



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 9 November 2012 (12.11)  
(OR. fr)**

**15996/12**

---

---

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

---

---

**LIMITE**

**DATAPROTECT 126  
JAI 776  
DAPIX 142  
MI 708  
FREMP 134  
DRS 125  
COMIX 624  
CODEC 2618**

**NOTE**

---

from: French delegation  
to: Working Party on Information Exchange and Data Protection (DAPIX)

---

No. prev. doc.: 14946/12 DATAPROTECT 119 JAI 700 DAPIX 130 MI 631 FREMP 125  
DRS 115 COMIX 568 CODEC 2383

---

Subject: Delegated acts and implementing acts in the 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)

---

The French authorities have already pointed out that the proposal for a Regulation contains many references to delegated or implementing acts – some of which are for essential items such as the right to be forgotten – particularly for determining the criteria in relation to these rights. This is clearly contrary to Article 290(1) of the Treaty on the Functioning of the European Union, which states that a "*legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act*". This principle is also reinforced in the CJEU's case-law, as in the recent judgment of 5 September 2012 (in case C-355/10) in which the Court ruled on the concept of essential elements that may not be determined by a delegated act.

Against this background, it is clear that such criteria should feature in the text of the Regulation itself.

As regards the use of delegated acts, the French authorities are not in favour, as a matter of principle, of such delegation of power in the context of this proposal for a Regulation. A large number of investments will depend on the provisions of this Regulation and its rules will govern the activities of many stakeholders in both the public and private sectors. Given the legal, organisational, technical and financial reach of the planned Regulation, delegating power in this way would create major economic risk and legal uncertainty for the various players involved by referring to acts which, while necessary for its implementation, would be adopted subsequently without directly involving the Member States in their drafting and approval. This would only serve to compound the problem of legal uncertainty and put the Member States in a position in which compliance with the Regulation would be virtually impossible. For example, a data processing operation that complied with the provisions of the Regulation could subsequently be rendered unlawful by a delegated act.

Furthermore, the French authorities do not consider it particularly relevant or constructive at this stage of the negotiations to discuss in detail those articles which the Commission has opted to refer to a delegated or implementing act. The first examination of the proposal is not complete (only a third of the articles have been examined) and there are still a number of unanswered questions about the very meaning of some articles that have already been discussed. It thus seems neither appropriate nor purposeful to examine the references to delegated or implementing acts on an article-by-article basis when the articles themselves may yet be changed.

The French authorities therefore think that any such discussion would be premature, and would reiterate that we have entered a general scrutiny reservation on all the provisions referring to a delegated or implementing act.

Finally, the French authorities are of the opinion that the Commission has chosen to provide on a systematic basis for power to be delegated for an indeterminate period. We reject this choice, too, as a matter of principle, as the standard clauses in 18039/11 of 6 December 2011 provide for three options<sup>1</sup>. While one of these is delegation for an indeterminate period, there are two other options: delegation for a period which, although limited, can be tacitly extended, and delegation for a limited period. In view of what is at stake here and the groundbreaking nature of a Regulation on this matter, delegation for an indeterminate period would not be suitable in any event.

**With regard to the new document put forward by the Presidency**, the French authorities wish to make several comments relating to both the methodology and the substance.

First, they would question the method adopted by the Presidency in this document, which consists of recording delegations' positions on each article and deducing from them an overall position on each article without discussing the problems in terms of substance (regarding the content of the Regulation and the alternatives to the delegated acts), despite the fact that such a general discussion could enable comprehensive statements of position to be established which would represent a more coherent reflection of each article.

The French authorities would point out that, in their view, each delegated act ought to be examined in the context of the rest of the article in respect of which it is laid down. At this stage, a preliminary discussion of the delegated acts should concern only the main principles and general outline of such delegation.

The French authorities would also note that, in terms of substance, the method chosen by the Presidency will lead to inconsistencies in the proposals incorporated into Annexes II and III to 14946/12. Why, for example, should Article 22(4), pursuant to which delegated acts will specify *inter alia* any further documentation requirements (other than those laid down in Article 28), be clarified further by means of one of the six alternatives proposed (since that Article is

---

<sup>1</sup> Article a – Exercise of the delegation

included in the list in Annex III), while Article 28(5), pursuant to which a delegated act will specify the requirements for documentation, is to be deleted and will therefore not be clarified further (since it is included in Annex II)?

The French authorities would also point out that Articles 8(3) and 31(5) are not included in either Annex II or Annex III. Consequently, no discussion seems to be planned with regard to those articles, even though they are among the articles already discussed by the Working Party. Here too, the French authorities would therefore question the method adopted by the Presidency, which fails to distinguish between those articles which have already been discussed and Articles 39 *et seq.* of the proposal for a Regulation, as would appear from paragraph 10 of the document.

Moreover, the French authorities would stress that Articles 8 and 31 both concern particularly important matters: in the first case, the delegated acts would specify "*the criteria and requirements for the methods to obtain verifiable consent*" (Article 8), while in the second they would specify "*the criteria and requirements for the circumstances in which the supervisory authorities must be notified of personal data security breaches*" (Article 31).

Finally, the French authorities note that while it is possible to adopt an unequivocal stance for or against Annex II and to answer the Presidency's question contained in paragraph 12(a) of the document, the same cannot be said for the question contained in paragraph 12(b) concerning Annex III. This is because that Annex does not have any specific content since the six alternatives proposed are very different in terms of both their normative value and the stakeholders to whom the delegation would be granted.

As well as questioning the legal feasibility of some of the alternatives proposed, the French authorities also wonder what meaning should be attached to a favourable response to the Presidency's question contained in paragraph 12(b): for the cases set out in Annex III, would the alternatives proposed in that Annex be more appropriate than the use of a delegated act? Six positive responses to that question could thereby be reflected in six different positions. Moreover, the French authorities note that, in paragraph 10 of the document, the Presidency itself underlines that the possible alternatives have not yet been discussed at working-party level.

**To conclude, therefore, the French authorities take the view that all these arguments support a different approach and hence a different working method, and that it would not be appropriate to develop their position as regards the question of delegated and implementing acts any further at this stage. They regard such a discussion as premature and would reiterate their general scrutiny reservation in respect of all the provisions specifying the use of a delegated or implementing act pending a discussion of the proposal for a Regulation as a whole.**

=====