

22.03.13

Resolutionof the Bundesrat

Proposal for a Directive of the European Parliament and of the Council concerning measures to ensure a high common level of network and information security across the Union**COM(2013) 48 final**

At its 908th sitting on 22 March 2013 the Bundesrat adopted the following opinion pursuant to Sections 3 and 5 EUZBLG (Act on cooperation between the Federal Government and the Länder in matters relating to the European Union):

1. The Bundesrat welcomes the aim of the Directive which seeks to ensure a high level of network and information security (NIS) in the Union through minimum harmonisation. In line with the objectives of the Directive, the Bundesrat takes the view that common NIS standards help to improve the internal market, given their suitability for dismantling obstacles to trade and eliminating distortions of competition. As the Bundesrat does not believe that central, regional and local NIS measures alone are sufficient, EU legislation in the field of NIS is largely justified given the objectives of the measures.
2. Furthermore, the rules governing the distribution of administrative responsibilities set out in the proposal for a Directive do not observe the principle of proportionality as defined in Article 5(4) TEU. Binding rules governing the responsibility of the single national authority are not necessary. Irrespective of whether rules governing responsibilities are even needed at European level, NIS would otherwise be effectively guaranteed by offering Member States the possibility to designate one or more competent authorities. This would then allow account to be taken of the way powers are allocated at Member State level, when designating the responsibilities of this authority. At the very least, an equivalent system of enforcement would be put in place,

resulting in a far less restrictive system which is equally well suited to designating Member State responsibilities. Furthermore, the intended rules are not appropriate. The appointment of the competent national authority will also lead to considerable attribution of powers according to Article 6(4) and Article 15 of the proposal for a Directive. Under Article 7(3) and (4) pertaining to CERTs, wide-ranging responsibilities are imposed on Member States concerning technical, financial and staffing aspects, as well as infrastructure. The impact would not simply be limited to interfering in a formal way in the way powers are allocated at Member State level, but would also include considerable substantive, technical, financial and staffing consequences. Bearing in mind that information technology plays a key role in almost all areas of the economy and governance, the attribution of powers to a national competent authority would have significant consequences for public administration as a whole.

3. In this context, the Bundesrat would also specifically point out that in related areas of EU law, the EU legislator has consciously avoided rules where responsibilities are managed at Member State level, preferring instead enforcement regimes which accommodate federal systems, such as in Article 28 of the EU Data Protection Directive (95/46/EC) or Article 46 of the proposal for an EU General Data Protection Regulation of 25 January 2012 (COM(2012) 11 final). In these examples, enforcement is not delegated to ‘an authority’ but to ‘one or more authorities’. Furthermore, in recital 92 and Article 46(1) of the proposal for a General Data Protection Regulation, it specifically states that the new Regulation shall provide for options which are better suited to federal states. In order to align the proposal more closely to the principle of subsidiarity, the Bundesrat takes the view that Articles 6 and 7 of the proposal for a Directive must be reformulated in order to accommodate federal systems. Article 46(1) of the EU General Data Protection Regulation could serve as guidance for adapting the proposal to the specific characteristics of administrative cooperation in the field of NIS.
4. The rules governing responsibility set out under the proposal for a Directive are also not compatible with the concept of respecting the national identity of the Member States, as laid down in the first sentence of Article 4(2) TEU. This specifically includes regional and local self-government. In this respect, the EU is required to act in a way which accommodates the Member States. Under the

proposed rules, a single competent authority must be designated and there is no provision for implementation in a way which reflects how powers are allocated in Member States with a federal structure. At the same time, as there is no requirement for such a rule, there is a disproportionate infringement of national identity.

5. Furthermore, as long as information systems used in public administration are broadly included within the scope of the Directive, the Bundesrat does not believe that Article 14 of the proposal for a Directive is covered by the general internal market competence laid down under Article 114(1) TFEU. Under Article 14(1), public administrations are required to ensure that as regards their information systems, they ‘take appropriate technical and organisational measures to manage the risks posed to the security of the networks and information systems which they control and use in their operations’. Article 14(2) stipulates that public administrations must notify incidents ‘having a significant impact on the security of the core services they provide’. Moreover, Article 14(5) empowers the Commission to ‘adopt delegated acts [...] concerning the definition of circumstances in which public administrations and market operators are required to notify incidents’. Indeed, under Article 14(7) of the proposal, the Commission is empowered ‘to define, by means of implementing acts, the formats and procedures applicable for the purpose of paragraph 2’.
6. The aforementioned provisions under Article 14 of the proposal for a Directive cover all Member State public administrations, without justifying the necessary relevance to the internal market. A measure may only be based on the internal market competence enshrined in Article 114(1) TFEU if, in objective terms, it contributes to an improved functioning of the internal market by dismantling obstacles to trade or eliminating distortions of competition. Given that the proposal for a Directive covers all public administration information systems in the Member States, these conditions are not met.
7. It is therefore unclear why, for example, employee portals used exclusively by Member State public administrations to handle internal legal matters between the public administration and its staff are considered to have sufficient internal market relevance. Just as internal enforcement of civil service law may not be subject to a Directive based on Article 114(1) TFEU, neither may a wide range

of other public administrative activities. In this context, for example, the ECJ exempted the activities of state secondary schools and state-funded universities from the scope of free movement of goods and freedom to provide services, and therefore also from the internal market competence under Article 114 TFEU.

8. The planned harmonisation measures may also not be based on Article 114(1) TFEU in respect of non-commercial research administration, tax administration, areas of social administration (e.g. social welfare and youth services), administration of justice and the administrations of the Bundestag, the Bundesrat, the state parliaments and the national and state courts of auditors. It is doubtful whether there is internal market competence on account of the lack of internal market relevance or more specific EU legislation, as well as in many areas of internal administration, e.g. enforcement of the right of assembly, immigration, civilian service, spatial and land-use planning, road transport, areas of environment and waste legislation, and the enforcement of nuclear energy law.
9. The Bundesrat would also point out that the proposal for a Directive lacks provisions exempting administrative areas with particular significance for security, such as the military, the police, the penal system and news services. In these instances, too, internal market relevance would seem questionable. Furthermore, it stands to reason that in the field of NIS, special arrangements are needed in certain sectors for practical reasons. As it broadly includes information systems used in public administration, Article 14 of the proposal for a Directive is not covered by Article 114 TFEU. It should therefore be redrafted, with a narrower scope, in a way which is consistent with internal market principles.
10. The Bundesrat is transmitting this opinion directly to the Commission.