First Initial Position

On the

Proposal for a Regulation 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)

First Initial Position of Digitale Gesellschaft e.V. (Digital Society)
on COM(2012) 11 final // 2012/0011(COD) as of 25.01.2012

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In general, Digitale Gesellschaft e.V. welcomes the intended enhancement for users in the Regulation proposal. Since the current Data Protection Directive 95/46/EC does not meet the requirements of todays data processing environment and is in particular highly problematic regarding its effectiveness on Internet related issues by public as well as private entities, Digitale Gesellschaft e.V. assumes that the Commissions intent was to solve the problems of data protection legislation.

As a matter of principle the modernisation of existing data protection legislation following the principle of informational self-determination by the individual and by that with the rule of reservation of consent is considered as the right approach. Even though there has been some idea on a general revision of the concept over the past years, we have to conclude that all existing ideas (i.e. treating personal data with analogous methods to intellectual property goods or to define general exceptions from the consent requirement) neither fulfill the aim to generally give the individual the opportunity to know who has received or processed when which data and by that allow for informational self-determination, nor do the existing proposals include substantial enhancements regarding todays challenges to data protection.

Digitale Gesellschaft e.V. welcomes that the proposal for a Regulation does explicitly not distinct between public and non-public entities. The general doubling of data protection law and the undue advantage of public entities regarding the possible measures by Data Protection Authorities are highly problematic, as several times shown by the lack of enforcement measures for the DPA trying to act against public bodies. The proposal of a Directive COM(2012) 10 as of 25.02.2012 is not covered by this statement. Digitale Gesellschaft e.V. will, if considered necessary, comment on this proposal at a later date.

Digitale Gesellschaft e.V. considers the lack of an exception for autonomous, local processing of data for private reasons by individuals as problematic. Even though it is hard to draw a clear border between local and remote storage in times of combined applications, we assume that, since the proposed Regulation clearly aims at politically shaping digital infrastructures in the internal market, an introduction of a privilege appears to be unavoidable: in a general view on the efficiency of a data protection ecosystem the promotion of decentralised, not accidentally and without consent interconnected and secure infrastructures has to be considered as an important pillar of the data protection regime. This has to be improved.

Digitale Gesellschaft e.V. considers the exclusion of areas covered by the E-Privacy Directive as highly paradoxical. Once the Regulation comes into force, the E-Privacy Directive should be abandoned without replacement, since the regulatory content is

considered lagging far behind compared to the proposed Regulation and co-existence would lead to double standards for comparable circumstances, which would contradict the goal of harmonisation.

We welcome in general the proposed new definition of the scope of the Data Protection legislation. Whilst taking into account that it cannot be assumed that it is evident to users under which jurisdiction data is processed in the current technological environment, this appears to be an important issue for the necessary modernisation. However, the Commission's proposal appears to be too weak here.

The territorial scope of applicability as defined in art. 3, nr. 2, a) does not include any kind of data procession without a commercial background that does not aim at the behavior of individuals but only on i.e. reference data. This causes unnecessarily legal uncertainty.

In principle, Digitale Gesellschaft e.V. welcomes the approach to enhance the consistency of the interpretation of Data Protection legislation and by that the choice of the instrument of a regulation. Clarifying the role of the Data Protection Authorities and the standardisation of the legal interpretation is an important point here, but has to prove itself in practice. The proposed Regulation lacks an evaluation mechanism here.

Digitale Gesellschaft welcomes the newly introduced „right to data portability". This right is considered as very important for real autonomy of the citizen with regard to all data processing entities, regardless the relationship between the data subject and the data processor to be mainly analogue or electronic. In old-fashioned seeming data processing scenarios like credit ranking business, the right to obtain a copy of the electronic data set in a structured, electronic open source format will be a major step forward to more transparency and trust.

One idea Digitale Gesellschaft can definitely not welcome is the reservation of final decision making by the European Commission in case of the Data Protection Authorities not finding a common viewpoint. Since the Commission, as an active key player of politics and namely as an executive agency in the European model, is not the right institution to solve disputes between independent Data Protection Authorities, we recommend that in case of continuing irreconcilable differences between the DPAs, a self-regulatory mediation body, elected by the DPAs, should be responsible for finding a solution and have the final word on the legal interpretation.

Digitale Gesellschaft e.V. especially welcomes the proposed introduction for associations, organisations and bodies to act on behalf of a data subject according to Article 73.2. This could become one of the most important steps forward to an active enforcement of rights of the subjects and by that a cornerstone for the enforcement of data protection legislation in general.

In the view of Digitale Gesellschaft e.V. the assumed legality of data procession for direct marketing purposes is however inappropriate. Processing personal data for direct marketing purposes cannot constitute a legitimate reason in the sense of Art. 6, Char. f of the proposed Regulation. In a more abstract view, it seems to be absolutely contradicting to the intention of the Regulation to grant direct marketing purposes a special role here. Furthermore, the Regulation does not distinguish between on- and offline direct marketing, why we find the assumed constitution of a legal base as highly problematic.

Digitale Gesellschaft welcomes the general aim of revised rules for adequacy decisions regarding data procession outside the European Union. But in detail, the proposed rules are not yet sufficient: in particular regarding the access to European Union citizens' data by public authorities and courts of third countries on data stored or accessible under their respective regime appears insufficient for Digitale Gesellschaft e.V. The legal content of Article 40 et. seq. does not fully reflect the problems outlined in recitals 90 and 91.

Regarding this issue, we consider the adequacy assessment procedure generally as problematic. The current problems under the regime of 95/46/EC Directive do not appear to be solved in a considerable better way with the proposed new set of legal instruments. We see a clear responsibility for Commission, Parliament and Member States to work together on finding an effective mechanism and solutions to the problem.

Regarding remedies and sanctions, Digitale Gesellschaft e.V. welcomes the proposed range of sentences since it shows the recognition by the Commission of the importance that data processing has today. In particular, the variety of possible sanctions, fines and remedies and notably the possibility to impose sanctions on public bodies as well, is an important step forward on the way to an effective data protection regime. In combination with the immediate applicability of the Regulation, this could lead to a substantial change in the role of the DPAs, in particular of those DPAs held toothless by their respective national legislators more or less on purpose which is moreover not-compliant with the existing Data Protection Directive.

Final remarks: On the level of the proposed Data Protection Regulation and the

constitutional protection of informational self-determination

For Digitale Gesellschaft e.V. there is no question: the level of data protection has to be at least on the same level of protection as guaranteed by the jurisdiction of the Federal Constitutional Court of Germany. If not in line with German standards, every limitation of the right to informational self-determination as well as the right to confidentiality and integrity of information technology will lead to a general rejection of the proposal and cause serious European and constitutional issues, that can be prevented only by consequently considering this as a requirement during the whole process. We are slightly optimistic that the European Commission, the European Parliament and the European Council will aim at ensuring this objective.

In the coming months, Digitale Gesellschaft e.V. will actively and discerningly follow the developments of the proposal. A subsequent and more detailed statement on the proposal will follow.