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ISPA CONTRIBUTION TO THE PUBLIC CONSULTATION ON THE INFORMAL JUSTICE AND HOME AFFAIRS MINISTERS' MEETING ON DATA PROTECTION – CERTAIN KEY ISSUES

Dear Madam,

ISPA (Internet Service Providers Austria; Identification Number: 56028372438-43) is pleased that the Federal Chancellery of the Republic of Austria has issued this consultation on certain key issues regarding data protection which are to be discussed at the Informal Justice and Home Affairs Ministers' Meeting.

ISPA would like to emphasize that it is very pleased that the aim of the proposed General Data Protection Regulation lies in a further harmonization of data protection rules and thus the creation of a "level playing field" in the entire European Union. ISPA however is of the opinion that harmonized rules alone cannot adequately address this challenge; coherent and consistent enforcement in all member states is equally important to accomplish this task. In ISPA's opinion it is therefore vital for the success of the Regulation that a "race to the bottom" facilitated through "forum shopping" in regard to enforcement is prevented.

ISPA would like to point out that the Austrian Data Protection Commission has so far done an excellent job; therefore ISPA hopes that the future competent authority will continue in this tradition.

In order to promote acceptance of the General Data Protection Regulation and to leave the private autonomy of natural persons in a private capacity untouched, the household exemption should be broadened.

ISPA emphasizes that the right to be forgotten needs to be further clarified or deleted entirely in order to facilitate compliance. Furthermore sanctions need to be flexible enough in order to not endanger the economic existence of small and medium-sized enterprises (SME).

1. The scope of the household exemption should be broadened in order to prevent that the usual way of using the internet by households is being made unlawful or illegal

Question 1:

whether the scope of the proposed household exemption is correctly or too narrowly defined in article 2.2(d);

- if too narrowly defined, in what way the scope should be extended; for example, by replacing "gainful interest" with "professional gainful interest" and by taking into account the frequency or occasional nature of the activity.

ISPA is of the opinion that the household exemption is very important and useful, since the aim of the General Data Protection Regulation does not seek to regulate the conduct of natural persons in their private sphere.

ISPA would like to point out that if the scope of the household exemption is too narrow, the proposed Regulation could encounter enormous problems in regard to the acceptance of the new rules by the general population as well as raise the question of enforcement. Any rule that will suddenly make the everyday conduct of natural persons within their private life unlawful, illegal or unnecessary complicated would not be perceived as a sensible rule and therefore simply ignored.

ISPA therefore calls for a broader scope of the household exemption in order to leave the private autonomy and freedom of natural persons untouched. This broadening could be reached by the inclusion of the word "professional" before gainful interest. ISPA is also of the opinion that it is absolutely vital to take into account the frequency or occasional nature of the conduct of the natural persons concerned in order to allow for a suitably flexible application of the exemption.

2. The right to be forgotten either needs to be clarified or deleted

Question 2:

whether they support a strengthening of the existing right to erasure in the form of the new "right to be forgotten";

- if so, whether the obligations imposed on data controllers arising from the "right to be forgotten" are reasonable and feasible.

ISPA would like to point out that the proposed obligation for data controllers to inform third parties who are processing the data about the request of the data subject seems relatively vague, since it is unclear which procedures should be used. Furthermore there exists a real risk that this would be very difficult to implement in practice.

In case of data that was made consciously public by the data subject itself, it is not possible for an Internet provider to identify all those who accessed and might be

processing the data; it would be very unreasonable to expect ISPs to contact these “third parties” which are not defined in the Regulation.

Finally, the Regulation states that where erasure is carried out, data cannot be processed further. The complete removal of all data, however, could negatively affect the capability of the controller to verify or prove compliance with the requests of the data subject.

The proposed rules regarding the right to be forgotten and corresponding obligations for controllers need to be further clarified. The interest of the user to be forgotten and the legitimate interests pursued by the controller for processing have to be balanced.

ISPA would like to emphasize that this obligation for controllers should only apply vis-à-vis recipients of data to whom the controller has transferred the data (i.e. when a contractual relation exists), because all other cases are not within the sphere of control of the controller. This case is already covered by article 13 of the Regulation, which foresees that “the controller shall communicate any rectification or erasure to each recipient to whom the data have been disclosed unless this proves impossible or involves a disproportionate effort”. ISPA therefore would like to point out that article 17 (2) of the Regulation does not add anything to what already exists in the proposed Regulation and should therefore be deleted.

Additionally, article 17 (8) of the Regulation, saying that where erasure is carried out, the data cannot otherwise be processed, should be modified in a way to allow the controller to verify or prove compliance with the requests of the data subject, or to allow processing for billing purposes.

3. Administrative sanctions should include warnings and reprimands in order to help SME to reach a higher level of compliance

Question 3:

whether the framework of fines set out in article 79 is appropriate;

- if wider provision should be made for warnings or reprimands, thereby making fines optional or at least conditional upon a prior warning or reprimand;
- if supervisory authorities should be permitted to take other mitigating factors, such as adherence to an approved code of conduct or a privacy seal or mark, into account when determining sanctions.

ISPA emphasizes that before the issue of sanctions is addressed, the issue of enforcement of the proposed Data Protection Regulation by the various competent national data protection agency needs to be addressed. This enforcement needs to be as coherent and consistent as possible across all member states in order to not endanger the goals of the proposed Regulation. In ISPA’s opinion it is therefore vital for the success of the Regulation that “forum shopping”, which would result in a “race to the bottom”, in regard to enforcement is prevented. ISPA would like to point out that a “race to the bottom” between member states could have severe consequences for the Austrian economy and its domestic companies.

All national data protection agencies need to be equipped with sufficient resources to accomplish their tasks in a fair and effective manner.

ISPA would like to add to the issue of sanctions that a wider provision for reprimands and warnings would be welcomed. This would be especially positive for small and medium sized enterprises, since such entities have disproportionate higher implementation costs, fewer resources and know-how at their disposal and therefore more difficulty with implementing new data protection rules. Warnings and reprimands could therefore help promote more compliance within these enterprises while limiting the risk of bankruptcy through too high fines. This could also be achieved through making the law more flexible; for instance the word 'shall' in article 79 (4 – 6) could be replaced by 'may' in order to provide data protection authorities with sufficient leeway.

Article 79 of the proposed Regulation foresees that, depending on the violation, companies can be sanctioned with a fine ranging from 0,5% to up to 2% of their annual worldwide turnover. ISPA is of the opinion that the turnover should be capped at a maximum amount that can imposed, in order to protect SME from economic collapse.

ISPA would like to point out that the proportionality of breaches allocated to the highest category of sanction should be re-considered, since simple administrative faults like the correct maintenance of documentation could trigger a significant fine. This could disproportionately affect SME, which may have difficulties in reaching compliance because of their limited resources.

In general fines should be reserved to most substantial and severe breaches and should take into account the damage to individuals as well as the presence of aggravating or mitigating circumstances such as repeated violations or full cooperation.

ISPA is of the opinion that harmonized rules alone cannot adequately address the challenge of a fully harmonized data protection regime; coherent and consistent enforcement in all member states is equally important to accomplish this task. In ISPA's opinion it is therefore vital for the success of the Regulation that a "race to the bottom" through "forum shopping" in regard to enforcement is prevented.

In order to promote acceptance of the General Data Protection Regulation and to leave the freedom of natural persons in a private capacity untouched the household exemption should be broadened. ISPA emphasizes that the right to be forgotten needs to be further clarified or deleted entirely in order to facilitate compliance. Furthermore sanctions need to be flexible enough in order to not endanger the economic existence of small and medium-sized enterprises.

For further information or any questions please do not hesitate to contact us.

Sincerely,



Dr. Maximilian Schubert
General Secretary
ISPA Internet Service Providers Austria

About ISPA: ISPA is the Austrian association of Internet Service Providers (Identification Number: 56028372438-43), representing approximately 200 ISPs. ISPA is a major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework supporting optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.