with some appropriate space for national specificities.

The lobbying surrounding the current review of EU data protection by organisations both from Europe and elsewhere has been exceptional. Following the presentation of our Annual Report of activities for 2012 to the competent committee (LIBE) at the European Parliament on 29 May 2013, I have therefore warned the EU legislator to guard against undue pressure from industry and third countries to lower the level of data protection that now exists, and instead seize the opportunity to ensure stronger and more effective protection to individuals across the EU.

I strongly believe that the benefits of new technologies for industry - and the same applies to public authorities - should not - and need not to - be at the expense of our fundamental rights to privacy and data protection. The integration of data protection principles in technical innovation or in the transfer of personal data to relevant bodies,

in the interests of security for example, can add significant value, both in terms of efficiency and lower costs, if privacy is built into the design of processes from the outset. This is exactly what the proposed Regulation aims to accomplish.

This is why the scope of the Regulation should be as horizontal as possible - i.e. apply both to private and public sectors - and as wide as currently intended. All those active on the European market should be held to essentially the same standards, subject only to some narrow exceptions and some further detail, in order to ensure effective and consistent protection of all European citizens across the EU.

The unanimous message of the German Bundestag in support of this approach is not only welcome, it should also lead to all appropriate steps to deliver the results, both in law and in practice, as soon as possible. Most building blocks are now on the table, it just takes the courage and the ambition to take the right decisions.