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GDPR evaluation after two years - Take the opportunity for changes!

The General Data Protection Regulation (GDPR) is one of the most ambitious EU legislative projects of recent years. It has reformed data protection in the EU and harmonised it throughout Europe. Rights and freedoms for people in Europe have been reformulated and strengthened overall. At the same time, effective tools for law enforcement by the supervisory authorities in the Member States under the aegis of the European Data Protection Board have been created.

The interim conclusion to be drawn after two years shows a lot of light, but - typical for a project of this size and complexity - unfortunately also shadow. On the positive side people in Europe are making use of the rights created by the GDPR and taking advantage of the new opportunities and rights for improving their data management. In recent years, companies have made considerable efforts to implement the provisions of the GDPR for being compliant to the new data protection law. The supervisory authorities have jointly developed numerous guidelines and recommendations for the interpretation and implementation of the new legal provisions in the European Data Protection Board with great success.

At the same time, however, in practice the enforcement of the GDPR to controllers is deficient in concrete implementation. The concept of the so-called One-Stop-Shop (OSS), according to which a lead authority at the location of a company's European head office is responsible for supervising all its data processing in the EU, has led to a shift of competence particularly in the case of large globally operating data processors to only a few supervisory authorities. In practice, a twin-track approach with dual speed has developed. On the one hand, purely national procedures in law enforcement are quickly passed through, while in the case of cross-border data processing in the OSS mechanism the procedures are often extremely lengthy. If proceedings run for more than two years without a draft decision by the lead authority this has a considerable impact on the Europe-wide protection of the rights and freedoms of data subjects. This shows for example in the case of the transfer of user data from WhatsApp to Facebook. At the same time, the systematically different reactions of data protection authorities on infringements or alleged infringements of data subjects by controllers lead to a negative impact on fair competition in the digital internal market. A corresponding distortion of competition has been complained for some time by companies with main establishments in Germany.

The evaluation to be carried out by the EU Commission after two years provides an opportunity for corrections. For this, the Hamburg Commissioner for Data Protection and Freedom of Information proposes to strengthen the position of the authorities concerned in the OSS procedure. The GDPR provides an obligation on lead authorities to submit a draft decision without delay to the concerned supervisory authorities. Relevant objections to draft decision then can lead into a clearing procedure before the European Data Protection Board. Concrete time limits, such as a three-month deadline, should significantly shorten the currently unsatisfactory processing times for the submission of draft decisions by lead authorities. An extension of the deadline in complex cases could be set out by the

European Data Protection Board on a case-by-case basis upon request by the lead authority. If this deadline is exceeded, the authorities concerned would have the right to take over the case as new lead authorities. Therefore, a mechanism should be established in which the authorities concerned jointly decide which authority should then take charge of the case as a new lead authority.

To ensure uniform enforcement, a fully harmonised administrative procedure is essential. Different national procedural rules lead to legal uncertainty and to massive delays in administrative procedures to the detriment of the rights and freedoms of data subjects. This applies, for example, to national provisions concerning the hearing of data subjects and controllers as well as for national provisions for the protection of business and trade secrets which can impede the exchange of information between the authorities involved.

Johannes Caspar, the Hamburg Commissioner for Data Protection and Freedom of Information, states: "After two years of the GDPR, there is both an opportunity and a need to substantially optimise the cooperative enforcement procedure of the GDPR. In the end, the GDPR will only be accepted by data subjects and also by the market, if European data protection law leaves no room for privileges of global, data-intensive players. The principle of "catching the small fry and letting the big fish go" must not apply here in particular. I am convinced that the necessary changes can be implemented quickly by the European legislator. "

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