



To be sent to:
European Parliament
European Commission

BUNDESARBEITSKAMMER
PRINZ EUGEN STRASSE 20-22
1040 WIEN
T 01 501 65
www.arbeiterkammer.at
DVR 1048384

Your reference	Our reference	Case officer	Tel. +43 1	Fax +43 1	Date
-	BAK- KS/Gst/DZ/SP	Daniela Zimmer	Ext. 2722	Ext. 2693	31.03.2015

Draft General Data Protection Regulation

Dear Sir or Madam,

The Austrian Federal Chamber of Labour (österreichische Bundesarbeitskammer - BAK) is the statutory representative body for around 3 million employees, and its remit also includes consumer protection. The further development of data protection in Europe is an issue of particular interest to the Federal Chamber of Labour (BAK) with a view to the increasing threat to the data protection interests of consumers as well as employees. The BAK supported the EU Commission in its initial efforts to establish up-to-date, harmonised data protection at a high level and is disappointed by the latest developments of the project. Against this background, the BAK addresses you as a member of the European Parliament or the European Commission to request your support. The current negotiation process raises the concern that the right to protection of personal data and privacy, as is laid down in the Charter of Fundamental Rights of the European Union, does not receive anywhere near the importance due to it in a society based on democratic principles such as rights of freedom:

- **The draft must not fall short of the level of protection provided by Directive 95/46/EC:**

The current Directive 95/46/EC contains general data protection principles, which have a "timeless" legitimacy and, therefore, must be retained largely unchanged. We are observing with a critical eye the attempt to use the current reform debate to substantially weaken the present level of protection. European citizens are also following closely to see whether the European Union takes historically hard-won fundamental rights seriously. This also includes protecting the right to self-determination in terms of the use of personal data against the primacy of economic (and security) interests wishing to exploit it.

In the view of BAK, it would be absolutely unacceptable if a future General Data Protection Regulation fell below the level of protection of 1995 in even one aspect.

- **Excessive data usage and systematic data protection violations demand more stringent data protection regulations:**

The need to protect consumers has increased enormously in the past two decades as a result of technological developments – the Internet of Things, data mining in times of big data, cloud computing, smart cars and many others. Data protection legislation is only capable of overcoming the present challenges if it responds to technology trends and their potential risk to privacy in as concrete a manner as possible and with strict constraints for data users.

In particular, the confidentiality of data traffic and the content of telephone and Internet communications is currently not even partially ensured. Systematic violations of the privacy of European citizens as a result of cybercrime and intelligence practices must act as an impetus to increase significantly the legal requirements for data protection and data security in communication networks. However, clear limits must also be set with regard to the analysis of communication content from social networks, location data and behaviour profiles of Internet users for the purposes of marketing and credit ratings for the sake of a fair balance between the interests of commercial exploitation and privacy.

Almost daily, the media uncover new facets of data acquisitiveness - by international Internet companies like Facebook, Google etc. and data brokers such as Acxiom (<http://en.wikipedia.org/wiki/Acxiom>), one of the biggest data collectors in the world, through to excessive surveillance of European data traffic by British and US intelligence. European citizens are not even close to being sufficiently protected against such a systematic disregard for European fundamental rights.

- **The main issues:**

We therefore also need your support and ask you to campaign for the following issues:

- 1. No erosion of the principles of the current Directive 95/46/EC:**

There is currently cause for concern that the desired compromise will reduce the level of protection compared to the current Data Protection Directive 95/46/EC, for example by means of

- a significant expansion of the grounds for data processing,
- measures to facilitate direct marketing,
- the further use of data for other purposes that are inconsistent with the collection purpose,
- measures facilitating the use of pseudonymised data by data controllers,
- reduction in the importance of the principles of purpose limitation and data minimisation

- the devaluation of the control instrument of an official mandatory prior check for sensitive data applications
- the curtailment of the rights to information of those affected and
- the lack of publicity of data processing activities (the task of compiling a generally accessible data processing register does not include a duty to establish a company data protection officer).

BAK demand: if the initially ambitious plans for reform ultimately fall short of the level of protection afforded by the applicable 1995 Directive, the draft must be withdrawn.

2. Consideration of the pressing need for regulation

There is also a failure to take into account the requirements of modern data protection, for example in terms of:

- stricter requirements for declarations of consent in terms and conditions
- user-friendly, detailed rules on scoring and profiling
- mandatory appointment of a data protection officer in as many companies as possible
- robust, binding rules in the area of data protection impact assessment
- easy access to law enforcement and rapid measures to assist those affected in the case of infringements

Demand: the draft does not meet the challenges of the digital revolution that is taking place in the 21st century. Those who urge a rapid conclusion to the negotiations in the face of the fragment of regulations are renouncing well-formulated standards of protection that take sufficient account of fundamental rights. The complexity of the issues justifies allowing significantly more time for the legislation to be drafted carefully and for the many outstanding conflicts of interest to be resolved.

3. Directive instead of regulation and the need for well-formulated legislation

Following the deletion of all "derogated legal acts" from the original Commission draft which the EU Commission would have to make subject to a variety of implementation rules, the draft of the Regulation is in many respects a fragment with good section headings. This is all the more serious following their decision to make it a directly applicable regulation. This rules out any national clarifications in future. Topics that are either not addressed at all or are insufficiently dealt with in the regulation can no longer be readily addressed by national legislators. Many of the rules lack determinacy, leading to the threat of considerable legal uncertainty and meaning that the aim of a uniform application of the law in Europe may be unsuccessful. A large number of clarification issues would first have to be referred to the ECJ.

Given the rapid pace of technological change and the development of a large number of new services, practices and equipment affected by data protection, no legal development appears to be likely in the immediate future.

BAK demand: the choice of a directly applicable regulation as the legal form requires that the content of the legislation is particularly well-formulated. The draft does not demonstrate this quality. The proposal should therefore be implemented as a Directive. Furthermore, the general principles of the current Data Protection Directive are up to date. It could therefore remain intact and be supplemented by an additional act, for example targeted specifically at the need for Internet-related regulation (the Internet of Things, big data, cloud computing, tracking, profiling, etc.).

4. The "legitimate interests" ground must not become carte blanche for excessive data exploitation:

Regarding the question of the permissibility of data processing, it cannot be sufficient that data controllers demonstrate their legitimate interest and those affected then have to argue their overriding confidentiality interests. Placing such a burden of proof on those affected would in practice lead to a situation in which there was no longer any rigorous balancing of interests at all prior to the commencement of data processing.

BAK demand: the data controller must be able to prove an overriding legitimate interest in processing the data. The inclusion of a list of grounds that do not or only negligibly affect the confidentiality interests of those affected should be helpful here. Contrary to the current plans, direct marketing, abuse control and data sharing between affiliated group companies should not be included among them.

5. Use of data only for its original intended purpose - no automatic further use for other purposes:

As a general rule, the client should be able to rely on a separate legal basis as evidence of the legality of each of their data applications. The possibility of the automatic further extensive use of legitimately collected data for other purposes is viewed very critically by the BAK. Against this background, a detailed and careful review of the area of data processing for historical, scientific and statistical purposes is needed. Otherwise, the future regulation would fall well short of the level of protection of the existing Directive 95/46.

BAK demand: companies may only collect the data that they actually need at the time they collect it. Data may not be further processed later for other purposes without consent from those affected (e.g. invoicing data should not be used for marketing or credit rating purposes).

To ensure an appropriately high level of data protection within the EU, the further use of data for a different purpose other than the primary storage use (e.g. for big data analysis) should be permitted only to a limited, clearly defined extent.

6. An effective broad definition of "personal data":

There are also currently attempts to circumvent the data protection rules in some data utilisation by not declaring it as personal data. In the online world, users are often identified indi-

rectly, for example by their terminal's IP address or the cookies in their web browser. It would be a massive step backwards in terms of data protection regulation if, contrary to prevailing jurisprudence, the personal nature of such data, which is directly traceable at any time, were denied.

7. Explicit consent:

Companies must be obliged to obtain the explicit consent of those affected for data processing. Adding a service usage to the consent to data processing, which is not required to perform the service, should be prohibited. "Legitimate interests" also allowing data processing without consent must be regulated in an extremely restrictive and strict manner. Some company representatives advocate a reversal of the principle, saying that all data processing should be permitted as long as those affected do not object to it. However, voluntary consent, explicitly declared in advance, is a key element of informational self-determination. The data user must justify why the data processing in question is necessary and legally permissible. It would be incompatible with the nature of the fundamental right to data protection if the consumer were to have to generally justify, by way of a reversal of the burden of proof, why data usage is in breach of his/her confidentiality interests.

Limitations must be placed on the effectiveness of data protection declarations of consent within employment relationships. Due to the typical imbalance of negotiating power within employment relationships, workers often state that they are willing to give consent out of necessity and do not dare to revoke it for fear of losing their jobs as a result.

8. Sectoral protection standards in the case of gross imbalance of powers, for instance for employee data protection

Employee data protection: the EU regulation should also apply as just the minimum European standard for employees. In the proposed Article 82 of the General Data Protection Regulation, it must be made clear that national legislators are not prevented from adopting different, primarily stricter standards of data protection in this regulatory area. In particular, the European data protection regulations must not affect national labour arrangements (i.e. the rights of company and industry-wide bodies representing employee interests). They therefore must not limit their validity or curtail existing works council rights.

In the area of consumer credit rating assessments by means of scoring methods, which often do not stand up to scientific scrutiny, there is also a need for data protection rules so that those affected are not discriminated against and prevented from participating in business life.

9. Effective implementation:

Data protection is currently suffering from a significant lack of enforcement. Data protection authorities lacking resources cannot maintain a market overview of innumerable and sometimes highly complex processing operations. Improving enforcement requires independent data protection officers (regardless of company size) or at least a carefully administered data

processing register, effective controls in all Member States (not just a "one-stop-shop" for the responsible authorities in the case of subsidiary companies) and serious penalties in the case of violations. An obligation on data users to carry out risk impact assessments themselves and data protection friendly default settings for devices, services and software are also forward-looking approaches, but only if the monitoring does not rest solely with the party being monitored. The data user's obligations and the data protection authority's rights must be regulated down to the last detail in this context.

BAK demands in relation to points 6 to 9: these provisions must be thoroughly re-worked and improved.

In the interests of our represented members, we urge you, when making your decision, to take into consideration that the General Data Protection Regulation involves the design of a constitutionally guaranteed fundamental right which, in addition, impacts virtually everyone - be it in the role of a consumer or employee.

We therefore request that you resolutely oppose attempts to reduce the future level of protection compared to the existing Directive. We naturally also hope that you fully support strong European data protection in the form of up-to-date, strict constraints and a significant improvement in legal enforcement. We remain at your disposal at any time for any additional information you may require.

Yours faithfully,

Rudi Kaske
President

Melitta Aschauer-Nagl
On behalf of the Director