

Response

on the public online-consultation for the purpose of reviewing directive 95/46/EC

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The Federal Association for Information Technology, Telecommunications and New Media (BITKOM) represents more than 1,300 companies in Germany. Its 950 direct members generate a sales volume of 135 billion euros annually and employ 700,000 people. They include providers of software, IT and telecommunication services, manufacturers of hardware and consumer electronics as well as digital media businesses. BITKOM is working, in particular, to improve the regulatory framework in Germany, for modernization of the education system and for an economic policy which encourages innovation.

The EU Commission (Justice and Home Affairs) has initiated a public online consultation for the purpose of reviewing directive 95/46/EC. In this consultation, it addresses three central issues. These issues are:

- What are the new challenges faced by data protection, especially with a view to new technologies and globalisation?
- Does the existing framework meet these challenges?
- Which (further) measures would be possible in the future in order to better meet the existing or impending requirements?

General Comments

We live in a world of information-based every-day life. There is hardly any other technology that has changes our way of life and our work environment quite as drastically and as permanently as information technology. This results in opportunities – but also in challenges. Data protection must meet such challenges. There must be answers as to how opportunities can be taken advantage of, and risks can be mitigated. BITKOM, therefore, welcomes the opportunity to present its view on these issues and comments as follows:

Harmonisation and Consistency as the Factors of Success

Adequate protection of data is fundamental to a web of trust and therefore indispensable to BITKOM. To foster such trust, a reasonable European level playing field must be created, meaning that consistent European standards for data protection must be created.

However, and in addition to the above, data protection in a world dominated by information technology must especially maintain a view to internationally accepted standards. This is required in order to satisfy both the requirements of the Internet as a global medium, but also of globally operating enterprises, and to create comparable economic starting conditions. The goal must be a consistent European model which will prove itself in an international environment as well. Without unified, consistent regulations, European and national locational disad-

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vantages will be inevitable. Furthermore, consistent regulations must apply to the government and the economy alike.

This holds true, for instance, for the areas of governmental obligations to retain data, new services and applications like cloud computing, and also for contract data processing on behalf. For all such areas, a harmonisation of data protection is necessary in order to implement comparable and reasonable standards for data protection. The ultimate goal must be a full harmonisation, and thus to disprove the understanding of individual member states, which may assume that the Directive intends to merely provide the lowest common denominator for such standardisation.

Pleading for a Group Privilege

Competition in an international environment requires, not only for reasons of cost-efficiency, a group-wide synchronisation and streamlining of processes and applications, and work-sharing structures – all of which, in turn, will lead to an ever-increasing volume of data transfers between affiliated legal entities. The support of multi-national customers follows suit and often presupposes a unified level of data protection in all parts and units of an enterprise. Today's narrowly limited relationship of data protection laws with the legal entities as the units responsible, without taking into account the group interactions, hinders the same and leads to a multitude of necessary, albeit frequently changing, individual contracts, which, in turn causes a lack of transparency for all involved, and in effect, a lack of compliance.

Organisational efficiency in groups of legal entities is not only driven by the streamlining of business processes and IT applications, instead, the structural organisation must be established globally. This leads to matrix structures built abstract from legal entity structures, and which, due to the rapidly changing market requirements are also subject to rapid change.

What is needed are unified regulations for data protection which enable the transfer of personal data between various corporate units. Extending a group privilege upon corporations that guarantee a consistent and adequate level of data protection in accordance with European standards would resolve the issues faced by multi-national matrix organisations.

The concept of Binding Corporate Rules is seen as one possibility to implement corresponding solutions compliant with data protection requirements. The quality of Binding Corporate Rules, which guarantee the level of data protection required throughout Europe, should be recognised. A swift approval flow for Binding Corporate Rules, with an application as consistent as possible, should be the goal on a European level, and it should implement a one-stop shop and avoid the necessity to obtain approvals in all member states.

The Data Protection Web of Trust

The confidence of data subjects is of paramount importance, especially to new services like Internet-based service models. BITKOM promotes all reasonable and practicable initiatives which foster the consumers' confidence in the digital economy.

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Data protection requires an increase in publicity. The media has, since about 2008, become more sensitive. Cases of data misuse, but also the discussions revolving around the Internet users' self-protection, have moved data protection to the centre of attention of the general public. The attention thus gathered should be used positively. In BITKOM's view, there should be a discussion in society around which data is considered to be in particular need for protection in the age of Web 2.0.

In this context, the decisive question will be how data subjects intend to treat their own data. Media competence is a key enabler in this discussion. Only informed, enlightened data subjects will be able to make decisions on their own data, and will be able to trust in modern information technology.

Modern, comprehensible data protection laws are another corner stone. Simple and transparent regulations should be created, and they should focus on the principles of data protection and should be easy to understand.

An additional aspect, and one which also promotes media competence and legal stability, is a clearer and more easily comprehensible regulation on the scope of application of national data protection laws which avoids a concurrent application of more than one jurisdiction's laws. The endeavour to foster consistent data protection regulations should not be thwarted by a difference in interpretation among various member states.

An important precondition is the confidence in the protection of personal data of citizens, employees, customers, business partners, and "affected third parties" in general against improper access and inadvertent disclosure. The method of choice to safeguard against this is the encryption of data. BITKOM, in this context, promotes the introduction of regulations consistent within the EU and across multiple business sectors.

The statutory duty to instruct employees used in the processing of data and to oblige them to data secrecy that exists in Germany (§ 5 of the German federal data protection act) provides a very efficient means to increase the employees' sensitivity when working with personal data. A similar regulation would be a welcome addition on an international level, as it permits each individual's awareness of data protection to be raised.

Strengthening the Corporate Data Protection Official

The role of the corporate data protection official in Germany is a proven and efficient one. The officer is an indispensable element of data protection in corporations. More recent developments in other countries – France, the Netherlands, and Switzerland, just to name a few – show that Germany has a leading edge and is considered a role model in that respect. The success this model has had should be used to foster and fortify the role of a corporate data protection official in a consistent way on the European level.

The success of the corporate data protection official's role results, on one hand, from the interconnection between the independent execution of its duties, and on the other hand from the inclusion and incorporation into the business which leads to a comprehensive understanding of the business and the parties involved.

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From the corporations' point of view, the corporate data protection official is a crucial element in corporate self-governance, as this role will, in general and also in specific cases, be instructive, provide advice and counsel, and control with a view to data protection. It is a role of a trusted advisor who, at the same time, promotes data protection compliance. In effect, it mitigates risks to the data subjects and the corporation.

Another essential and positive aspect of appointing a corporate data protection official is the liberation of the corporation from numerous duties to notify and register. This statutory privilege associated with the role makes it particularly clear that the corporate data protection official is far from being an element of bureaucracy, but that it actually reduces bureaucracy – the relief of external duties to notify or obtain approvals is a primary competitive advantage for many German corporations which find that their business processes are substantially speeded up.

From the data subjects' point of view, especially considering customers and employees, the corporate data protection official is a trustworthy arbitrator that is obliged to maintain secrecy. In this role, he will not unilaterally represent the interests of the data subjects in the corporation, and equally, he will not be considered the strong arm of the supervisory authorities. Instead, the successful work of the corporate data protection official presupposes that he is capable of balancing the – sometimes opposed – interest of all parties involved, that he knows the legal framework and possibilities for the corporation, that he enables business processes, but also that he makes clear where the boundaries are and that he audits compliance with those boundaries.

A data subject may – in confidence, if he so desires – contact the corporate data protection official, not only in order to enforce his own rights, but also in order to have processes verified. This makes the data protection official an element not only of the audit of compliance, but he also creates transparency and legal tranquillity.

To the supervisory authorities, the corporate data protection official is a crucial element that relieves them of part of their obligations, and that fosters cooperation; after all, he will provide trainings and information in the corporation, handle complaints and a multitude of enquiries that, in his absence, would partially need to be processed and resolved by the supervisory authorities. When a supervisory authority is involved, the corporate data protection official is one of its primary points of contact. The corporate data protection official as the well-educated and versed partner is a crucial link between the supervisory authority and the corporation and, in his capacity, will support a targeted and expeditious handling of enquiries.