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THE PROPOSAL FOR A REGULATION OF THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA ON THE FREE MOVEMENT OF SUCH DATA

The European Commission published on 27 January 2012 a proposal for a general regulation on data protection (COM (2012) 11 final) which will replace the current directive on data protection 95/46/EC.

Below is LGDK's first response to the proposal of European Commission.

LGDK agrees with the European Commission that the way in which we exchange data both as single individuals, companies and authorities, has developed since the data protection directive came into force. LGDK also agrees with the European Commission's remark that data security should be as high as possible to secure the citizens' confidence in the authorities' storage and handling of data. Likewise, LGDK agrees that it is important that the EU is able to develop the digital economy. But LGDK finds it important that the legislation will not become a burden for the authorities - where the costs of the reform are higher than the benefits.

Regulation or directive

LGDK is of the opinion that the European Commission's proposal goes too far by a very detailed regulation. The proposal would impose large administrative burdens on the municipalities without significantly improving the protection of the citizens. The regulation will furthermore have large consequences for handling of data in relation to the possibilities of agreements between social partners. Finally, series of articles of the regulation are unclear.

LGDK urges the European Commission to reconsider the proposal for a regulation on data protection. A solution could be to differentiate the rules for the corporate use of citizens' data and the public authorities' handling of citizens' data. A reform of public authorities' handling of citizens' data could likely be based on a revision of the current directive where the current uncertainties can be overcome.

This would help to avoid the unfortunate consequence that the municipalities will be subject to excessive administrative burdens because of a Regulation that will not benefit the citizens right significantly. Citizens' rights in connection with corporate / virtual social network's use of citizens' data can be secured in a separate regulation.

In relation to conditions of employment will the most appropriate adjustment from LGDK's point of view be a revision of the current directive rather than a new regulation. Another possibility is an enhanced possibility for national (collective agreement) adjustments in personal data in matters of conditions of employment. Finally, an option is to exclude conditions of employment from the scope of the regulation.

The proposed regulation will give the European Commission an extensive power to adopt delegated acts, which are also binding. Besides decreasing the national latitude, such acts will lead to a high degree of uncertainty about what is current law. Thus the proposal is not by itself final and exhaustive regulation of data protection since it contains several points in which the European Commission has the possibility of issuing further acts. LGDK is very skeptical about the European Commission's possibilities for further regulation, which it is feared will lead to additional administrative burdens without benefitting the citizens.

The extent of the European Commission's possibilities for further regulation can be illustrated as follows (all the below mentioned articles allows the European Commission to issue new acts):

Article 6. 5, Article 8. 3, Article 9. 3, Article 12. 5, Article 14. 7, Article 15. 3, Article 17. 9, Article 20. 6, Article 22. 4, Article 23. 3, Article 26. 5, Article 28. 5, Article 30. 3, Article 31. 5, Article 32. 5, Article 33. 6, Article 34. 8, Article 35. 11, Article 37. 2, Article 39. 2, Article 43. 3, Article 44. 7, Article 79. 6, Article 81. 3, Article 82. 3 and Article 83. 3.

According to LGDK an act as a regulation is not in accordance with the principle of subsidiarity.

Additional administration and additional costs

It is LGDK's opinion that the proposal in general will impose additional administration and thus additional costs to the municipalities both as an authority and as an employers. The proposal is much more detailed and heavily regulated – it contains 91 articles - than the current data protection directive 95/46/EC, which only contains 34 articles. The European Commission itself acknowledges that the Regulation will impose additional administration to the authorities because the European Commission exempts in several matters businesses employing fewer than 250 people. e.g. Article 35 concerning the designation of the data protection officer.

Article 17 - The right to be forgotten and erasure is an example of additional administration for the municipalities.

The municipalities currently erase the information and the recorded data subject when this is no longer needed. Handling deletion requests will partly come into conflict with the above mentioned evaluation of need and partly be financially burdensome.

Having to use EU-standard forms in addition to the municipal forms will also increase the expenses of the municipal administration and confuse citizens who would then have to receive multiple forms in connection with an application. - Unlike today, where all data to and from citizens is via 1 single form.

The rules on information are too detailed and administratively burdensome. e.g. Article 18 says that the data subject has the right to data portability, i.e. to obtain a copy of data undergoing processing from the controller "in an electronic and structured format which is commonly used and allows for further use by the data subject". This imposes further demands on the municipalities' processing of information, including any IT systems.

Furthermore the regulation contains new requirements regarding documentation (Article 28), notification to the data subject of personal data breach (Article 32) and carrying out impact assessments (Article 33) which

will impose the municipalities and the municipalities as employers administrative burdens and associated costs.

The proposal further demands designation of a data protection officer (Article 22, 35-37). Articles 36 and 37 include a very detailed regulation of the position and duties of the data protection officer. In addition, the data protection officer is designated for a period of at least 2 years and may only be dismissed if he/she no longer fulfills the requirements to perform the duties. This is an interference with the employer's managerial authority. It will in addition lead to an increased cost for the municipalities.

LGDK remarks that it may be questioned whether the stricter rules will be seen as an improvement for the citizens. The Danish municipalities do not experience that the current rules of the data protection directive, which is intended to give the registered data subject rights in relation to the processing of their data in fact makes a difference to the data subject. Despite that the citizens have the possibility to gain insight into the processing; this is not something which citizens make any use of. It is therefore important that there are not established new administrative cumbersome and costly procedures that will not be seen as an improvement to the citizens. In fact the

Danish municipalities experience that the citizens expect the authorities to handle the information, including exchange of information, without the citizens being involved herein.

Employment

In Denmark, employers' processing of personal data is not subject to specific labor law but essentially based on collective agreements. Via the collective agreement the Social Partners in Denmark have adopted a more stringent protection of personal information than the current Directive require. It is LGDK's opinion that with the proposal for regulation it will no longer be possible to maintain the collective agreements.

Article 82 recognizes the labor market as a special area but does not address the right to collective bargaining. The regulation gives authority to adopt rules on how the employers can treat personal data but the rules have to be implemented within the framework of the regulation. Thus the regulation contains limited latitude compared to the current Directive and Danish law on Personal Data.

Regarding consent requirements in employment relationships, it is recognized that an employee's consent to an employer to process information in the employment relationship is voluntary and therefore valid. The proposal for regulation raises doubts about whether this status can be maintained.

If an employer in the future does not have the possibility to ask for consent to the processing of sensitive personal information, the employer will have to rely on a different basis of treatment. The employer's latitude will therefore be limited.

Administrative sanctions

According to the proposal for regulation the supervisory authority has the power to impose sanctions, which include administrative fines. LGDK finds the fines to be disproportionately high compared to the character of offense.

It is proposed that it is possible to impose a fine of up to 250,000 EUR for lack of or insufficient compliance with the data subject's rights. It is also proposed to impose a fine of up to 1,000,000 EUR, if a Data Protection Officer is not appointed or the conditions for the exercise are not guaranteed.

The proposed fines are considerably high compared to the municipalities' budgets and it is beyond the goal of effective law enforcement. At the same time it appears that it is not possible to balance the nature of the offense in relation to the actual harm of the data subject and is therefore not in accordance with the principle of proportionality.

Unclear legal basis

LGDK notes that the proposal contains several unclear articles that need to be clarified. The European Commission needs to elaborate on the articles to secure an informed basis of the adoption of the regulation.

For example:

Article 4, 8) 'the data subject's consent' means any freely given specific, informed and explicit indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action, signifies agreement to personal data relating to them being processed;

What does it mean that consent must be explicit?

Article 5 a) processed lawfully, fairly and in a transparent manner in relation to the data subject;

What does in a transparent manner mean?

Article 5 d) accurate and kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay;

What does "reasonable steps" mean in relation to ensuring that information is accurate and up to date? Does it contain additional administrative tasks?

Article 5 f) processed under the responsibility and liability of the controller, who shall ensure and demonstrate for each processing operation the compliance with the provisions of this Regulation.

How shall the controller ensure and demonstrate that each processing operation is in compliance with the provisions of the Regulation?

Article 15 - Right of access for the data subject

LGDK acknowledges the ambiguity of the right of citizens to inspect their own data in Denmark. The ambiguity is whether the right of access includes the right to inspect particular documents or whether it is only the right to inspect the data being processed. Unfortunately, this ambiguity will not be eliminated with Article 15, which therefore needs to be clarified if it is to rectify the current situation.

Local Government Denmark (LGDK) is the interest organization and member authority of all 98 Danish municipalities. The mission of LGDK is to safeguard common interests of the democratically governed Danish municipalities and to act as their unified body of negotiation, knowledge center, and forum for mutual municipal initiatives.

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