Bundesrat **Ref. No: 145/17 (Decision)**

02.06.17

Decision
of the Bundesrat

Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)
COM/2017/10 final; Council Document 5358/17

Pursuant to Sections 3 and 5 of the Act on Cooperation between the Federal Government and the Federal States in EU Affairs (EUZBLG), the Bundesrat adopted the following opinion at its 958th meeting on 2 June 2017:

General opinion

1. The Bundesrat welcomes the fact that clear and simple rules on the handling of personal data are to be established in the European Union.

   In the interests of a clear framework for the Digital Single Market, it welcomes this proposal for a Regulation aimed at supplementing Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data (General Data Protection Regulation) in the field of electronic communications, as Article 95 of the General Data Protection Regulation currently provides for the continued validity of Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) alongside the General Data Protection Regulation, which will be directly applicable from 25 May 2018, thereby creating a great deal of legal uncertainty for the operators of electronic communications networks and communications services as well as their users.

   The Bundesrat welcomes the objective of the Regulation proposal to guarantee a high

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degree of privacy protection for users of electronic communications services and equal competition conditions for all market operators.
The proposed Regulation contains numerous consumer-friendly provisions that should be supported.

2. The Bundesrat believes that the General Data Protection Regulation makes a significant contribution towards the establishment of a uniform minimum level of data protection for personal data within the EU. It particularly welcomes the harmonised legal framework and associated legal certainty that result from this. The Regulation proposal should also allow these objectives to be met for providers and users of electronic communications services. Although its objectives and principles still apply, the ePrivacy Directive is now out of touch with the reality of citizens' everyday lives because of the technological and economic changes that have taken place since it came into force.

3. Furthermore, the Bundesrat welcomes the fact that the Commission wishes to supplement and clarify the general legal framework of the General Data Protection Regulation with regard to electronic communications services. The ePrivacy Directive, which was last reviewed in 2009, is now obsolete because of the technological and economic changes that have taken place. For instance, consumers now communicate in some – or even most – cases via over-the-top services (such as messenger services) instead of by telephone or SMS. It is therefore essential to adjust the legal framework accordingly in order to close any gaps in protection that exist.

4. The Bundesrat also welcomes the technological progress in data-based services. It believes that Big Data processes and the Internet of Things will be important aspects of the economy in the future.

5. Nevertheless, the Bundesrat considers that it is essential to fundamentally review and improve the Regulation proposal, even if this causes delays in the legislative process, in order to add missing details and correct fundamental deficiencies regarding the delineation of the Regulation proposal in relation to the General Data Protection Regulation and in order to strike a better balance between the protection of electronic communication, security concerns and the design of the supervisory regime.

<u>Legal certainty regarding the scope of the General Data Protection Regulation</u>

6. The Bundesrat stresses that in order to avoid legal uncertainty, particular care should be

taken when regulating the relationship between the submitted Regulation proposal and the provisions of the General Data Protection Regulation.

7. In view of the comprehensive legal framework established by the General Data Protection Regulation, the Bundesrat considers it necessary to question whether particular provisions relating to the protection of personal data should continue to apply, at least with regard to the provision and use of electronic communications services. If certain features, particularly the protection of the confidentiality of communication, justify specific provisions, their relationship to the other provisions of the General Data Protection Regulation should be defined clearly and unambiguously.

   In the Bundesrat's view, these requirements have not been met, particularly in the provisions contained in Chapter II of the Regulation proposal. It therefore asks the Federal Government to call for a fundamental revision of the proposal in which the necessity of each individual provision and the extent of each deviation from the General Data Protection Regulation are reviewed and defined more precisely than in the general delineation clause in Article 1(3) of the proposal which is taken from the existing ePrivacy Directive.

<u>The balance between protecting communications and dealing with security concerns</u>

8. a) The Bundesrat welcomes the fact that it is stated in Article 2(2)(d) of the proposal that the Regulation does not affect the processing of electronic communications data for the purposes of, inter alia, the prevention and prosecution of criminal offences by the relevant authorities. Nevertheless, the Bundesrat considers that the Regulation should not only define the European legal framework for the protection of communications data but also take account of the balance to be struck between the necessary protection measures and the need to effectively combat terrorism and crime more extensively than through mere restrictions (Article 11 of the proposal), the relationship of which to the restriction of the Regulation's scope remains unclear.

   b) In view of the obvious security challenges faced by all Member States, the Bundesrat believes that the objectives to modernise the legal framework for electronic communications must be thoroughly redefined and extended by including the requirements for the Member States to work together to combat terror, crime and cyber dangers, as well as the need for effective data exchange and cooperation between security agencies. Further integration of these concerns would also reinforce the basic aim of the Digital Single Market, which is to create a comprehensive, harmonised legal framework for providers of electronic communications services which is determined by

both basic commercial and uniform regulatory conditions.

c) As a follow-up regulation to the ePrivacy Directive, the Regulation should take into account the increasing misuse of electronic means of communication for the propagation, preparation and execution of terrorist acts and criminal offences by including individual principles and minimum provisions at the very least.

d) The Bundesrat asks the Federal Government to strive to ensure that the necessary action recognised at EU level, such as the provision of effective local contact points for the security authorities or the duty of communications service providers to cooperate, is incorporated into the legislative procedure and followed up in the evaluation process (Article 28 of the proposal). These contact points should be fully authorised by all providers with a significant number of customers to provide information and obliged to respond immediately to requests for information from security authorities.

e) Furthermore, the Bundesrat considers it inadequate to limit the key issues relating to the conflict between protecting communications processes and meeting the requirements of effective crime prevention and prosecution, such as data retention, to general introductory remarks. It therefore calls at the very least for those provisions not contested by the European Court of Justice in its decisions on data retention and contained in the second sentence of Article 15(1) of the ePrivacy Directive to be carried forward, for example by amending Article 11 of the Regulation proposal.

Supervisory regime

9. a) The Bundesrat is concerned that the expansion in the scope of application resulting from the Regulation proposal will lead to significantly more work for the data protection authorities. This will not only have an impact on the enforcement tasks of the Federal Data Protection Commissioner, but will also put pressure on the data protection authorities in the Länder. Additional tasks, such as the monitoring of requirements for terminals and software (Articles 8 and 10 of the proposal for a Regulation), lead to conflicting objectives and resource bottlenecks with the tasks that have already increased in number due to the adaptation requirements of the General Data Protection Regulation.

b) In the Bunderat's view, the extensive competence of the data protection authorities and the European Data Protection Board outlined in the proposal for the monitoring of the ePrivacy Regulation does not include special justification via Article 8 of the Charter of Fundamental Rights for the fully independent execution of tasks. Only this can provide adequate justification for breaching the principle of parliamentary responsibility for

governance and, at EU level, for shifting responsibility for implementation to the European Data Protection Board.

c) The Bundesrat therefore calls on the Federal Government to work towards a comprehensive revision of the rules in Chapter IV of the proposal which regulate who has responsibility for each task. These provisions should give Member States comprehensive jurisdiction over domestic matters and should limit the requirements for the independent execution of tasks and coordination at EU level via the European Data Protection Board to specific areas which are directly linked to the protection of personal data.

Scrutiny reservations for further procedures

10. a) The Bundesrat is currently prevented from carrying out a final assessment of the Regulation proposal, as essential terms are only defined through references to the European Electronic Communications Code (Ref. No 612/16), which has not yet been adopted. It calls on the Federal Government to make decisions relating to the Council's position on the proposal for a Regulation dependent upon an agreement being reached between the European Parliament and the Council in relation to this Code and to ensure that it has the opportunity to issue another opinion before such decisions are taken.

b) The Bundesrat calls on the Federal Government to give it the opportunity to issue another opinion before significant decisions are taken in the legislative process on the fundamental issues listed in points 7 to 10 a), so that it can assess the improvements that have been made. Furthermore, it calls on the Federal Government to provide the Bundesrat with an opinion on the adjustments the legal act requires to media and telecommunications law before a decision is made regarding Germany's approval of a Council position.

Specific issues

Relationship to the General Data Protection Regulation

11. a) The Bundesrat believes that there must be a comprehensive and specific revision of the delineation between the general requirements of the General Data Protection Regulation and the specific requirements of the proposal for a Regulation which particularise and complement them (Article 1(3) of the proposal for a Regulation). The majority of the rules for telecommunications services do not indicate whether they replace the General Data Protection Regulation in relation to personal information as lex specialis or if they

are complemented by it. This applies to both general requirements, such as the principle of accountability or the conditions for third country transfers, and specific operational conditions, such as the rules on offline tracking in Article 8(2)(b) of the proposal, which can be interpreted as both an obligation to provide information and a suppression of the right to object and the profiling requirements in Article 22 of the General Data Protection Regulation.

b) The Bundesrat requests that every provision be examined in the future legislative process in order to ascertain whether any deviations from the General Data Protection Regulation limit the specific risks of using publicly accessible electronic communications services and are therefore justified as a sector-specific complement to the General Data Protection Regulation. Instead of complementing the General Data Protection Regulation, provisions such as the requirements for 'unsolicited communications' (Article 16 of Regulation proposal) undermine the provisions it contains in relation to direct online advertising by replacing the processing conditions in Article 6(1)(f) and the specific right to object in Article 21(2) of the General Data Protection Regulation with a requirement to obtain consent which is not limited to automated calling systems (Article 13(1) of the ePrivacy Directive).

c) In order to clarify the relationship between the legal acts, the Bundesrat also requests clarification on which provisions of the proposal, in accordance with Article 5(1) of the ePrivacy Directive, will only concern the actual communication process.

Scope of application

12. The Bundesrat welcomes the fact that the proposal still refrains from including specific requirements for communications services which are not publicly available (Article 2(2)(c) of the Regulation proposal) and therefore the general requirements of the General Data Protection Regulation in relation to the protection of personal data continue to apply. It calls for clarification in the future legislative process, if possible in the legal text, that the exception also applies to the specific internal communications structures of the authorities and the courts and their special legal requirements, such as under the BSI (Federal Office for Information Security) Act or parallel provisions in the law of the Länder.

Furthermore, the Bundesrat calls for the material scope of the Regulation proposal to be adapted to the lex loci solutionis of the General Data Protection Regulation, as Article 3(1) of the proposal defines this scope primarily with regard to communications services and terminal equipment and therefore it is unclear whether further material requirements

are valid for third country providers (e.g. Article 10 of the Regulation proposal for software vendors or Article 15 of the Regulation proposal for providers of publicly available directories).

13. The Bundesrat in principle welcomes the fact that the scope of the Regulation applies to all the market participants offering functionally equivalent communications services to end users in the European Union, irrespective of whether the provider requires payment from end users for the provision of such services. This creates broadly similar data protection provisions for traditional telecommunications services and new internet services, the over-the-top providers, which make interpersonal communication, such as voice over IP telephony, messenger services and web-based email services, possible. It notes that this provision implements an important demand from its decision of 22 April 2016 (Ref. No 88/16 (Decision)) that substitutes for telecommunications services, such as messenger services, receive more equal treatment.

14. However, the Bundesrat would like clarification of the extent to which this equal treatment also concerns all internet providers offering location services (e.g. mapping services) and consequently also processing location data. In the aforementioned decision it also called for these location services to be treated more equally. Clarification is required due to the unclear wording in Recital 17 of the Regulation proposal.

15. The Regulation proposal is intended to apply to electronic communications not only between natural persons, but also between legal entities and machinery (M2M communication). This could affect new business models and companies that integrate signal transmission into their products as part of M2M communication, such as in networked vehicles, automated supply chains or fleet solutions, for example in the automotive industry or the logistics sector. With this in mind, it will have to be ascertained whether extending the scope of the Regulation to include the transmission of M2M communication is a good idea or whether this would call into question current European economic processes and limit scope for innovation in Industry 4.0, the Internet of Things and other new lines of business to too great an extent. This would have a negative impact on the competitiveness of the European economy.

Confidentiality of telecommunications data and protection of terminal equipment

16. The Bundesrat notes that by including the protection of legal entities and non-interpersonal communication, the provisions relating to the protection of

telecommunications data in Articles 5 and 6 of the Regulation proposal go far beyond the scope of protection offered by data protection law and actual telecommunications secrecy and nevertheless only allow limited intervention in these areas. It therefore calls for a fundamental review of the regulatory framework in the discussions and an examination of regulatory gaps, as, for example, sentence 2 of Article 7(1) of the Regulation proposal allows for further processing by referring to and on the grounds of the General Data Protection Regulation for personal communications data only and not for other types of communications data.

17. The Bundesrat also calls for an examination in the future legislative process as to whether the inclusion of pseudomysation in Article 6(2)(c) of the Regulation proposal could lead to the more consistent processing of personal data. Pseudonymous data processing in accordance with the protection mechanisms in the General Data Protection Regulation would allow the creation of flexible added value and business models in Europe.

18. In the Bundesrat's opinion, the provisions relating to the protection of communications content need to be improved. The access rights of electronic communications services operators (Article 6(3) of the Regulation proposal) should be more closely aligned to the standards for the protection of telecommunications secrecy provided for under the Basic Law. It believes that unless it is necessary in order to provide specific services, access to the content of emails, SMS and other forms of electronic communication, which is governed by Article 6(3)(b) of the Regulation proposal, should only be permissible under very precise conditions. Given the extensive encroachment on the confidentiality of electronic communication, which is protected by the Basic Law, it should be examined whether the requirements for explicit and voluntary consent pursuant to Article 9(1) in conjunction with Article 4(11) and Article 7 of the General Data Protection Regulation are sufficient. Furthermore, provision should be made for the supervisory authority to be able to prohibit the processing of data in accordance with Article 6(3)(b) of the Regulation proposal and for the definition of the grounds that would justify such a decision. Additional criteria could include a requirement for explicit consent, as with the protection of sensitive data (Article 9 of the General Data Protection Regulation) instead of simple and thus also implicitly permissible consent in accordance with Article 7 of the General Data Protection Regulation and a procedural safeguard by means of a time limit which, as with security requirements, calls on operators to update their processing authorisations at regular intervals. In addition, Recital 19 in the standard text of the Regulation proposal should make it clear that the consultation requirement under Article 36 of the General Data Protection Regulation is

based on a previous data protection impact assessment carried out in accordance with Article 35 of the General Data Protection Regulation, which, in view of its important content, should be published in the interests of transparency.

19. The Bundesrat believes that the principle of data economy must also apply to electronic communications services. Therefore, in contrast to what is currently stipulated in the proposal, Article 7 should principally provide for the erasure of data and providers should only be allowed to make data anonymous when it cannot be erased for technical reasons.

20. The Bundesrat calls for clarification in the future legislative process as to whether the sending of spam mail should also be classed as processing under the prohibition of the use of terminal equipment's processing capabilities set out in Article 8(1) of the Regulation proposal and therefore be subject to the penalty outlined in Article 23(2)(a) of the proposal.

It considers that Article 8(1)(d) of the Regulation proposal is inappropriate, as on the one hand this provision claims that it wishes to protect information stored in or related to end users' terminal equipment, yet on the other hand it removes this very protection if 'it is necessary for web audience measuring'. This means the commercial interests of the provider of the information society service requested by end users in measuring the audience would carry the same weight as the consent given by end users (see Article 8(1)(b) of the Regulation proposal). The Bundesrat therefore calls on the Federal Government to follow the example of the provision in Section 15(3) of the Media Act and advocate for further content-related conditions which provide for the use of pseudonyms and the right to object.

21. It suggests that there be an examination as to whether the relevant providers can be forced after a period of, for example, six months to remove or deactivate cookies and other means of processing and storing data on terminal equipment within the meaning of Article 8(1) of the Regulation proposal in order to limit the consequences of fictitious consent based on browser settings in accordance with Article 9(2) of the Regulation proposal.

22. The Bundesrat believes that there must be a comprehensive revision of the provisions relating to offline tracking in Article 8(2)(b) of the Regulation proposal. It criticises the fact that the increasing offline tracking of customers in railway stations, airports and shops via the information sent by their smartphones when they search for WLAN or Bluetooth signals is inadequately regulated in the proposal. Smartphones and other

devices send clearly recognisable signals in order to enable a telephone, internet, WLAN or Bluetooth connection. These signals can be used by companies, for example in the retail sector, in order to track consumers offline. They are therefore able to recognise consumers when they enter a certain store again and track their movements within the store. Depending on the technology used, this allows customers to be tracked over a distance of several hundred metres. This increasingly important form of tracking will, according to Article 8(2)(b) of the Regulation proposal, be permissible without prior consent if a clear notice is displayed informing the public about the conditions and purpose of the tracking. It is not enough to inform consumers merely via signs or similar when they enter an area that is monitored in such a way. This is even more true when minors are involved, as they are not able to grasp the significance of offline tracking due to their age and are therefore particularly vulnerable. The Bundesrat believes that the proposed provision, which states that merely displaying a 'clear notice' is enough to allow the tracking of data terminal equipment locations (e.g. WiFi tracking), would considerably lower the level of protection**.** The Bundesrat is therefore of the opinion that those involved should also have to give their prior consent for online tracking. It therefore also shares the concerns and supports the recommendations that the Article 29 Data Protection Working Party outlined in its opinion of 4 April 2017.

23. The Bundesrat welcomes the provision in Article 9(1) of the Regulation proposal which stipulates that the strict conditions for consent provided for in the General Data Protection Regulation shall apply. This applies especially to the provision in Article 7(4) of the General Data Protection Regulation, which will limit companies' ability to link a contractual offer to consent to data use across the board.

24. The Bundesrat calls for clarification within the framework of Article 9 of the Regulation proposal on the ratio of consent expressed via software settings to consent granted independently of this, and for it to be guaranteed that consumers' wishes are being respected. Article 9(2) of the Regulation proposal needs to be put in more concrete terms. Companies must not be able to evade the wishes of users by wresting consent from them that they did not grant intentionally, irrespective of their software settings. The proposed provisions in relation to tracking do not only concern browser cookies, i.e. files which are saved on users' terminals so that they will be recognised in the future, but all forms of tracking technology.

25. The Bundesrat welcomes the fact that the provision in Article 9(3) of the Regulation proposal takes into account the special significance and scope of content by stipulating

that end users can withdraw their consent at any time and must be reminded of this possibility at periodic intervals. It calls for an examination as to how these safeguards can be strengthened further, such as a legal requirement that end users have to give their explicit consent. Finally, Article 9(3) of the Regulation proposal relates to consent for the processing of electronic communications metadata and the electronic communications content of those involved and therefore concerns particularly vulnerable data. On the basis of this legal concept, the General Data Protection Regulation also includes strict consent requirements for the processing of special categories of personal data (e.g. data concerning health) by stipulating in Article 9(2)(a) that the data subjects must give their explicit consent.

Obligation to adapt communications network software

26. The Bundesrat points out that the notion of 'software placed on the market' in Article 10(1) of the Regulation proposal should also cover all communication-enabling software, thus also operating systems or software which is only sold with the corresponding hardware, and calls for clarification in the Regulation. The settings options that have been described thus far are limited to preventing third countries from storing information on terminals or retrieving this information. In the Bundesrat's view, however, there must be a setting which allows users to give their general consent to tracking (beyond cookies and similar technology) in order to allow users, for instance, to consent to fingerprinting via the settings or to prohibit this form of tracking, such as through do-not-track settings.

27. The Bundesrat calls for the obligations relating to privacy-by-design and privacy-by-default to apply to the providers of hardware and software used for communication. This is the only effective way to protect users from tracking. However, Article 10(2) of the Regulation proposal only refers to software. Hardware must therefore also be included under Article 10(2). This would supplement the General Data Protection Regulation in a meaningful and necessary way. Otherwise, users will have to adjust a number of settings in various applications. In many cases, they will not know which settings are best for them when they install the application. In the Bundesrat's view, all hardware and software should already have the strictest default privacy settings when it is delivered to customers.

28. For the sake of legal certainty and clarity and on grounds of practicality, the Bundesrat would consider it advisable for the statutory text in Article 10(2) of the Regulation proposal to give a more detailed explanation of what is understood or can be understood

by the term ‘consent’. The guiding principle for such amendments should be Recital 32 of the General Data Protection Regulation, which, inter alia, stipulates that action implying intent is a possible form of consent.

The Bundesrat stresses that for the sake of legal certainty and the effective implementation of the proposed Regulation, the obligations to modify software contained in Article 10(3) of the Regulation proposal should be adapted to the practical realities of the situation, whereby providers of software, e.g. various open source software products, make their programs available for download and thus only offer an update but cannot guarantee that they will inform the program users in accordance with Article 10(2) of the Regulation proposal.

Restrictions

29. a) The Bundesrat believes that the regulatory powers of Member States in accordance with Article 11 of the Regulation proposal should be harmonised with those of Article 23 of the General Data Protection Regulation in light of the fact that the Regulation proposal has a broader scope than the currently applicable law. This would ensure that Member States maintain the right to adopt divergent provisions in order to, for instance, protect judicial independence (Article 23(1)(f) of the General Data Protection Regulation), protect the rights and freedoms of other persons or enforce civil law claims.

b) The Bundesrat calls for an examination of whether, in addition to the obligation to provide information under Article 11(2) of the Regulation proposal, the Regulation should also include an obligation to inform the public about statistical data relating to requests for access to electronic communications data. This would guarantee transparency and is already being carried out in practice by communications service providers.

Application in public bodies and courts

30. The Bundesrat believes that within the scope of the tasks and powers assigned to them under national law, the judicial and administrative authorities are not ‘providers’ but solely ‘end users’ of electronic communications services within the meaning of Article 4(1)(b) of the Regulation proposal in conjunction with Article 2(14) of the Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Ref. No 612/16). Therefore, no separate permission is required from these authorities in the Regulation text for the processing of electronic communications within the meaning of Articles 5 to 8 of the Regulation proposal.

According to the Bundesrat, this also applies in particular if the judicial and administrative authorities provide special software in order to communicate properly and securely with the courts and authorities, such as the Electronic Judicial and Administrative Mailbox (EGVP), the special 'authorities mailbox' (beBPo) and citizen service accounts.

31. For the sake of legal certainty, the Bundesrat calls for electronic communication in the procedures of judicial and administrative authorities to be excluded from the scope of the Regulation or for Member States to be allowed to introduce further restrictions via Article 11 of the Regulation proposal, in a similar way to the provisions in Article 23(1)(f) and (j) of the General Data Protection Regulation on the protection of judicial independence and judicial proceedings and the enforcement of civil law claims.

32. Furthermore, in the Bundesrat's opinion, court registers (particularly company registers, cooperative registers, partnership registers, marital property registers, land registers and shipping registers) do not fall under the concept of 'publicly available directories' outlined in Article 15 of the Regulation proposal. According to Article 4(3)(d) of the Regulation proposal, a publicly available directory is a 'directory of end users of electronic communications services, whether in printed or electronic form, which is published or made available to the public or to a section of the public, including by means of a directory enquiry service.' Court registers, however, do not constitute such directories of end users. They are rather public registers containing factual information. The Bundesrat calls for the Regulation to clarify that court registers are not subject to the provisions for 'publicly available directories'.

Unsolicited communication

33. The Bundesrat calls for it to be made clear that electronic communication within the framework of an existing contract (e.g. the sending of invoices, reminders, queries, additional information or consumption/measurement data relating to service agreements) or an existing customer relationship is still possible without restriction and does not fall under the concept of 'unsolicited communication' within the meaning of Article 16 of the Regulation proposal. The concept of 'unsolicited electronic communication' is currently too vague and too broadly defined, and is not only limited to unsolicited advertising.

34. The Bundesrat believes that consent within the meaning of Article 16(1) of the

Regulation proposal should have to be given explicitly. Otherwise, there is a risk that this will contradict national provisions in accordance with the Unfair Competition Act (UWG), which states that marketing calls without the prior explicit consent of the consumer are considered unfair.

35. The Bundesrat proposes that Article 16(3)(a) of the Regulation proposal and Article 16(3)(b) of the Regulation proposal are not alternatives, and therefore should be connected with 'and' rather than 'or'. As it stands, voice-to-voice direct marketing calls are permitted as long as either the identity of a line is presented on which the caller can be contacted (Article 16(3)(a) of the Regulation proposal) or a specific prefix is presented which identifies the fact that it is a personal direct marketing call (Article 16(3)(b) of the Regulation proposal). If the conditions remain mere alternatives, there is the risk that callers will make voice-to-voice direct marketing calls, which consumers often find particularly irritating, solely on the basis of the 'less severe' conditions in Article 16(3)(a) of the Regulation proposal. However, from a consumer policy perspective, it would be much better if callers were not only obliged to present the identity of a line on which they can be contacted but if the telephone number itself actually identified the call as a voice-to-voice direct marketing call in the first place. Consumers would therefore not be required to answer the call in order to determine whether it is a voice-to-voice direct marketing call. Finally, the reference in Recital 36 of the Regulation proposal to voice-to-voice direct marketing calls being more expensive for the callers because of staffing costs, while imposing no costs on end-users, does not make consumers any less vulnerable.

36. The Bundesrat opposes the opening clause pursuant to Article 16(4) of the Regulation proposal, which states that Member States can permit voice-to-voice direct calls as long as those receiving the calls have not objected to receiving them. This should be rejected from a consumer policy perspective, as consumers often find these calls particularly irritating. It is therefore not appropriate to require that consumers actively resist these calls by objecting to them.

37. The Bundesrat calls for the addition of class action law to the Regulation proposal. Otherwise, there is the risk that the level of protection will be reduced, particularly in the field of consumer protection, as consumer associations will no longer be able to, for instance, pursue infringements of the unsolicited communication provisions in Article 16 of the Regulation proposal (e.g. voice-to-voice direct marketing calls). Consumer associations are one of the bodies that is able to take action against unauthorised

marketing calls under Section 8(3) of the Unfair Competition Act.

Requirement to inform end users about disruptions

38. The Bundesrat supports the fact that under Article 17 of the Regulation proposal the operators of electronic communications services are obliged to inform end-users about security risks and any possible remedies. However, in addition to what is already outlined in Recital 37, it should be made clear that other obligations of service providers and telecommunications network operators to inform users, such as those stipulated in Articles 33 and 34 of the General Data Protection Regulation, or those of authorities defending the country against cyber threats, remain unaffected.

Responsibility of the supervisory authorities

39. In view of frequent cross-border issues in the field of electronic communication, the Bundesrat also calls for an examination as to whether to add specific provisions on responsibilities and voting arrangements, which also guarantee the effectiveness of the 'one stop shop' principle in the application of the ePrivacy Regulation, to the general reference in Article 18 of the Regulation proposal to the tasks and powers of the supervisory authorities under Chapters VI and VII of the General Data Protection Regulation.

The Bundesrat calls on the Federal Government to advocate for an opening clause in Article 18 of the Regulation proposal which allows Member States to choose other effective supervisory structures. Otherwise, they risk being at odds with existing supervisory structures at national level.

Appeal and legal remedy

40. The Bundesrat notes that Article 21 of the Regulation proposal extends the scope of national regulatory powers relating to data protection class action to that of the ePrivacy Directive, which is far wider, by referring to the legal protection offered by the General Data Protection Regulation, and that Article 21(2) establishes options under EU law for direct legal remedy for third parties and competitors in telecommunications law. In view of the existing options for legal remedy under national law and fact that the provisions in the Regulation proposal only offer partial protection for individuals, the Bundesrat calls for clarification in the future legislative process regarding the objectives and necessity of these comprehensive additional options for legal remedy, bearing in mind the supervision rights of the supervisory authority that have been stipulated.

41. The Bundesrat particularly welcomes the fact that the right to compensation for both material and non-material damage is enshrined in Article 22 of the Regulation proposal, as this means that appropriate penalties can be issued for infringements of the Regulation.

Penalties

42. The Bundesrat calls for the powers of Member States to limit penalties in the public sector under Article 23 of the Regulation proposal to be harmonised fully with the provisions of the General Data Protection Regulation and for this to be achieved in a manner which offers legal certainty. Article 23(6) and (8) of the current Regulation proposal merely adopt the statutory text of the General Data Protection Regulation but do not include the necessary clarification of these provisions from Recital 151 of the General Data Protection Regulation which explains that Article 23(8) of the Regulation proposal, just like Article 83(9) of the General Data Protection Regulation, only relate to the legal systems in Denmark and Estonia.

Miscellaneous

43. The Bundesrat calls for an examination as to whether the Regulation should ensure that electronic communications data are transmitted principally in encrypted form in order to increase data security, especially in light of the Internet of Things.

Forwarding of the opinion

44. The Bundesrat will send this opinion directly to the Commission.