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AK Position Paper

Proposal for a EU Data Protection Regulation

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About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
President

Werner Muhm
Director

Executive Summary

1) Concerns from the consumer's point of view: The AK has repeatedly notified the EU Commission of its desires for what it considers as contemporary data protection for consumers. Consequently, not only was the need expressed for declarations of consent on data use, but also binding rules for social networks, personal and other search engines, geo-based services, behavioural profiles on the web, creditworthiness data, direct marketing and a great deal more were demanded and mention was made of the extreme imbalance of powers between data collectors and those affected.

- The AK welcomes the fact that the draft data protection regulation anticipates **some improvements for consumers** (e.g. stricter consent requirements). This positive approach requires express support, in order not to be lost from sight during negotiations.

- **Particular areas of the Regulation remain well short of consumers' expectations.** For example, it is unacceptable that the projected mandatory consent to using data for direct advertising should be watered down to a simple right of retraction. The duty to provide information on the origin of data also still refers only to "available" data, which means that, without a strict duty to retain documentation – it is up to the person responsible for data whether or not to provide information (fully) on the data source, or not.

2) Concerns from the employee's point of view: an assessment of the draft from the employee's point of view proves highly critical. The draft does not properly deal with the potential risk regarding data arising on the subject of working conditions. Rather certain projects are even a clear step backwards with regard to existing possibilities and rights for employees and works councils. For example, it should be made clear that European data protection rules do not affect **national working arrangements.** The **one-stop-shop** principle for investigations by the national data protection authority concerned is rejected, since making responsibility dependent on the place of a group's main establishment hinders efficient implementation of the law. Provision should also be made for mandatory appointment of a **company data protection officer** for a substantially smaller number of employees and he should also be present in appropriate subsidiaries away from the main establishment.

3) Implementing the law: in addition, while the draft offers some **good ideas** (e.g. regarding stricter responsibilities for data processing firms), **the wording of the rules is none-theless still so faulty** that they would be of little use in practice without thorough revising. Half-baked rules regarding duties to keep documentation and risk analyses and making data protection

officers mandatory only in establishments with extremely large workforces do not create an acceptable balance for the removal of the transparency and control provisions (reporting procedures and prior checks) under the present legal position.

The AK feels that effective implementation of the law requires a combination of both mechanisms: transparency through a simplified data processing register, minimising the risk of sensitive data use through official prior checks and, in parallel, shifting cost and effort to the data processing firm itself, (the data protection authority should be able to demand submission of certifications, risk analyses and the like). It should moreover be made clear that not only data protection organisations but also Chambers of Labour and trades unions are institutions authorised to submit complaints.

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The AK position in detail

1. Improvements for consumers and the AK's demands in this connection:

Consent to data use

A measure central to consumer protection is that the **consent of those affected (Articles 4 and 7)** must **expressly** be obtained in future for the use of their personal data. Consent through implicit acceptance of business conditions is no longer possible. For consent to be effective, the data user must in any event obtain an active response from the consumer (e.g. placing a tick when clicking a box on the internet, signature). **This change means a substantial raising of the existing level of data protection. For reasons of legal clarity, the AK demands in any event that this requirement should also be enshrined in the provision concerning "consent" (article 7) (and not only in the grounds for consideration and definitions).**

The provision that written declarations of consent may no longer be hidden away in General Terms and Conditions of Business is also positive. Consent must be **recognisable and separate from other texts.**

Consent should further be **invalid** if a clear imbalance exists between the position of the persons affected and that of the data processor (as is the case with dependencies in e.g. employee relations). **The AK demands that the grounds for consideration should also include consumer-related examples:** companies frequently refuse to conclude a contract with consumers if they do not agree to data use clauses for marketing purposes. An imbalance of forces therefore also exists amongst consumers that do not agree to their data being used and are consequently excluded from procuring the goods or services (linked offers) or can find no alternative offers in the market.

Scope:

The applicability of the Regulation to suppliers from non-member states is welcomed, e.g. Internet services from providers in the USA. It must in particular also be applied when data on consumers within the EU is collected by a company that is not established in the EU. A prerequisite for this is that their data processing serves to provide European consumers with goods or services or to observe their consumer or other behaviour. This clarification is meaningful as many large-scale Internet offers and those infringing data protection law often cannot be attributed to a European establishment.

Child protection:

The **processing of data on children (Article 8)** is restricted insofar that the parents must consent to data being processed by Internet services up to age 13. Service providers must also make efforts to ensure that they can provide evidence that parental consent has been obtained. The provision is welcomed in principle by AK side but protection should nonetheless be extended to a higher age, since legal contractual capacity is limited in Austria – graduated for age groups of up to 14 and 18).

Deletion of rights on the Internet

Having regard to personal data published on the Internet, a **legal entitlement** is introduced, e.g. **"to be forgotten"** as the possessor of a Facebook profile **(Article 17)** through full data deletion on request. The obligation on a person who has published data (on the Internet) to take "all reasonable steps" to inform third parties who process such customer data further that the Internet user has requested deletion of all links and copies is essentially positive. Article 23 requires internet services to be prealigned in favour of data protection, but leaves the further essential features of delegated legal provision to the EU Commission. **The AK requires that the Regulation makes prior provision that privatesphere tools offered by platform operators such as social networks should be so preset by the provider that data are not thereby made accessible to the public.**

Automated consumer information:

Persons affected by processing must in future also receive **more preliminary information from the data user (Article 14):** consumers must therefore, when data is retrieved, be advised within a reasonable period of not only the name and contact data of the person responsible for and the purpose of the use of those data, but also initially of the actual storage period, the origin of data, whether the providing of data is mandatory or voluntary, and the like.

This measure serves transparency and is the unconditional prerequisite to enable consumers to exercise their rights in practice. Without knowing who is processing what data and why, those concerned cannot make proper use, either, of their rights to information, retraction, deletion and authorisation. Against this background, **the AK nevertheless demands that such information may be omitted only if it is impossible to provide it – but not if it is associated with "disproportionately high effort".** This restriction encroaches on the principle of transparency and results in a high degree of legal uncertainty, because whether the effort is justifiable cannot – without knowledge internal to the busi-

ness – be reliably adjudged either by the person concerned or by the data protection authorities.

Rights to information:

That persons responsible for data must normally reply to requests for information within a month is positive (hitherto, the processing firm has in Austria had to respond within 8 weeks).

Breaches of confidentiality:

Data protection infringements must in principle be reported to the data protection authority within 24 hours. If it is suspected that in this case the private sphere of those affected was also infringed, this, too, must be notified without delay. A similar provision also in fact exists in Austrian law, but with far stricter conditions, which in practice are very difficult to prove (gross, systematic infringement of data protection; the cost of advising the victim must be reasonable).

Strengthening the powers of the data protection authorities and heavy administrative penalties

Under the Commission's initial plans, the data protection authorities should be able to impose draconic penalties: on a scale of from between 100 and 300,000 Euros for less culpable breaches, and between 100,000 Euros and 1,000,000 Euros or 5% of the company's annual turnover for seriously culpable breaches (e.g. for unlawful use of data, invalid decla-rations of consent). The process is now weakened in the official draft: on first-time "unintentional" breaches by an undertaking of up to 250 employees the data user should only receive a warning. However, penalties in more serious cases should also potentially be up to 1,000,000 Euros or represent 2% of turnover.

2. Points for criticism

Good ideas exist from the consumer point of view in the following proposals. However, their wording is so defective that drastic revision is necessary in order to offer consumers value added in practice.

Rights to information:

As hitherto, consumers should on request receive information on all **"available" information on the data source.** This provision induces data users to allege that in the absence of records no information can be provided on data origin, especially if they use questionable data sources. Against this background,

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the AK requires it to be made clear that information on origin must be recorded and remain available unless the principal plausibly explains why this is impossible or unreasonable in a particular case. Only then can those affected defend themselves against irregularities at the data source.

Duties on passing data onwards:

The data officer must certainly **advise all data receivers to whom he has passed data that those data have been corrected or deleted.** However, the duty does not apply if passing on this information proves impossible or requires a disproportionate effort. This provision is important to consumers, since marketing and also creditworthiness data and internet inputs often pass through many hands after the original source. If the person concerned exercises his deletion or correction rights, he still has no overview of the user chain as a whole following the passing on of his data to third parties unknown to him. Against this background, the proposed duty of information is enormously important. **The AK for its part demands that the duty to inform is not weakened by considerations as to whether it is reasonable.**

Data processors should bear more personal responsibility

This should be achieved by means of documentation, security measures and, in certain cases, through data protection officers and by risk assessment for sensitive data applications (personal profiles, scoring, use of health data, etc.), as required by articles 30 et seq.

There is in principle no objection to strengthening responsibility and liability for per-sons in charge of data. The AK has long demanded obligatory "data protection MOTs" as a measure against increasing deficits in performance: as with the Pickerl motor vehicle test, data processing firms should have sensitive projects examined by independent approval bodies at their own expense, to guarantee conformity of data protection in every respect (the data protection authorities should decide whether a project is regarded as "sensitive" under data protection law. The data protection authorities cannot keep a check on millions of registered data applications at the same time and must at present rely on complaints. However, much processing takes place "behind the scenes" beyond the consumer's knowledge, so that more than receiving notifications is needed.

However, this should not result in existing monitoring requirements (reporting procedures, prior checks) being wholly or largely abandoned. The notifications register fulfils a publicity purpose (consumers can inspect it) and helps the data protection authority to obtain an overview of processing practice in Austria. In view of the millions of notifications, the data protection authorities can admittedly not check legal conformity of reported data usage generally. However, on a complaint being made or as part of random testing, notifications on the data processing register are checked.

"Impact assessments", i.e. risk assessments should be made as a follow-up to the prelim-

inary draft, before data processing commences, and **made easily accessible to the public. Unfortunately, this is no longer mentioned in the present draft.**

In addition, the AK considers the provisions to be too imprecise and undeveloped to offer legal certainty as to when something must be examined, and to what extent. The data protection authority's role is unclear. Care must be taken to ensure the data protection authorities continue to be advised of processing (in excess of simple standard processing). Only then can they ensure that data officers undertake follow-up assessments of data protection. The results of a risk assessment must also necessarily be submitted to them, so that the authorities can draw the necessary conclusions (in the form of instructions or recommendations).

Direct marketing:

The EU Commission has unfortunately abandoned one project prematurely: an unofficial draft still laid down that commercial direct marketing would be permitted only with the prior consent of the consumer. There is now no longer any question of this: in accordance with the Austrian legal position, when certain customer data are used for direct advertising purposes, there is only a right of retraction (Article 19). Since many consumers feel greatly irritated by **direct advertising, the requirement should be tightened up and mandatory consent introduced.**

Support from data protection organisations

The powers under Article 76 are welcomed but require clarification. On the one hand, it must be made clear that institutions that represent employee and consumer interests (and consequently also their data protection matters) are amongst those authorised to make complaints. On the other hand, powers to represent individual claims before the courts should also include generic powers for associations to bring actions (e.g. monitoring of data protection clauses).

The EU Commission can deal with further details (delegated legal law-making):

The AK strictly rejects any such procedure. It is certainly true that laying down numerous industry-specific details would be beyond the scope of the Regulation. However, since the Commission is giving itself regulatory authority in such broad areas, thereby evading reference to the EU Parliament, these powers should be deleted and not replaced.

3. Further matters:

- request inhibiting of automatic search engine access to websites,

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- transparency obligations regarding data protection relevant functions for apps and social networks,

- viable forms of consent by Internet users on use of cookies (alternatives to complicated date protection declarations that are usually incomprehensible to consumers) and removal of enormously defective action on unlawful use of cookies (hidden use, data utilisation for purposes other than those indicated)

- consent requirement for data use for direct marketing purposes

- limits to use of creditworthiness data (especially having regard to automated calculation of scoring values and the data protection-sensitive projects in the draft Directive on residential property credit agreements)

- binding data protection rules for geo-based services and use of RFID chips.

4) Improvement of employee data protection in Europe

Both Austrian and European data protection law have so far contained few specific provisions that take account of the special need for protection of persons working under a contract of employment. The present draft Regulation in turn hardly touches on the work relationship and even includes substantial impairments to implementation of the rights of works councils and employees.

Against this background, the AK seeks adequate protective provisions for employees and efficient application of the law to protect employee data in a business context.

In this connection, the most pressing AK concerns include:

clarification that European data protection regulations will not be able either to affect national labour arrangements or, consequently, to limit their validity. According to Art. 1 (3) of the projected European Data Protection Regulation, *"free movement of personal data within the Union may not be restricted nor prohibited on the grounds of the protection of private persons, when personal data are processed "*. If, for example, the obligation to conclude a works agreement under § 96a ArbVG were to be regarded as a **restriction** of this kind, the new EU data protection regulations would substantially encroach on our **Workers Co-determination Act** and curtail existing works council rights.

- **Clarification that Chambers of Labour and trades unions are included amongst the institutions, organisations and associations entitled to make complaints.**

Under the projected EU Regulation, institutions, organisations or associations that seek to protect the rights and inter-

ests of the persons concerned in the data protec tion area are entitled to make complaints. The projected Regulation should make it clear that those institutions entitled to complain include company and industry-wide bodies representing employee interests.

- **Strengthening the position and importance of works councils, especially corporate works councils, European works councils and EES works councils,**

by, for instance, making data transfers permissible, based on the conclusion of works agreements rather than on the existence of unilaterally issued employer guidelines. Internal guidelines issued unilaterally by the employer regarding data protection should, under the projected Regulation, for instance, authorise data transfer within the group. It is doubtful whether protection for employee interests will thereby be ensured. It would be more rational to focus on the consent of the company employee bodies and so strengthen social partnership at work.

- **Safeguarding publicity through mandatory notification to the Data Processing Register**

Replacement by an assessment of the consequences of data protection by employers, for which the draft provides, is inadequate. Without external control, they would otherwise be in a position to assess for themselves the risk and intensity of encroachment of applications introduced by them and take suitable steps (such as calling in the data protection authorities) – or decide not to do so. Publicity and monitoring would thereby be largely eliminated and the data protection authorities would no longer have an overview of the data applications made. Similarly, works councils would be deprived of the possibility to ascertain whether the application adopted by the employer was notified and where appropriate, take appropriate steps.

- **Maintaining the competence of national data protection authorities to ensure efficient implementation of the law**

The one-stop principle for which the draft provides would mean that appropriate authorities for an Austrian subsidiary of an international group would no longer be the Austrian data protection authority but the authority at the place of the group's princi-pal establishment. The result would be that the contact point for employees and works councils would no longer be the national data protection authority but the authority in the state of the group's principal place of establishment. Contact would not therefore become faster or easier and companies would probably show a definite tendency to refrain

from choosing countries where the data protection culture is the most stringent.

- **The requirement that an industrial data protection officer must be available on the spot**

The proposed group data protection officer, situated only at the group's principal place of establishment, would naturally be unable to serve as contact person for the works councils in diverse subsidiaries. The works council would thereby lose not only the local authority but also a contact person located locally within the business. It is to be feared that the sum of these projected measures would in practice largely eliminate industrial data protection.

- **Establishing a lower employee number for the mandatory appointment of a company data protection officer**

The draft clearly sets the number of employees too high at 250 and would thereby, in Germany for example, mean an enormous step backwards compared with the current legal position. Moreover, the works council has no right to codetermine the appointment or dismissal of the data protection officer, nor is there any mention that he also serves the works council as contact person.

- **No materially unjustified exceptions for small and medium-sized businesses**

These exceptions are in any event inadequate as far as the core of personal rights is affected. Protection for the employee's personal data must remain safeguarded in small businesses as well.

On behalf of the employees and consumers concerned, we trust that account will be taken of our concerns and will be pleased to provide further information at any time.

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Should you have any further questions please do not hesitate to contact

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