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NOTE

From: Estonian delegation
To: Working Party on Information Exchange and Data Protection
Subject: General Data Protection Regulation
- Proposals for amendments and comments on Article 1(2a) and 21,
Chapter II and IX, and deceased persons

Please find herewith the Estonian proposal for amendments and comments on draft regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) in addition to the comments presented orally in the working party.

I. Public sector

(1) Article 1(2a)

We would like to confirm that we can support article 1(2a) (i.e. specifying the provisions)¹ of document 14270/1/14 REV 1. Namely, for Estonia it is important to be able to specify regulations (particularly in the public sector). We believe that there is also now a better connection to article 6. However, there might be a need to clarify further (mainly in recital 35a the notions “*specifying*” as well as “*specific processing situations*”. We are still working on it and, if needed, will present our wording proposals as soon as possible.

Therefore, for Estonia it is not essential to be able to have a possibility to stipulate more stringent provisions. However, if needed for other Member states, we are not against it as long as it does not affect the data transfer between Member States or to third countries and the possibility to specify the rules is clearly stated as well. To sum up, we could support the principle of article 1(2a) in document 14732/14 (Hungarian proposal) as long as it will be aligned more to the text of article 1(2a) in document 14270/1/14 REV 1.

(2) Article 5 “Principles relating to personal data processing”

We believe also that the liability should be regulated in chapter VIII. Therefore, we can support the erasure of the addition mentioned in footnote 42 in document 14270/1/14 REV 1 (i.e. article 5(2)). However, we think that the liability of the processor could not be excluded totally according to our private law (e.g. non-contractual liability). We are still analysing the matter of liability of the processor and controller as well as the joint controllers. Therefore our remarks are preliminary and still reserved for discussions in the context of Chapter VIII.

(3) Article 9 “Processing of special categories of personal data”

Firstly, as a small remark, we can raise our reservation in footnote 70 as article 9(1) does not contain a reference to criminal convictions and offences. Therefore, we are satisfied with the listing of sensitive data.

¹ *Hereinafter, we refer to the Document 14270/1/14 REV 1, if not specified otherwise.*

Fourthly, our health law specialists believe also that article 9(4a) might cause problems in case of contamination or epidemic. We have understood that the previous examples might go under article 44(1)(d) (transfers in case of important reasons of public interest). However, for more clarity, we believe that the recital 87 should be further specified bringing more examples for the public health in the fifth line, e.g.:

“or for public health, for example in case of **epidemic or contamination, including** contact tracing for contagious diseases, or in order to reduce and/or eliminate doping in sport.”

(4) Article 9a “Processing of data relating to criminal convictions and offences”

We would like to support current draft where the data relating to criminal convictions and offences has been stipulated in a separate article and is not considered a sensitive data anymore. We believe that it will give Member States more flexibility. Therefore we can lift our reservation in relation to the data referring to criminal convictions and offences (footnote 87).

(5) Article 80 “Processing of personal data and freedom of expression”

Firstly, we are satisfied with the last wording of article 80. Namely, we have always supported that not only the freedom of expression but also the freedom of information would be clearly mentioned (as in article 11 of the Charter of Fundamental Rights of the EU).

Secondly, we believe that the text of article 80(2) should be kept in line with the article 52 of the Charter of Fundamental Rights of the EU as mentioned by the General Secretariat of the Council. Therefore we can accept the current wording of article 80(2).

Thirdly, we prefer keeping the reference to the principle of respecting freedom of expression and information in the main text, e.g. either in article 80 or if necessary in article 1.

(6) Article 80a “Processing of personal data and public access to official documents”

We would like to mention that in our law the private companies, which are assigned with public tasks, have to follow the rules on public access to official documents regarding those public tasks. Therefore, we would support the wording suggestion by DK delegation, which clearly stipulates in recital 18 that the notions “*public authority*” and “*public body*” should include all authorities or bodies covered by Member State law on public access to documents.

(7) Article 83 “*Derogations applying to processing of personal data for archiving, scientific, statistical and historical purposes*”

Having consulted with our specialists in the adequate fields we could accept that the relevant purposes will be combined into one article. It might be useful to specify the provisions with the Union or Member State law in the specific fields. To sum up, we can accept the principles and, if needed, we will send some technical comments on the wording.

II. Regulation on deceased persons

We would like to send again our comments sent on the 04.04.2014 regarding deceased persons as it was mentioned in the working party by the Slovenian and French delegations. We have sent previously two alternative proposals, which in our opinion could also help our colleagues.

Namely, as SI and FR, we believe that the principles of data protection should under certain conditions be also applicable to the data related to deceased persons. However, alternatively we would like to at least have a possibility to provide for such rules in our national legislation. Otherwise we would lower enormously the level of protection in Estonia for the data of the deceased persons.

We believe that there are very many situations, where a deceased person`s personal data still needs protection for a certain amount of time after the person has passed away. We also believe that the current wording in some of the recitals (“*this Regulation should not apply to deceased persons, unless information on deceased persons is related to other data subjects*”) is not sufficient. For example, how would relatives be able to delete a Facebook profile of a deceased person as the whole profile would not contain information related to them? Furthermore, some controllers/processors might continue sending letters to a deceased person to his or her home address. How would the family members be able to ask to erase the data concerning the deceased data subject or to exercise other data subject`s rights stipulated in the Regulation?

There also might be cases where publication of data related to deceased persons might affect the living persons, although the data itself does not contain the information on that living person (for example medical data of the deceased etc.). We have to keep in mind that any death is very burdensome, whereas we have to give the relatives a possibility, for at least for a certain period, to protect the deceased persons and their personal data from undesirable processing operations. For example for the relatives of the deceased, the publication of the medical history or data related to the deceased person`s behaviour, relations etc. might be highly uncomfortable, burdensome or damaging. This might happen if the personal data of deceased persons is excluded from the scope of the Regulation.

We do understand that we cannot take into consideration all different cultures of the Member States. Therefore, we would like to propose two alternatives; whereas (1) we would extend the scope of the regulation also for deceased persons or (2) we would give the Member States the possibility to decide to apply the rules also for deceased persons.

- (1) Extending the scope of the regulation also for deceased persons by adding a new article to the first chapter (and erasing the reference to deceased persons in recitals 23, 125a and 126a):

Applicability to deceased persons

1. The principles of data protection set out in this Regulation should apply to deceased persons 25 years after the death of the data subject, unless the processed personal data contains only:
 - a. the data subject's name;
 - b. sex;
 - c. date of birth and death; and
 - d. the fact of death.
2. After the death of a data subject, processing of personal data pursuant to article 6(1)(a) is permitted with the written consent of the successor, spouse, descendant or ascendant, brother or sister of the data subject. Any of the previously mentioned persons can give the consent, but each of them has also the right to withdraw the consent pursuant to article 7(3).
3. After the death of a data subject, any of the rights set out in this Regulation can be performed by the persons specified in paragraph 2.

(2) Giving the Member States the possibility to decide to apply the rules also for deceased persons:

We believe that it is necessary to give this right in an article as it is not sufficient to mention it only in recitals, because of their non-compulsory nature. Therefore we suggest adding a paragraph to article 2 as follows:

Article 2

Material scope

[The wording of other paragraphs will stay the same]

3a. Member States law may stipulate the applicability of the principles of data protection to the data of the deceased persons.

Furthermore, the recital 23, 125a and 126a should be amended. We have given as an example the wording of recital 23 (*the other recitals should be changed accordingly*):

Recital 23

(On the basis of the last wording in document 6762/14;

Changes are made in bold and underlined)

The principles of data protection should apply to any information concerning an identified or identifiable natural person. To determine whether a person is identifiable, account should be taken of all the means reasonably likely to be used either by the controller or by any other person to identify the individual directly or indirectly. To ascertain whether means are reasonable likely to be used to identify the individual, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration both available technology at the time of the processing and technological development. The principles of data protection should therefore not apply to anonymous information, that is information which does not relate to an identified or identifiable natural person or to data rendered anonymous in such a way that the data subject is not or no longer identifiable. This Regulation does therefore not concern the processing of such anonymous information, including for statistical and research purposes.

The principles of data protection should not apply to deceased persons, unless information on deceased persons is related to an identified or identifiable natural person. **However, the Member States law may provide derogations from the previously mentioned principle and stipulate the applicability of the principles of data protection also to the data of the deceased persons.**