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EU Commission presents evaluation report on the GDPR - missed opportunity to take action

The report published yesterday by the EU Commission on the evaluation and review of the General Data Protection Regulation (GDPR) draws largely a positive conclusion. However, after more than two years of practice of the GDPR, it does not take the opportunity for suggestions to correct recognisable malfunctions. In particular, the Commission's consideration of the provisions of Chapter VII on cooperation and consistency, which should actually have been a focus of the evaluation under Art. 97 para. 2 DPA, is rather disappointing. In this context, the approach of relying on a cooperative administrative procedure involving all supervisory authorities of the Member States for the control of cross-border data processing is one of the most far-reaching changes brought about by the GDPR. Behind this lies a detailed network of provisions which contain a complex interplay of authorities involved in different functions with each other and with the European Data Protection Board as the highest decision-making authority.

After two years of experience with this approach, it is clear that there are massive obstacles for enforcement in the context of cross-border data processing. The GDPR has so far proved to be a blunt sword, particularly in relation to large, globally active Internet services and platforms. GDPR, not least, was created for a better regulation of those services and to protect those affected. In contrast to small and medium-sized enterprises, the global Internet companies have not been subject to appropriate regulation by the supervisory authorities despite numerous massive data protection incidents in the last two years, apart from the 50 million euro fine imposed on Google by the CNIL. This has been, however, a purely national procedure, as up to then there was no main establishment of Google in Europe. The processing of complaints, which were raised primarily by civil society organisations representing many users in Europe at the beginning of the GDPR, is still a long way off.

It is to be welcomed that the EU Commission in its evaluation report calls for appropriate resources of the supervisory authorities by their Member States. Their human and financial resources are often inadequate. This is also the case in Germany, where, for good reasons, the enforcement of regulations is mainly the responsibility of the supervisory authorities of the Länder. However, the reasons for the difficulties in cross-border monitoring of data processing are clearly too limited to be attributed solely to the inadequate resources. Rather, the following causes are proving to be responsible for this:

- the One Stop Shop rules, whereby a national authority in the member state of a company's main establishment in the EU is the competent lead authority for all its data processing, without clear deadlines being set,
- an extremely bureaucratic participation procedure between the supervisory authorities,
- the lack of options for action vis-à-vis lead supervisors, as long as they do not introduce draft decisions into the procedure,
- national procedural regulations which differ widely from one another and whose compatibility with the GDPR is sometimes doubtful,
- differences in understanding of regulatory law and different approaches to impose sanctions between European data protection authorities.

Johannes Caspar, Hamburg Commissioner for Data Protection and Freedom of Information: "The positive function of the General Data Protection Regulation as a pan-European draft and beacon project for the protection of rights and freedoms in the digital age is beyond doubt. However, it is also

clear that the GDPR has obvious legislative dysfunctions in the area of law enforcement. In future, we will need clear regulations which do not encumber the European supervisory authorities and which do not leave room for forum shopping by global Internet companies. The current regulatory instruments have lead to two-speed data protection enforcement: While national proceedings often end in due time and in some cases with very high fines, the serious cross-border cases involving all data protection authorities hang in the mill of a bureaucratic procedure for years and absorb the strength and the poor resources of the authorities. Effective protection of the rights and freedoms of data subjects, but also fair competition in the digital market, cannot be achieved in this way. A critical analysis must be carried out if the regulatory project is not to be jeopardised. Even if a systemic change of direction is not yet imminent: The need to adapt some of the provisions of the GDPR is beyond question. Unfortunately, the evaluation report has not taken advantage of the opportunity to make adjustments.

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