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LIMITE

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DAPIX 130
MI 631
FREMP 125
DRS 115
COMIX 568
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NOTE

from: Presidency
to: Working Group on Information Exchange and Data Protection
(DAPIX)/COREPER

No. Cion prop.: 5853/12 DATAPROTECT 9 JAI 44 MI 58 DRS 9 DAPIX 12 FREMP 7
COMIX 61 CODEC 219
14609/4/12 REV 4 DATAPROTECT 114 JAI 672 MI 603 DRS 113 DAPIX 119
FREMP 119 COMIX 550 CODEC 2304 + ADD 1
14731/12 DATAPROTECT 116 JAI 682 DAPIX 120 MI 613 FREMP 121
DRS 114 COMIX 557 CODEC 2336
14236/12 JUR 508 JAI 647 FRONT 128 COMIX 520

Subject: Proposal for a 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) - Questionnaire on delegated/implementing acts

1. At the July JHA Informal Ministerial Meeting in Nicosia, the Presidency invited Ministers to discuss three horizontal issues arising from the Commission proposal for a General Data Protection Regulation, on which delegations had expressed common concerns in the course of technical discussion in the DAPIX Council Working Party. These concerns specifically related to the administrative burden imposed by the draft regulation, to the application of data protection rules in the private and the public sector and the number of delegated and implementing acts that the proposed Regulation provides.

2. A large number of delegations have replied to the part of the Presidency questionnaire on the case-by-case revision of the Commission proposals for delegated (24 MS) and implementing acts (22 MS). On the basis of these replies and on the basis of the discussions at the meeting of the Friends of the Presidency on 12 October 2012 and of the Working Group on Information Exchange and Data Protection (DAPIX) of 22 October 2012, it appears that the vast majority of delegated acts are rejected by the Member States. There is more willingness among Member States to accept or discuss implementing acts in a significant number of cases, but there are also some implementing acts which are clearly rejected by Member States.

3. For ease of reference, the entry into force of delegated acts is subject to the following horizontal conditions :
 - a) no objection has been expressed either by the Council or the European Parliament within two months after the notification of the acts by the Commission; or
 - b) if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. The two months period may be prolonged with another two months.
 - c) The delegation of power may be revoked at any time by the European Parliament or by the Council.

4. Recital 129 of the Commission proposal for a Regulation states the power to adopted delegated acts should be given to the Commission in accordance with Article 290 TFEU in order to protect the fundamental right to data protection and to ensure the free movement of personal data within the Union. As far as implementing acts are concerned, Recital 130 states these are required in order to ensure uniform conditions for the implementation of the Regulation. Neither delegated nor implementing acts are a precondition for the application of the Regulation.

5. At the meeting of the Friends of the Presidency on 12 October 2012, the Commission explained that the large number of instances in which it had proposed delegated (26) or implementing (22) acts should only be understood as a tool of last resort, if all other tools for a harmonised approach fail, referring in particular to the possibility for the proposed European Data Protection Board to issue guidelines, recommendations and best practices and to the drawing up of codes of conduct. This prompted some delegations to argue that an empowerment should only be allowed for where there was a demonstrable need for delegated or implementing acts and not just as a fall-back position and that the Commission's approach should be more in line with relevant case law such as ECJ judgement C-335/10. In addition, empowerments without time limitations would in effect contribute to legal uncertainty and additional burdens to controllers.

6. Both at expert and at political level (Council meeting of 26 October), the Commission has indicated its willingness to engage in a discussion on alternatives to the use of delegated or implementing acts. It has also indicated that where a delegated or implementing act was proposed, the exercise of this power could be further qualified in three ways:
 - 1) by inserting in a recital specific consultation arrangements (e.g. involving SME representatives) regarding the empowerment;
 - 2) by putting substantive conditions on the empowerment; or
 - 3) by limiting the scope of the empowerment.

7. In the course of the technical meetings, another question that was examined was whether Member States will be able to specify some details in Member State law or keep in place rules on data protection following the adoption of the General Data Protection Regulation. Whilst it appears difficult at this stage to provide a detailed statement for each article on the scope, if any, for Member State law specifying the Regulation, it is obvious that, as a general rule, national law must respect the Regulation and must be clearly framed in the legal text and limited for specific situations, in order not to jeopardize the unity of the application of the Regulation.

8. In the questionnaire Member States were invited to indicate which alternatives they would prefer in case a Commission proposal for a delegated act or implementing act could not be accepted. Other than a blanket deletion of a proposed empowerment to the Commission, different alternatives could be envisaged, such as a providing more details in the Regulation itself or leaving these rules to be worked out in codes of conduct. Other alternatives have been mentioned in the course of the technical discussions, such as guidance by the national data protection authorities and/or the European Data Protection Board, possibly via the consistency mechanism proposed by the Commission in the Regulation.
9. An important question at the outset of this exercise was whether the possible deletion of a delegated or implementing act necessitated the replacement of that proposed act by an alternative solution. In a number of cases, some delegations expressed reservations on the need for alternatives, and cautioned against a tendency towards over-regulation.
10. One of the conclusions emerging from the technical meetings was that several Member States were not in a position to make final choices regarding the alternatives to be adopted in those cases where the Commission proposal for a delegated or implementing act cannot be accepted. This is mainly due to two factors. First, in a number of cases, the substance of the rules for which the Commission proposes to have recourse to delegated and/or implementing acts has not yet been discussed in the DAPIX Working Party. Second, a number of the possible alternatives, such as the role of data protection authorities, of the European Data Protection Board or the consistency mechanism have not yet been discussed at technical level either.
11. The Presidency stressed on a number of occasions that the positions expressed in this exercise were expressed *ad referendum*, i.e. subject to a final agreement on the entire text and subject to the finalisation of all details. Annex I of this paper tabulates the written contributions of delegations as these were submitted to the Presidency.

12. *On the basis of this understanding, the Presidency invites delegations to:*

- a) agree that no empowerment for delegated or implementing acts should be adopted for the cases set out in Annex II to this paper;*
 - b) agree that for the cases set out in Annex III of this paper, an alternative from the provided summary of alternatives proposed in this Annex, would be a more acceptable/ appropriate solution;*
 - c) agree that in all cases not included in Annex II and Annex III of this paper, any decision as to the need for an empowerment and/or possible further constraints on and/or possible alternatives to these empowerments should be deferred to a later stage;*
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Delegated Acts

Art	BE	BG	CZ	DE	DK	EE	ES	FI	FR	IE	IT	LI	LT	LU	HU	NL	PL	PT	RO	SE	SL	SK	NO	UK
6.5	N.c	N.b.3	N.c	N.b.1	N.b.1	N.c	N.b.1	N.b.1	N	N.c	N.c	N.b.1		N.c	N.b	N.c	N.c	Y	N.c	N.c	N.c	N.c	N.c	N.c
8.3	N.c	N.c	N.c	N.b.1	N.b.1	N.b.3	N.c	N.b.2	N	N.b.2	N.c	N.b.1	N.b.1	N.c	N.b	N.b.2 ,3	N.b	N.a	N.b.2	-	N.c	N.c	N.c	N.c
9.3	N.a.c	N.b.3	N.c	N.b.c	N.c	N.c	N.b.1	N.b.1	N	N.c	N.c	N.b.1	N.c	N.b	N.b	N.c	Y	Y	N.b.1	N.c	N.c	N.b.1	N.c	N.c
12.5	N.c	N.c	N.b.1	N.b.1	N.b.1	N.c	Y	N.a,b ,2	N	N.c	N.c	N.b.1	N.b.1	N.c	N.c	N.c	N.c	Y	Y	N.b.1	N.c	N.b.1	N.b.3	N.c
14.7	N.c	N	N.c	N.c	N.c	N.c	N.b.1	N.c	N	N.b.2	N.c	N.b.1	N.c	N.c	N.c: f-g N.b:b	N.b.2 ,3	Y	Y	N.c	N.c	N.c	N.b.3	N.c	N.c
15.3	N.c	N.b.1	N.c	N.c	N.c	N.c	Y	N.b.2	N	N.c	N.c	N.b.1	N.c	N.c	N.c	N.c	Y	Y	N.c	N.c	N.c	N.c	N.c	N.c
17.9	N	Y	N.b.1	N.b.1	N.b.1	N.c	N.b.1	N.b.1 ,a	N	N.c	Y	N.b.1	N.c	N.c,b .1	N.c: a-b N.b:c	N.b.3	Y	Y	N.c	N.c	N.c	N.b.1	N.b.3	N.b.1
20.5	N	Y	N.b.1	N.b.1	N.c	N.c	N.b.1	-	N	N.c	Y	N.b.1	N.b.1	N	N.b	N.b.2 ,3	Y	N.a	N.c	N.c	N.c	N.b.1	N.c	N.b.1
22.4	N	Y	N.b.3	N.b.1	N.b.1	N.c	N.b.2	N.b.1 ,c	N	N.b.1	N.c	N.b.1	N.c	N.c	N.b,c SMEs	N.b.2 ,3	Y,N	N.a	Y	N	N.c	N.b.2	N.c	N.c
23.3	N.c	Y	N.c	N.b.1	N.b.1	N.a	N.c	-	N	N.c	N.c	N.b.1	N.b.1	N.c	N.c	N.b.2 ,3	N.c	Y	N.c	N.c	N.c	N.b.1	N.c	N.c
26.5	N.c	N.b.1	N.b.1	N.b.1	N.b.1	N.a	N.b.1 ,c	N.c	N	N.b.2	N.c	N.b.1	N.b.1	N.c	N.b	N.b.1	N.a	Y	N.c	N	N.c	N.b.3	N.c	N.b.1
28.5	N.c	N.c	N.b1, c	N.b.1	N.b.1	N.c	Y	N.b.2 ,c	N	N.c	N.c	N.b.1	N.c	N.c	N	Del.2 8	N.c	Y	Y	Y	Y	N.c	N.c	N.c
30.3	N.c	N.b.3	N.c b.1	N.b.1	N.c	N.c	N.c	N	N	N.b.3	N.c	N.b.1	N.c	N	N.c	N.b.3	N.a	Y	N.c	N.c	N.c	N.c	N.b.2	N.c

31.5	N	N.b.1	N.c	N.b.1	N.b.1	N.c	N.c	N	N	N.b.1	N.c	N.b.1	N.b.1	N	N.b.	N.b.1,3	N.a	N.a	Y	-	N.c	N.b.3	N.c	N.c
32.5	N	N.b.1	N.b.1	N.b.1	N.b.1	N.c	N.b.2,c	Y/N	N	N.c	N.c	N.b.1	N.b.1	Y	N.b.	N.b.1,3	N.a	Y	Y	-	N.c	N.b.1	N.b.3	N.c
33.6	N	N.c,b.1	Y	N.b.1,3	N.b.1	N.b.3	Y	N.a,b.2	N	Y	N.c	N.b.1	N.b.1	Y	Y	Y	Y	Y	N.c	Y	Y	N.b.1	N.c	N.c
34.8	N	N.b.1	N.b.1	N.b.1	N.b.1	N.c	Y	N	N	Y	N.c	N.b.1	N.b.1	Y	N.b.	N.b.3	N.a	N.a	N.c	Y	N.c	N.b.3	N.c	N.c
35.1 1	N	N.c,b.1	Y	N.b.1	N.b,c	N.a	N.c	N.b.2,c	N	N.c	N.c	N.b.1	N.c	N.c	N.b: core N.c: general tasks	N.c	N.a	Y	N.b	N	N.c	N.b.3	N.b.2	N.c
37.2	N.c	N.c,b.1	N.b.1	N.b.1	N.c	N.c	Y	N.c	N	N.c	N.c	N.b.1	N.c	N.c	N.b.N.c.	N.b.3	N.a	Y	N.c	N.c	N.c	N.b.3	N.c	N.c
39.2	Y	N.b.3/Y	Y	N.b.1		Y	Y	-	N	Y	Y	N.b.1	Y	Y	Y	N.b.3	Y	Y	N.c	Y	Y	Y	Y	N.c
43.3	N.c	N.b.3/Y	Y	N.b.1	N.b.1	Y	Y	N.c,b.2	N	N.c	N.c	N.b.1	N.c	N.c	N.c	N.b.3	N.c	Y	Y	Y	Y	Y/N	Y	N.c
44.7	N	N.c b.1	N.b.1	N.b.1	N.b.1	N.c	N.b.1	N	N	N.c	N/Y	N.b.1	N.c	N	N.b	N.c	N.c	N.a	N.c	N	N.c	N.c	N.c	N.c
79.7	N	N.c.	Y	N.c	N.c	N.c	Y	N.c	N	N.c	N.c	N.b.1	N.c	N	Y:only auth orais ation N.c para 2	N	Y	Y	N.c	N	N.c	Y	Y	Y

81.3	N.c	N.b. 1,c	Y	N.c	N.b. 1	N.c	N.b. 1	N	N	N.c	Y	N.b. 1	N.b. 1	N	N.b N.c: MSs	N	Y	N.a,b	N.c	N	N.c	N.c	N.c	N.c
82.3	N.c	N.b. 1	Y	N.c	N.c	N.c	N.b. 1	N	N	N.c	Y	N.b. 1	N.b. 1	N	N.b,c	N	Y	Y	Y	N	N.c	N.c	N.c	N.c
83.3	N.c	N.b. 1	N.b. 1	N.b. 1	N.b. 1	N.c	N.b. 1	N	N	N.c	N/Y	N.b. 1	N.b. 1	N	N.b,c	N	N.a	N.c	Y	N	N.c	N.a	Y,N	N.c

Y: Yes N: No

If No: a: Retain provision with stricter conditions
b: Replace with: 1,2,3
c: Delete Provision

If b: 1: More detailed rules in the substantive provisions
2: Codes of conduct
3: Other

Implementing Acts

Arti	BE	CZ	DE	DK	EE	ES	FI	FR	IE	IT	LI	LT	LU	HU	NL	PL	PT	RO	SE	SL	SK	NO	UK
8.4	N.b	N.b	N.b	N.b	N.b	N.b	N.b	N	N.b	Y	Y		N.b	N.b	N.c	N.b	N.a	N.b	Y/N	N.b	N.a	Y	N.b
12.6	N.b	N.b,c	N.b	N.b	N.c	Y	Y	N	N.b	Y	N.a		N.b	N.b	Y	Y	Y	Y	N.b	N.b	N.c	Y	N.b
14.8	N.b	N.b,c	N.b	N.b	N.b	Y	Y	N	Y	Y	N.a		-	N.b	Y	Y	Y	N.b	N.b	N.b	N.c	Y	N.b
15.4	N.b	N.b,c	N.b	N.b	N.b	Y	Y	N	N.b	Y	N.a		-	N.b	N.b	N.b	Y	N.b	N.b	N.b	N.c	Y	N.b
18.3	N.b	-	N.c	N.b	N.b	Y	N.c	N	N.b	Y	Y		-	Y	Y	Y	Y	N.b	N.b	N.b	Y	Y/N	N.b
23.4	N.b	N.b	N.b	N.b	N.b	N.b	N.c	N	N.b	N.a	N.a		N.b	N.b	N.c	N.b	Y	N.b	N.b	N.b	N.b	N.b	N.b
28.6	N.b	N.b,c	N.b	N.b	N.b	Y	Y	N	Y	N.b	N.a		N.b	N.b	N	N.b	Y	Y	Y	Y	N.c	Y	N.b
30.4	N.b	N.b,c	N.b	N.b	N.c	N.b	N.c	N	N.b	N.c	N.a		Y	N.b	Y	Y	N.a	N.b	N.b	N.b	N.b	N.b,c	N.b
31.6	N.b	N.b,c	N.c	N.b	N.b	Y	Y	N	Y	Y	Y		-	N.b	Y	Y	Y	Y	Y	N.b	N.c	Y	N.b
32.6	N.b	N.b,c	N.c	N.b	N.b	Y	Y	N	Y	Y	Y		-	N.b	N.b	Y	Y	Y	Y	N.b	N.b	Y	N.b
33.7	N.b	N.b,c	N.b	N.b	Y	Y	Y	N	Y	Y	N.a		N	N.b	Y	Y	Y	N.b	Y	Y	N.b	N	N.b
34.9	N.b	N.b,c	N.a	N.b	N.b	Y	Y	N	Y	N.b	N.a		-	N.b	N.b	Y	Y	N.b	Y	N.b	N.a	N.b	N.b
38.4	Y	Y,Nc	N.c	N.b	N.b	N.b	Y	N	Y	N.b	Y		Y	Y	Y	Y	Y	Y	Y	Y	N.c	Y	Y
39.3	Y	N.a,c	N.b	N.b	N.b	Y	Y	N	Y	Y	Y		N.b	Y	N.b	N.a	Y	N.b	Y	Y	N.b	Y	N.b
41.3	Y	N.a,b	Y	Y	N.c	Y	Y	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	N.a	Y	Y
41.4	Y	N.a,b	Y	Y	N.c	Y	Y	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	N.a	Y	Y
41.5	N.b	N.a,b	N.b	N.b	N.c	Y	Y	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	N.a	Y	Y
43.4	N.b	N.b,c	N.c	N.c		Y	-	N	N.b	N.b	Y		N.b	N.b	N.c	Y	Y	Y	N	N.b	N.c	Y	N.b
55.10	N.b	N.b,c	N.c	N.c	Y	Y	Y	N	Y	Y	Y		-	N.b	N.c	Y	Y	Y	N.b	N.b	Y	Y	N.b
62.1		N.b,c	N.c	N.c	Y	N.c	-	N	N.b	N.c	N.a		-	N.b: (a)(c) ,(d) Y: (b)	Y/N	quest ionab le	N.a	N.b	N.b	N.b	N.c	N.b	N.b
62.2		N.b,c	N.c	N.c	Y,N	N.b	-	N	N.b	N.c	N.a		-		Y/N	quest ionab le	N.a	N.b	N.b	N.b	N.c	N.b	N.b

Y: Yes N: No

If No: a: Retain provision with stricter conditions

b: Delete Provision

c: Other

Delegated Acts for which at least half (12 or more, out of the 24) of delegations have expressed clear preference or have included in their reply option for deletion (Option N.c):

Article

6.5 15 N.c
9.3 14 N.c
12.5 12 N.c
14.7 17 N.c
15.3 18 N.c
23.3 14 N.c
28.5 15 N.c
30.3 16 N.c
35.11 15 N.c
37.2 17 N.c

Implementing Acts for which at least half (12 or more, out of the 22) of delegations have expressed clear preference or have included in their reply option for deletion (Option N.b):

Article

8.4 14.N.b
15.4 13.N.b
23.4 16.N.b
30.4 13.N.b

Summary of Alternatives:

1. European Data Protection Board
2. Consistency mechanism
3. Accountability/ DPO/ Codes of Practice
4. Self regulation/ Codes of Conduct
5. More detailed rules in substantive provisions
6. National DP authorities

Delegated acts for which a significant* number of delegations have indicated that possible alternatives would be a more acceptable/ appropriate solution:

Article*

- 17.9** 16 (4Y+12 N.b)
- 20.5** 13 (3Y+10 N.b)
- 22.4** 14 (3Y+11 N.b)
- 26.5** 13 (1Y+12N.b)
- 32.5** 15 (4Y+11N.b)
- 33.6** 18 (9Y+9N.b)
- 34.8** 13 (4Y+9N.b)

*At least half (12 or more, out of the 24) of delegations have expressed clear preference or have included in their reply option to retain or replace the Act (Options Y and N.b):