

Decision of the Bundesrat

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An open and secure Europe: making it happen COM(2014) 154 final

In accordance with Articles 3 and 5 of the EUZBLG [Act on cooperation between the Federal Government and the Länder in matters relating to the European Union], the Bundesrat adopted the following opinion at its 922nd session, held on 23 May 2014:

General points

1. The Bundesrat has taken cognisance of the Commission communication. In our opinion, the practice of adopting five-year programmes has worked well so far. The European Council's "work programme" for 2010 to 2014, the Stockholm Programme, is due to end on 1 December 2014 – as is the accompanying Commission action plan (IP/10/447). We believe that a post-Stockholm programme is necessary, given the need for institutional balance between the Commission and Member States; the new multi-annual programme should aim mainly to consolidate, evaluate and implement existing legislation. However, any shortcomings should be remedied, and, where there is still a need, matters outstanding from the Stockholm Programme should be properly incorporated into national law.

An open and secure Europe – continued development of data protection in accordance with the principles of subsidiarity and proportionality

2. The Bundesrat supports the EU's continued development into a "Europe of rights" and underlines the importance of basic rights and freedoms in the EU. We therefore feel it is unfortunate that the development of European data protection law is not considered in the communication, although the need for reform has already become abundantly clear during the current discussions on the general legal framework for data protection.
3. In our view, the key strategic tasks of an EU obliged to protect its citizens, especially in an era of globally connected communications, include putting in place effective safeguards to protect personal data. In addition to the limits set by the EU treaties, for example as regards national security, high-quality modern European data protection law must take account of the fact that the public and private sectors have differing regulatory needs; it must not fall short of the protection offered by existing national rules and by current EU law on data protection in cross-border police and judicial cooperation.
4. In its opinions of 30 March 2012 the Bundesrat identified key areas of concern with the General Data Protection Regulation proposal and the proposed Directive on data protection in relation to the police and judicial authorities (see BR documents 52/12 (decision) and (decision) (2), BR documents 51/12 (decision) and (decision) (2)). Its demands, in particular on the core issue of allowing adequate room for manoeuvre for national data protection rules in the public sector, are still relevant.

We note that discussions on the data protection reform package unveiled by the Commission in January 2012 have progressed since the Bundesrat's decision of 30 March 2012. During negotiations in the European Parliament, which have come to an end for the time being following the adoption of a position at first reading on 12 March 2014, the outlines of a solution have begun to emerge for an EU data protection standard which is as uniform and as high as possible.

Nevertheless, we feel there is a need for clarification, particularly as regards Member States' ability to lay down special requirements for personal data processing. The questions outstanding must be settled quickly in the Council of Ministers, so that it can enter into negotiations with the European Parliament as soon as possible.

It is vital that a uniform legal framework for data protection at EU level be found soon.

5. The need for overarching strategic coordination of efforts to safeguard freedom and security in the information society is demonstrated by issues such as how the package relates to data protection in the telecommunications area, or to the cloud computing strategy, and by parallel initiatives to improve the security of European communications networks or security against cyber attack.
6. We also believe it is essential to develop dialogue and cooperation with third countries in order to work together to tackle the challenges of data protection in an interconnected world. It is unfortunate that the EU's previous efforts in this area (for example in the dialogue with the US on the safe harbour principles or a data protection "umbrella" agreement in the area of law enforcement) have yielded only slow progress, despite the fact that action is unquestionably needed. In general, it is essential to increase control of these EU external policy measures by involving the Council and the Parliament more closely and to achieve greater consistency by setting targets for the time scale and content of data protection agreements with third countries.
7. Discussion on the data protection reform package has thrown up new general questions regarding the demarcation between EU competences and Member States' responsibilities in the area of legislation and administrative enforcement; these questions need to be settled by agreement between the Commission, the Council and the European Parliament, particularly with future EU strategies in mind.

The ability to transfer powers to adopt delegated acts and implementing acts can open up far-reaching scope for the Commission to act outside the ordinary legislative procedure, without the counterbalance of workable and effective input from Member States and the European Parliament, as required by the TFEU and the committee procedure rules. We refer to our positions of principle in BR document 97/11 (decision) of 18 March 2011 and in BR document 768/13 (decision) of 19 December 2013. The transfer of powers to adopt delegated acts and implementing acts should be narrowly circumscribed in an interinstitutional agreement between the Council, the European Parliament and the Commission, for example on the basis of different categories of situation, in accordance with the principles of proportionality and subsidiarity, and clearly limited to areas where questions which do not need to be settled in the basic act itself still need to be regulated by

further Europe-wide rules.

8. We would also point out that primary European law, in conjunction with Court of Justice rulings, have made possible a major shift in responsibility for enforcement from Member States to the Commission and in particular to independent EU agencies, thus calling into question the balance of administrative powers at national level.
9. The debate in the context of the General Data Protection Regulation on the centralisation of data protection supervision in Europe in the hands of a legally autonomous European Data Protection Board is not an isolated example of what fundamental shifts of power can occur owing to the fact that under EU law, Member States' administrative powers can be undermined simply in the interests of completing the internal market. Since cross-border personal and economic relations are constantly increasing, not just in the area of digitalisation, this transfer of decision-making power to European central bodies may be conducive to the internal market, but it makes it harder for individuals to exercise their rights and freedoms in practice, by moving their legal protection. The principles of subsidiarity and proportionality must be upheld.

Internal security

10. The Bundesrat sees the communication as a further important step towards consolidating past achievements in the area of freedom, security and justice in Europe and as a fitting basis for the new multi-annual programme to be adopted under the Greek Presidency in June 2014.
11. We regret that the Commission has so far not delivered on its promise to develop a "Police code, including the codification of the main instruments of access to information" as stated in its action plan implementing the Stockholm Programme, and that it may not go ahead with the project. However, given the major practical difficulties with applying and interpreting the current rules, steps should be taken to improve legislation in specific areas – for example, cross-border police cooperation – and to amalgamate old laws (such as the few remaining Schengen Convention rules) with more recent legislation from the Schengen acquis.
12. The Bundesrat considers that the post-Stockholm programme should aim to further improve information sharing between police services. It stresses the central importance of

information sharing for cooperation between security authorities in order to develop police cooperation. Plans for a European Police Records Index System (EPRIS) need to be implemented in order to remedy the current shortcomings in police information exchange between Member States and effect a lasting improvement.

13. The Bundesrat broadly supports the priority topics on policing outlined in the Commission communication. However, the content of these topics is mainly couched in very abstract terms, making it hard to give a practical assessment. It is also unclear which components of the Stockholm Programme the Commission considers still need to be put into practice.
14. With regard to the drafting of a new multi-annual programme, the Bundesrat attaches particular importance to the following areas:
 - improving cross-border police cooperation,
 - sustainably combating cybercrime,
 - combating serious and organised crime,
 - combating violent extremism and terrorism,
 - preventing violence in connection with sporting and other major events, as well as meetings with an international dimension,
 - combating crime by itinerant criminal groups and
 - financing EMPACT projects with the EU funding made available by the new Internal Security Fund (ISF).
15. It emphasises that the Länder too take a critical view of the Commission's increasing tendency to cooperate with the Member States within the scope of informal structures. Furthermore, for politically significant strategies or legislative proposals and initiatives in the area of police and judicial cooperation in criminal matters, the Council Presidency must ensure the timely involvement of the Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS). In the opinion of the Bundesrat, this aspect ought to be reflected more fully in the drafting of the post-Stockholm programme.
16. The Bundesrat welcomes the premise in the Commission communication whereby the political priorities in the area of EU home affairs policy must in future be evidence-based. Nevertheless, it has reservations as to whether the Commission can meet this ambitious requirement with the valid data which are actually available. Moreover, it must be ensured that the Commission properly consults and involves public agencies in the Member States rather than acting autonomously and solely on the basis of statistical data.

17. The Bundesrat supports the Commission's objective whereby the new multi-annual programme should focus on implementing existing legislation, consolidating all that has been achieved to date and enhancing practical cooperation.

The same applies as regards the objective of monitoring and evaluating the effectiveness of legislation and strategies so as to be able to carry out targeted adjustments, as well as in terms of focusing on the principle of the citizens-oriented approach.

18. In principle, the Bundesrat welcomes the Commission's commitment to upholding the educational mandate of the European Police College (CEPOL) through a European training programme. However, account must be taken of the EU's mandate in terms of providing training and further education to Member States' police forces, which is limited by Article 87(2)(b) TFEU on the provision of support services. In this regard, it is also particularly important to safeguard the principle of subsidiarity. In that connection, the Bundesrat would refer to its detailed opinion of 3 May 2013 (BR document 248/13 (Decision)).
19. In the field of cyber security too, the Bundesrat takes the view that what is needed in the post-Stockholm process is not so much new European legislative initiatives as the systematic and coordinated transposition of existing rules into national law and the consistent application of such rules.
20. The Bundesrat considers that essential aspects of computer and cyber security, given their particular relevance to data protection, security and critical infrastructures at European level, ought to be handled while maintaining the existing structures and competences within the Council in areas including justice and home affairs.
21. Protection of critical infrastructures must therefore constitute a priority for cyber security. Specifically, cooperation between the utilities sector and state bodies in the area of crisis response needs to be developed appropriately.

Civil protection

22. A consolidation phase is necessary in the field of European civil protection. A fundamentally new legal basis for such protection was provided by Decision

No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, which came into effect on 1 January 2013.

Those new EU provisions of 17 December 2013 need to be evaluated and monitored. The Bundesrat does not see any scope for any new legislative initiatives.

23. In conclusion, the European provisions concerning the importance of prevention in civil protection, the role of the "Emergency Response Coordination Centre" (formerly the MIC), the risk management plans and, in particular, the European Emergency Response Capacity in the form of a "voluntary pool" constitute a solid basis for the effectiveness of the new mechanism. Attention will have to be focused on the proper implementation and consolidation of the body of legislation.
24. However, implementation and consolidation must not be allowed to alter the European civil protection architecture in such a way as to deny the fundamental primacy of national responsibility.
25. The Bundesrat regards Article 12 of the legislative act, which provides for possibilities for filling gaps in response capacities, as barely compatible with Article 196 TFEU. The legislative act suffers from design flaws in particular insofar as it not only creates false incentives through numerous possibilities for European co-financing but also, through the financial governance of civil protection, reinforces the trend towards EU-led civil protection, whereby the essential operational and financing decisions would be taken by the Commission. The new legal bases for transport financing are giving rise to similar aberrations. In Germany's opinion, the transposition and implementation phase for these regulatory areas needs to be strictly monitored in order to control and limit these shifts of emphasis in EU interaction.

Formulating the EU's future home affairs policy in the field of asylum, migration, integration and return

26. The Bundesrat is in favour of the EU becoming a Europe of responsibility, solidarity and partnership in matters including migration and asylum.
27. The Bundesrat supports the EU's current objective of ensuring a common area of protection and solidarity through the Common European Asylum System (CEAS). In order to guarantee the sustainable implementation of the CEAS in all Member States, it considers it

essential to implement current Union legislation equally everywhere in such a way as to systematically reduce the sometimes wide discrepancies between the Member States in terms of admitting asylum seekers and as regards procedural arrangements.

28. Furthermore, the Bundesrat takes the view that the sustainable implementation of the CEAS also requires a high degree of solidarity among all Member States. The objective must be to ensure a uniform distribution of the tasks and the related consequences. In terms of the admission of refugees, the Bundesrat considers that all EU Member States are obliged both collectively and as individual nation-states to display solidarity and provide assistance within the limits of their capacities.

Only by ensuring the coherent and consistent transposition and implementation of the adopted CEAS legal instruments in all EU Member States can the necessary protection of refugee rights be guaranteed and the requirements laid down in the EU Charter of Fundamental Rights be satisfied.

29. In future, in the case of infringements by Member States of the European law standards enshrined in the CEAS, full use must be made of all the options available: from improved cooperation with the Member States, aided by a European Asylum Support Office (EASO) benefiting from increased funding and human resources, to the launch of infringement proceedings by the Commission.
30. Greater efforts and measures on the part of the Commission would also appear necessary to accompany the transposition and implementation process. In order to ensure an effective CEAS, the evaluation provided for in the respective legislative acts must be applied consistently.
31. The Bundesrat stresses its critical stance on the Commission's plans to introduce European rules on the mutual recognition of national asylum decisions and/or an asylum status valid throughout the EU (see also the Bundesrat's opinion of 18 September 2009, BR document 616/09 (Decision), paragraph 69).

Mutual recognition would presuppose the actual implementation of a uniform procedural and protection standard in all Member States. To that end, further progress in implementing the CEAS must first be awaited and evaluated in full.

32. With regard to border security measures and cooperation with third countries, full compliance with human rights and humanitarian standards must be ensured. The Bundesrat considers it essential to take determined action to minimise the risk of people dying in their quest to reach Europe. In this respect, in close cooperation with the Member States and the Commission, the resources available ought to be exploited efficiently in particular in order to reinforce the activities of the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) in the Mediterranean and along the EU's south-eastern borders. Full consideration must be given to the principle of non-refoulement and to the obligation to carry out rescues at sea.
33. In view of demographic change and the increasing shortage of skilled workers in the EU, priority should be given to the objective of encouraging legal channels for labour migration corresponding to the needs of national labour markets. Within the framework of the external dimension of asylum policy, particular consideration should be given to the consolidation and development of Regional Protection Programmes (RPPs) and to the implementation of measures in accordance with the Global Approach to Migration and Mobility (GAMM).
34. In view of the continuous influx of refugees, particularly from Syria, its neighbouring countries and Egypt, there is a need for a stronger commitment on the part of all EU Member States to demonstrate their solidarity and provide support within the limits of their capacities. Through its refugee admission programmes, Germany has accepted this responsibility, in addition to taking in a large proportion of the asylum seekers entering Europe illegally. Apart from significantly increasing the possibilities for funding national measures via the Asylum, Migration and Integration Fund (AMIF), the EU should seek to ensure stronger pan-European coordination for the reception of vulnerable persons by individual Member States.
35. The current Commission proposal to allow asylum applications to be submitted from abroad raises complex questions which require in-depth discussion.
36. Individuals who do not have right of abode in the Member States should be returned to their countries of origin, preferably on a voluntary basis. Through EU-wide cooperation, the countries of origin should also be encouraged to cooperate more closely. In that respect, the EU's present readmission agreements provide a solid foundation which should be expanded further. To that extent, the Bundesrat welcomes the proposal to consider new agreements with other important countries of origin. Resources from the AMIF fund also offer scope for

resettlement projects across Land and Member State borders.

37. With regard to the governments of the Western Balkan states of Bosnia and Herzegovina, Macedonia and Serbia, the Commission should work to ensure swift and sustainable measures to improve living conditions on the ground.

Direct submission of the opinion to the Commission

38. The Bundesrat hereby submits this opinion directly to the Commission.