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digitalcourage e.V.

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BIG BROTHER AWARDS

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In the course of our participation in the consultation process on the reform of data protection, digitalcourage (formerly FoeBuD) would like submit the following comments on the amendments made by IMCO.

Recital 23

23) The principles of protection should apply to any information concerning an identified or identifiable person. To determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the individual. The principles of data protection should not apply to data rendered anonymous in such a way that the data subject is no longer **directly** identifiable, **including, where possible, a separation of processed data from identity-revealing data. In the latter case, also pseudonymized data are useful if the key to link the pseudonymous with the identity is safe according to the state of the art.**

Comments by digitalcourage:

digitalcourage disagrees with the proposed amendment. Links stored to recover a pseudonymous identity are a risk in itself and therefore should be treated under the data protection regulation. The data protection standards provided by the regulation should not be weakened when pseudonyms are used.

Recital 34

34) Consent should not provide a valid legal ground for the processing of personal data, where there is a clear imbalance between the data subject and the controller. This is especially the case where the data subject is in a situation of dependence from the controller, among others, where personal data are processed by the employer of employees‘ personal data in the employment context. Where the controller is a public authority, there would be an imbalance only in the specific data processing operations where the public authority can impose **a new and unjustified** obligation by virtue of its relevant public powers and the consent cannot be deemed as freely given, taking into account the interest of the data subject.

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Comments by digitalcourage:

digitalcourage disagrees with the proposed amendment because it creates two different levels of data protection: one for the existing obligations, the other for new obligations. Additionally, the condition of an obligation being “unjustified” is introduced without definition or decision criteria. This will lead to uncertainty as to whether the data protection regulation is applicable or not.

Article 4, paragraph 1, point 1 and point 2

‘data subject’ means an identified natural person or a natural person who can be identified, directly or indirectly, by the controller or by any other natural or legal person, in particular by reference to an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person. In order to determine whether a person can be identified, account should be taken of:

a) the means likely reasonably to be used by the controller or any other natural or legal person who accesses the data to identify such a person and

b) the measures that the controller or the processor has put in place in order to prevent the information from fully identifying a natural person. A natural person is “indirectly identifiable” when the data processed allows the controller to solely individualise one person from another and the controller cannot verify its identity.

Article 4, paragraph 1, point 2

(2) ‘personal data’ means information relating to an identifiable data subject;

Comments by digitalcourage:

Digitalcourage disagrees with the proposed amendments because they allow weaker levels of protections for a new category of data in which subjects are “indirectly identifiable”. But if a data controller can “solely individualise one person from another”, this person is clearly identified. It is therefore not appropriate to introduce this new category. To do so would only create more uncertainties for companies and for data subjects as well. German data protection considers these two categories and does not make this distinction. Indirectly identifiable and identifiable are treated the same in German law.

Article 17, paragraph 2

Where the controller referred to in paragraph 1 has **transferred** the personal data, **or has made such data public without being clearly instructed by the data subject to do so,** it shall take all reasonable steps in relation to data for the

publication of which the controller is responsible, to inform third parties which are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data. Where the controller has authorised a third party publication of personal data, the controller shall be consider

Comments by digitalcourage:

Digitalcourage believes that these proposed amendments do not serve consumers nor companies' best practices. The definition of “clearly instructed” remains unclear, so the proposed criterion produces uncertainties.

The term “transferred” is unnecessary and diminishes the scope of the protections provided by this paragraph. The criterion that the data was made public should be the only one to be applied, so the clause “without being clearly instructed by the data subject to do so” should be removed.

Article 18, paragraph 3a (new)

Where the processed data are, at least partially, meaningless for the data subject, the obligations following from the present article do not apply, (...)

Comments by digitalcourage:

This new paragraph is confusing to consumers and to data processors as well. From both perspectives, there is no such thing as “meaningless data”: If data is being processed, clearly the processor had an initial motive and has therefore perceived some meaning in the data. From a consumer’s point of view it is not clear what kind of data might be regarded as meaningless.

General comments on amendments to articles 15 and 18:

Digitalcourage welcomes the consolidation of the right of access and the introduction of the right of data portability. Digitalcourage agrees that the right of data portability is one of the key issues in the data protection regulation. Especially in social media, this seems to be the only way to break monopolies and create a working market. Imagine that email services worked like social networks: If you were not able to send an email from Hotmail to Google Mail, email would never have been a success. In social networks like Twitter and Facebook, this is exactly the situation we have now. There are no visible moves by the main social networks to introduce formats or procedures for data portability. So the deletion of Article 18, paragraph 3, which allows the Commission to standardise a format in which data can be ported, is not justified by the given argument that “the market can provide [portability] without the Commission’s intervention”.