



Brussels, 18 November 2014
(OR. en)

15712/14

LIMITE

JUR 868
DATAPROTECT 172
DAPIX 176
JAI 901
COMIX 620
CODEC 2285

**Interinstitutional File:
2012/0011 (COD)**

OPINION OF THE LEGAL SERVICE¹

From: Legal Service
To: Working Party on Information Exchange and Data Protection
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

- compatibility with the Treaties of a possible minimal harmonisation clause introduced in the draft Regulation for certain activities carried out in the public sector

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (10.12.2014)

I. INTRODUCTION

1. In January 2012, the Commission submitted a proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data² (the "draft Regulation").

¹ This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

² Doc. 5853/12. The draft texts discussed in this Opinion are the ones presented by the Presidency in doc. 11028/14 (whole draft Regulation) and doc. 14270/14 (only Chapter II, Article 21 and Chapter IX of the draft Regulation).

It is based on Article 16 of the Treaty on the Functioning of the European Union ("TFEU") and will replace the existing legal framework set up by Directive 95/46/EC³.

2. Directive 95/46/EC, which is based on Article 114 TFEU (internal market legal basis), applies to data processing activities in Member States in both the public and the private sectors, except as regards certain activities such as activities in the areas of judicial co-operation in criminal matters and police co-operation. In the *Lindqvist* case, the Court of Justice held that:

*"Directive 95/46 is intended, as appears from the eighth recital in the preamble thereto, to ensure that the level of protection of the rights and freedoms of individuals with regard to the processing of personal data is equivalent in all Member States. The tenth recital adds that the approximation of the national laws applicable in this area must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community. The harmonisation of those national laws is therefore not limited to minimal harmonisation but amounts to harmonisation which is generally complete. It is upon that view that Directive 95/46 is intended to ensure free movement of personal data while guaranteeing a high level of protection for the rights and interests of the individuals to whom such data relate"*⁴ (emphasis added).

3. On 16 October 2014, the Presidency suggested to introduce in Article 1(2a) of the draft Regulation, as Option 1, a minimal harmonisation clause applicable to certain categories of data processing whereby:

"Member States may maintain or introduce more stringent national provisions ensuring a higher level of protection of the rights and freedoms of the data subject, than those provided for in this Regulation, with regard to the processing of personal data by public authorities for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. [Each Member State shall notify to the Commission the text of the provisions referred to in this paragraph by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them]."

Article 1(3) of the draft Regulation (the so-called "free movement clause") which reads "*the free movement of personal data within the Union shall neither be restricted nor prohibited for reasons connected with the protection of individuals with regard to the processing of personal data*" would remain unchanged.

³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

⁴ Case C-101/01, Judgment of the Court of 6 November 2003, paragraphs 95 and 96.

4. On 24 October 2014, the Presidency retained another option, Option 2, for Article 1(2a), than the one referred to in paragraph 3 above. This suggested provision for Option 2 reads as follows:

"(...) Member States may maintain or introduce national provisions to further specify the application of rules of this Regulation with regard to the processing of personal data for compliance with a legal obligation or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or for other specific processing situations as provided for in Article 6(1)(c) and (e) by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX (...)"⁵.

5. In January 2012, the Commission submitted another legislative proposal which is the Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data (the "draft Directive")⁶. The draft Directive is, like the draft Regulation, based on Article 16 TFEU.
6. Article 1(1a) of the draft Directive contains a minimal harmonisation clause which reads:

"This Directive shall not preclude Member States from providing higher safeguards than those established in this Directive for the protection of the rights and freedoms of the data subject with regard to the processing of personal data by competent public authorities."⁷

Article 1(2) of the draft Directive reads:

"In accordance with this Directive, Member States shall:

- (a) protect the fundamental rights and freedoms of individuals and in particular their right to the protection of personal data; and*

⁵ Doc. 14270/1/14 REV 1.

⁶ Doc. 5833/12. The draft text discussed in this Opinion is the one presented by the Presidency in doc. 11109/14.

⁷ In footnote 77 (doc. 11109/14) on the minimal harmonisation clause, it is stated that *"(...) Commission welcomed the insertion of the paragraph as long as the free flow of data was not hampered"*.

(b) *ensure that the exchange of personal data by competent public authorities within the Union is neither restricted nor prohibited for reasons connected with the protection of individuals with regard to the processing of personal data".*

7. At the DAPIX Working Party meeting of 21-22 October 2014, the Legal Service gave an oral presentation on the legal implications of Option 1 (i.e. the minimal harmonisation clause combined with a free movement clause). At the DAPIX Working Party meeting of 28 October 2014, the Presidency requested the Legal Service to confirm this oral presentation in writing. This legal opinion further develops the oral intervention made by the Legal Service at those meetings.

II. LEGAL ISSUE

8. The legal issue is whether the possible introduction of Article 1(2a) of the draft Regulation containing a minimal harmonisation clause applicable to certain categories of data processing and combined with a free movement clause (Option 1 referred to in paragraph 3 above) would be compatible with the legal basis (Article 16 TFEU) and Article 8 of the Charter of Fundamental Rights of the European Union (the "Charter") as well as with the nature of a Regulation as a legal act pursuant to the second paragraph of Article 288 TFEU.

III. LEGAL FRAMEWORK

9. The second paragraph of Article 288 TFEU provides that "*[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*"

10. Article 16 TFEU provides:

"1. *Everyone has the right to the protection of personal data concerning them.*

2. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities (...)" (emphasis added).*

11. Article 8 of the Charter provides:

- "1. *Everyone has the right to the protection of personal data concerning him or her.*
2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
3. *Compliance with these rules shall be subject to control by an independent authority.*" (emphasis added).

IV. LEGAL ANALYSIS

A. **The compatibility of a minimal harmonisation clause with Article 16 TFEU and Article 8 of the Charter**

12. Whilst Directive 95/46/EC is based on Article 114 TFEU (internal market legal basis), the draft Regulation will be based on the new legal basis of Article 16 TFEU introduced by the Treaty of Lisbon.
13. Article 16(1) TFEU refers to the right to the protection of personal data which is guaranteed as a fundamental right in Article 8(1) of the Charter.
14. Article 16(2) TFEU empowers the Union legislature to adopt "rules" acting in accordance with a legislative procedure and therefore through adopting legislative acts. In cases where the legal basis does not specify the type of legal act to be adopted, as is the case here where Article 16(2) TFEU refers to "rules", "*... the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality*" (Article 296 TFEU)⁸. Such a legislative act, which is subject to Article 16(1) TFEU and Article 8 of the Charter, shall lay down rules relating to the protection of personal data and rules relating to the free movement of such data.

⁸ In addition, Article 16(2) TFEU requires the Union legislature to act in accordance with the ordinary legislative procedure which is defined in Article 289(1) TFEU as a procedure which "*...shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission...*" (emphasis added).

15. **DELETED**

16. **DELETED**

17. **DELETED**

18. **DELETED**

DELETED

19. **DELETED**

20. **DELETED**

21. **DELETED**

DELETED

22. The Legal Service also notes that the Commission has accepted that there will be different levels of data protection in the draft Directive referred to in paragraphs 5 and 6 above, given the introduction of a minimal harmonisation clause therein. Likewise, the Legal Service notes that the Commission has accepted that there will be different levels of data protection in the draft Regulation as it has proposed, and this has been accepted, that Member States could be allowed to derogate from the harmonised level of protection by providing a lower protection in certain cases (see Article 21 of the draft Regulation).

B. The compatibility of the minimal harmonisation clause with the nature of a regulation as defined in Article 288 TFEU

23. Unlike a directive, the rules contained in a regulation will be directly applicable in all Member States (Article 288 TFEU).

24. **DELETED**

DELETED

DELETED

25. **DELETED**

26. **DELETED**

DELETED

V. **DELETED**

27. **DELETED**

