COUNCIL OF THE EUROPEAN UNION

Brussels, 26 February 2013

6828/13

Interinstitutional File: 2012/0011 (COD)

LIMITE

DATAPROTECT 25
JAI 142
MI 147
DRS 38
DAPIX 36
FREMP 19
COMIX 119
CODEC 421

NOTE

from:	Presidency
to:	Working Party on Data Protection and Exchange of Information
No. prev. doc.:	16529/12 DATAPROTECT 133 JAI 820 MI 754 DRS 132 DAPIX 146 FREMP 142 COMIX 655 CODEC 2745
Subject:	General Data Protection Regulation - Revised draft of Chapters I and II

1. Following the completion of a first reading of the Commission proposal for a General Data Protection Regulation under the Danish, Cyprus and current Presidency, the Presidency invites the Working Party on Data Protection and Exchange of Information to commence the second reading of Chapters I and II the draft Regulation.

2. A revised draft of these Chapters was issued already in 2012. As the changes introduced into document had not yet been discussed, the underlined text has been kept. New changes are indicated in underlined bold text. The recitals will be revisited at a later stage.

ANNEX

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter and objectives

1. This Regulation lays down rules relating to the protection of individuals[1] with regard to the processing of personal data and rules relating to the free movement of personal data[2].

2. This Regulation protects (…)[3] fundamental rights and freedoms of natural persons, and in particular their right to the protection of personal data.

3. (…)[4] [5].

[1] AT, supported by LI, thought that a recital should acknowledge Member States' right to lay down the right to data protection rules for legal persons.

[2] IT thought that a reference to the internal market should be added here. DE, on the other hand, thought that it was difficult to determine the applicability of EU data protection rules to the public sector according to internal market implications of the data processing operations.

[3] Deletion of 'the' in order to allay concerns that this paragraph conveyed the impression that the right to data protection enjoyed a higher status than other fundamental rights.

[4] Deletion as the Presidency agreed with FR that this paragraph, which was copied from the 1995 Data Protection Directive (1995 DPD 95/46), did not make sense in the context of a Regulation as this was directly applicable. LU and COM reservation on deletion. NL remarked that the drafting did not specify the addressees of this rule. DE scrutiny reservation: queried whether Member States would still be allowed to keep more stringent, sectoral data protection rules in place. SK thought that this paragraph needed to be redrafted so as to allow processing of personal data from one Member State in another Member State, also in cases where the processing in another Member State was not necessary or reasonable.

[5] EE, FI, SE, and SI thought that the relation to other fundamental rights, such as the freedom of the press, or the right to information or access to public documents should be explicitly safeguarded by the operative part of the text of the Regulation. FI thought that Member States should retain the right to apply their national legislation in this regard. DE concurred that this was a very important issue which needed to be addressed. The Commission stated that its proposal did not contain rules on the access to public documents as regards the fundamental right aspect, since the Charter only refers thereto regarding the EU institutions.

Article 2

Material scope

1. This Regulation applies to the processing of personal data wholly or partly by automated means, and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system[6] [7].

2. This Regulation does not apply to the processing of personal data:[8]

   (a) in the course of an activity which falls outside the scope of Union law (…)[9];

   (b) by the Union institutions, bodies, offices and agencies[10];

   (c) by the Member States when carrying out activities which fall within the scope of Chapter 2 of the Treaty on European Union[11];

---

6 FR queried the exact meaning of the second half of this sentence. HU objected to the fact that data processing operations not covered by this phrase would be excluded from the scope of the Regulation and thought this was not compatible with the stated aim of a set of comprehensive EU data protection rules. HU therefore proposed to replace the second part by the following wording 'irrespective of the means by which personal data are processed'.

7 BE scrutiny reservation related to the fact that the processing of personal data by judicial authorities would be covered by the Directive.

8 The Presidency considers that a specific exclusion for data which have been rendered anonymous may be beneficial.

9 DE, RO and SI thought the activities covered by Union law should be listed as fully as possible. SE also thought that the utmost clarity was required in this respect. The Presidency is of the opinion that activities which fall outside the scope of Union law such as processing operations concerning public order, internal security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) should rather be clarified in a recital.

10 FR wants clarification as to whether transfers of data by Member States to these EU institutions are covered by this exception. BE, DE, EE, ES and RO thought the Regulation should be applicable to EU institutions.

11 IT thought this exception overlapped with (a).

(d) by a natural person (…)[12] in the course of (…) a personal or household activity;

(e) by competent **public** authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties[13] [14] **or other body designated under the law of the Member State concerned or Union law for those purposes.**

3. This Regulation shall be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive[15].

---

[12] Deleted further to the remarks by DE, IE, LT, NL, SI and UK, who questioned the need for the criterion of absence of gainful interest in this so-called household exception and the compatibility thereof with the Lindqvist case law of the ECJ (which, at any rate, predated the 'social network era'). UK thought that selling personal possessions on an auction site also fall within the household exemption. The enforceability of data protection rules in this type of situation was also challenged. SE thought the household exception needed to be drafted in a sufficiently wide manner so as to ensure the practical enforceability of data protection rules. COM affirmed the compatibility with the Lindqvist case law. Several delegations (DE, SE, SI and UK) asked whether the use of social networks on the internet would be covered by this exception. COM replied that in its view the Regulation should apply to an individual who uses a social network and has 'with the public' privacy settings, i.e. when personal data are available itch to an unrestricted number of individuals and not only to a limited audience. CZ thought that the processing of personal data by a natural person which is not part of its own gainful activity should be subjected to limited, specific rules to be spelled out in the Regulation. LU, NO, SI and SK also thought this exception needed to be more clearly regulated. LT proposed to add 'with the exception of data which might be made available to transfer to third parties or publish'. BE, supported by RO, would like to add the following recital: 'That exception must therefore be interpreted as relating only to activities which are carried out in the course of private or family life of individuals, which is clearly not the case with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people.'

[13] RO scrutiny reservation: it thought that this exception should be worded more broadly and suggested referring to 'competent authorities for the purpose of ensuring public order and security'. FR thought that this exception should be worded more broadly so that it would cover all forms of exercise of 'sovereign power' with a sanctioning goal. FR also thought that the 'competent authorities' should be clearly defined. COM replied that point e) should mark the delimitation between the two data protection instruments. DE referred to the difficulties flowing from the fact that the prevention of dangerous situations (*Gefahrenabwehr*) is not covered by the proposed Data Protection Directive, whereas the processing of data in that context is intrinsically linked to other police activities covered by that Directive. At the request of HU, COM clarified that Member States in their national data protection legislation could cover in a single law also data processing in this area.

[14] ES proposed to insert two further exemptions for processing by competent authorities for the purposes of producing and disseminating official statistics and of drawing up electoral rolls.

[15] FR scrutiny reservation: FR demands clarification as to whether 'Business to Business (B2B)' transactions are covered by the proposed Regulation. FR and IT underlined the importance of close alignment of this Regulation with the E-Commerce Directive; LU supports this reference; IT thought that it was not expedient that the exceptions listed here were broader than under the E-Commerce Directive. DE queries whether also the implementing law of the Member States should be taken into account or also other EU Directives, such as the so-called Cookies-Directive 2002/58/EC.

Article 3

Territorial scope [16]

1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union[17].

2. [18]This Regulation applies to the processing of personal data of data subjects residing in the Union[19] by a controller not established in the Union[20], where the processing activities are related to:

   (a) the offering of goods or services,[21] irrespective of whether a payment of the data subject is required[22], to such data subjects in the Union; or

   (b) the monitoring of their behaviour as far as their behaviour takes place within the European Union[23] [24].

---

16 AT scrutiny reservation.

17 FR accepted this criterion. DE and LV expressed some doubt as to its practicability with regard to corporations in the EU that are active on a worldwide basis. Some delegations thought the criterion of establishment should be better defined (PT), e.g. whether it also applied to natural persons (LV).

18 COM stated that this territorial scope stemmed from a human rights obligation to protect EU data subjects also regarding their personal data processed outside the European Union, whose data are processed by a controller not established in the EU.

19 UK remarked that this criterion/condition implied a different data protection regime for the EU establishments of non-EU companies according to whether their customers are EU residents or not. COM indicated it would reflect on this. NO thought the Regulation should also cover the processing done outside the Union by processors established within the Union. At the request of FR, COM clarified that this criterion was intended to apply solely to persons with a residence in the EU, not to persons travelling in the EU.

20 DE, supported by BE, queried whether this would also apply to foreign public authorities (e.g. US DHS) and to endowments or other non-profit associations. The UK, supported by other delegations, pointed to enforceability problems, especially in cases where companies have not appointed a representative in the EU. COM replied that the Charter made no distinction according that 'nature' of the controller and that possible practical enforcement problems should not deter the EU from laying down clear rules on the rights.

21 The Presidency thinks that the territorial scope of the Regulation as laid own in Article 3(2) should be further clarified in a recital to be drafted along the lines of the ECJ *Alpenhof* case law (judgment of 7 December 2010 in cases C-585/08 and C-144/09).

22 Suggested text to allay concerns expressed by DE and PT, that it needed to be clarified that this also covered services offered free of charge.

23 BE, IE, LT, NO, SE and SK scrutiny reservation. Several delegations remarked that this would also apply to some foreign public authorities, e.g. the under the US ESTA programme. Several delegations (IE, LT, NO SK and SE) had remarked that more clarity was required as to the exact scope of this, pointing out that 'monitoring' encompassed much more than tracking on the internet. COM replied that Recital 21 offered some clarifications.

24 FR and CZ thought the two subparagraphs should be deleted. FR supported the proposed first sentence of the current paragraph 2, whereas CZ thought one should revert to Article 4(1) (c) of the 1995 Directive. UK would like to see Article 3(2) removed in its entirety.

3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where the national law of a Member State applies by virtue of public international law[25].

Article 4

Definitions[26]

For the purposes of this Regulation:

(1) 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, by means reasonably likely to be used[27] by the controller **[**or by any other natural or legal person**]**[28], in particular by reference to a name[29], 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[30]. If identification requires a disproportionate amount of time, effort or material resources the natural living person shall not be considered identifiable.[31];

---

25 BE and UK scrutiny reservation: unclear in which cases this article will apply. Cf. Recital 22.

26 AT scrutiny reservation. AT supports in principle the wider scope of the definitions in the light of future developments. If restrictions should be necessary, they could be added elsewhere (e.g. in connection with the legal consequences like obligations of the data controller).

27 FR, LU and UK thought that this concept was too broad. UK thought that the principles of data protection should apply only where a person can be easily identified and not where there is only a remote chance of identification.

28 The Presidency invites the Commission to clarify this aspect of the definition.

29 SE proposal.

30 LU scrutiny reservation: this extended scope lacks legal certainty and takes no account of the intended purpose, context, circumstances or likely privacy impact of processing the personal data concerned. It has not been sufficiently demonstrated that the existing definition of 'personal data' in article 2(a) of Directive 95/46 needs to be replaced. UK thought it was preferable to list these examples in an exemplary manner in a recital rather than in the operative body of the text. FR and UK thought the definition of personal data rather than of data subject should be determining.

31 Further reflection may be needed in order to establish to whom the identification must be disproportionate. To the original data controller, identification will most likely never be disproportionate, but this may be the case for third parties that e.g. only see an ID number or some other 'abstract identifier', which they cannot use to identify the data subject.

(2) (…) [32];

[(2a) **'rendering personal data pseudonymous' means processing personal data in such a way that the data cannot be attributed to a specific data subject without the use of additional information which would allow such identification; such additional information shall be kept separately and shall be subject to technical and organisational measures to ensure non-attribution.]**

(3) 'processing' means any[33] operation or set of operations which is performed upon personal data or sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage[34], adaptation or alteration, retrieval, consultation, use, disclosure[35] by transmission, dissemination or otherwise making available, alignment or combination, or erasure[36] [37];

(4) 'filing system' means any structured set of personal data which are accessible according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis[38];

---

32 DE, EE, FR and IT thought that the definition of personal data was no longer compatible with the digitalised age in which even satellite images could fall under this definition. AT however thought that so-called geo data could be the subject of specific sectoral rules. FR and HU proposed to clarify, as is the case under the 1995 Directive, that the data concern an identified or identifiable data subject. DE, ES, LU, SE and SK queried why anonymisation and/or pseudonymisation techniques were not covered and defined here: anonymised data should not be covered by the Regulation. COM referred to Recital 23 which excluded truly anonymised data from the scope of the Regulation. CZ proposed to insert the following definition: (2a) 'pseudonymous data' means any data where determination of the identity of the data subject requires a disproportionate amount of time, effort, or material resources. SK also thinks greater clarity is required, also in distinguishing the terms 'personal data' and 'information'.

33 BE and FR scrutiny reservation: FR thought that this concept was too broad in view of the wide variety of data processing operations possibly covered by this. Read in conjunction with Article 28, this definition would increase rather than reduce administrative burdens on companies. BE thought that the rules applicable to set of operation should more stringent than those for 'any operation'.

34 CY queried what was the difference between 'storage' and 'retention' of data.

35 SK thought the list should also include 'making public' and 'copying'. These two concepts appear to be already covered by the proposed definition. DE also thought further defining might be necessary.

36 DE, FR and NL regretted that the blocking of data was not included in the list of data processing operations as this was a means especially useful in the public sector. COM indicated that the right to have the processing restricted in certain cases was provided for in Article 17(4) (restriction of data processing), even though the terminology 'blocking' was not used there. DE and FR thought the definition of Article 4(3) (erasure) should be linked to Article 17and the need for a separate concept of 'destruction ' was questioned.

37 DE and FR were of the opinion that a separate definition of 'publication of personal data' was required.

38 DE, FR SI, SK and UK scrutiny reservation. UK thought that the concept of 'specific criteria' needed to be clarified. DE and SI thought this was completely outdated concept. COM explained that the definition had been taken over from Directive 95/46/EC and is related to the technical neutrality of the Regulation, as expressed in Article 2(1). DE also thought a recital should clarify the cases covered by this, e.g. in the context of social networks.

(5) 'controller' means the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes, conditions[39] and means of the processing of personal data; where the purposes, conditions and means of processing are determined by Union law or Member State law, the controller or the specific criteria for his nomination may be designated by Union law or by Member State law[40];

(6) 'processor' means a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller[41] [42];

(7) 'recipient' means a natural or legal person, public authority, agency or any other body[43] to which the personal data are disclosed <u>whether a third party or not[44] ; however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients</u>;

[39] UK suggests deleting the reference to the conditions, as this is normally for the processor to determine, not for the controller. UK suggests reverting to the formulation under the 1995 Directive.

[40] DE scrutiny reservation on paragraphs 3 to 5: the practical applicability of these definitions in the context of new health services such as Google-health.

[41] CZ reservation: CZ wants to delete this definition as it considers the distinction between controller and processor as artificial.

[42] SI scrutiny reservation on paragraphs (5) and (6) as data subjects entering data on social media may also fulfil some functions of controller and processor.

[43] HU proposed adding 'other than the data subject, the data controller or the data processor'.

[44] DE, FR, SI and SE regretted the deletion from the 1995 Data Protection Directive of the reference to third party disclosure and pleaded in favour of its reinstatement. COM argued that this reference was superfluous and that its deletion did not make a substantial difference. FR and UK also pleaded in favour of the reinstatement of the phrase: 'authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients'.

(8) 'the data subject's consent' means any freely given specific, informed and explicit[45] indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action[46], signifies agreement to personal data relating to them being processed[47];

(9) 'personal data breach' means a breach of security leading to the accidental or unlawful (…) loss, alteration, unauthorised disclosure of, or [48]access to, personal data transmitted, stored or otherwise processed[49];

(10) 'genetic data' means all personal data relating to the genetic characteristics of an individual which have been inherited or acquired during early prenatal development as they result from an analysis of a biological sample from the individual in question, in particular by chromosomal, deoxyribonucleic acid (DNA) or ribonucleic acid (RNA) analysis or analysis of any other element enabling equivalent information to be obtained[50 51;]

---

45 AT, BE, CZ, CY, IE, FR, FI, LT, LU SE, SI, SK and UK scrutiny reservation. Many of these delegations criticised the additional requirements to consent as unrealistic and queried its added value. LU wondered whether 'explicit' consent by the EU legislator would rather protect the controller more when cases were brought to court and where consent would meet all the legal requirements, rather than protecting the data subject. In the same vein, IE wondered whether the proposed requirements would in reality not lead to 'click fatigue'. DE stated that the conditions for electronic consent should be set out here. UK thought that there needs to be consistency with other pieces to legislation such as the E-Privacy Directive. CZ proposed to replace the word 'explicit' by 'provable'.COM argued that this definition merely clarified the 1995 Directive concept of consent, which does not allow for silent or implicit consent. COM referred to recital 25 for clarifying that consent should not be unnecessarily disruptive to the use of the service for which it is provided. See also UK suggestions for amending that recital in the footnote thereto. FR also referred to the need to reflect on consent given by the representative of the data subject.

46 HU suggests adding 'made in writing or by any other recorded means'.

47 DE rejected a 'one-size-fits-all' solution. FR queried why this also covered the representative of the person concerned.

48 ES proposed adding the word 'illegal'; this seems however to be covered by the term 'unauthorised'.

49 COM explained that it sought to have a similar rule as in the E-Privacy Directive, which should be extended to all types of data processing. LU supports having the same rules. DE questioned the very broad scope of the duty of notifying data breaches, which so far under German law was limited to sensitive cases. NL, LV and PT concurred with DE and thought this could lead to over-notification. On the other hand HU and SK preferred a broader definition that covers each and every incidents stemming from the breach of the provisions of the regulation. HU therefore suggests amending the definition as follows '…a breach of (…) the provisions of this regulation leading to any unlawful operation or set of operations performed upon personal data such as ….'. CZ also proposed to refer to a 'security breach' rather than a 'personal data breach'.

50 Several delegations (BE, CH, CY, DE, FR and SE) expressed their surprise regarding the breadth of this definition, which would also cover data about a person's physical appearance. DE thought the definition should differentiate between various types of genetic data. AT scrutiny reservation.

51 The redraft seeks to make definition dependent on a biological – and therefore presumably technologically neutral concept (DNA) – indicator.

(11) 'biometric data' means any personal data resulting from a specific technical processing relating to the physical, physiological or behavioural characteristics of an individual which contributes to (…) unique identification of that individual[52], such as facial images, or dactyloscopic data[53];

(12) 'data concerning health' means such information related to the physical or mental health of an individual, which reveal information about significant health problems, treatments and sensitive conditions of an[54] individual[55];

'(12a) 'profiling' means an **automated** processing technique that consists of applying a 'profile' to an individual, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes[56]; a profile being a set of personal data characterising a category of individual;

(13) 'main establishment' means

– as regards the controller, the place of its establishment in the Union where the main decisions as to the purposes, conditions and means of the processing of personal data are taken; if no decisions as to the purposes, conditions and means of the processing of personal data are taken in the Union, **(…)** the place where the main processing activities in the context of the activities of an establishment of a controller in the Union take place[57];.

---

52 FR scrutiny reservation. CZ proposal to replace this wording by '…and individual which are unique for each individual specifically…'

53 SI did not understand why genetic data were not included in the definition of biometric data. AT scrutiny reservation. FR queried the meaning of 'behavioural characteristics of an individual which allow their unique identification'. DE thought that the signature of the data subject should be exempted from the definition. CH is of the opinion that the term 'biometric data' is too broadly defined.

54 CZ proposal. RO reservation on the term 'significant'.

55 CZ, DE, EE, FR and SI expressed their surprise regarding the breadth of this definition. AT, BE, SI and LT scrutiny reservation. Proposal to allay the concerns raised. COM scrutiny reservation.

56 Further to a FR proposal based on the Council of Europe Recommendation (2010)13.

57 BE, CZ DE, EE, IE and SK scrutiny reservation: they expressed concerns about this definition, which might be difficult to apply in practice. DE thought it needed to be examined in conjunction with the one-stop-shop rules in Article 51. IE remarked this place may have no link with the place where the data are processed. DE also remarked that in the latter scenario, the Commission proposal did not determine which Member States' DPA would be competent. CZ thought the definition should be deleted.

– as regards the processor, the place of its central administration in the European Union, and, if it has no central administration in the European Union, the place where the main processing activities take place;

(14) 'representative' means any natural or legal person established in the Union who, explicitly designated by the controller, **represents** the controller, with regard to the obligations of the controller under this Regulation[58];

(15) 'enterprise' means any **natural or legal person** engaged in an[59] economic activity, irrespective of its legal form, **(…)** including **(…)** partnerships or associations regularly[60] engaged in an economic activity;

(16) 'group of undertakings' means a controlling undertaking and its controlled undertakings[61];

(17) 'binding corporate rules' means personal data protection policies which are adhered to by a controller or processor established on the territory of a Member State of the Union for transfers or a set of transfers of personal data to a controller or processor in one or more third countries within a group of undertakings;

(18) 'child' means any person below the age of 18 years;

(19) 'supervisory authority' means a[62] public authority which is established by a Member State **pursuant to** Article 46;

(20) 'third party' means any natural or legal person, public authority, agency or any other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorized to process the data[63];

---

58 SK scrutiny reservation: unclear whether this definition is linked to Article 25.
59 DE proposed to add the requirement 'independent'.
60 SE criticised the term 'regularly'. It was also queried why the term 'enterprise' was used here, whereas subparagraph 16 used the term 'undertaking' (as in competition law).
61 UK scrutiny reservation on all definitions in paragraphs 10 to 16.
62 FR proposal, supported by SI, to add 'independent'.
63 Based on UK suggestion.

(21) 'Information Society service' means any service as defined by Article 1 (2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services[64] [65] [66].

[64] OJ L 204, 21.7.1998, p. 37–48.

[65] UK suggests adding a definition of 'competent authority' corresponding to that of the future Data Protection Directive.

[66] BE, FR and RO suggest adding a definition of 'transfer' ('communication or availability of the data to one or several recipients'). RO suggests adding 'transfers of personal data to third countries or international organizations is a transmission of personal data object of processing or designated to be processed after transfer which ensure an adequate level of protection, whereas the adequacy of the level of protection afforded by a third country or international organization must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations'.

CHAPTER II

PRINCIPLES

Article 5

Principles relating to personal data processing[67]

Personal data must be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject[68];

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes[69]; further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible subject to the conditions and safeguards referred to in Article 83[70];

(c) adequate, relevant, and limited to the minimum necessary[71] in relation to the purposes for which they are processed; they shall only be processed if, (…)[72] the purposes could not be fulfilled by processing information that does not involve personal data[73];

---

67 AT scrutiny reservation. UK thought that the transparency principle should be safeguarded in the relevant sections of the regulation rather than as an overarching principle.

68 At the request of CY and SI, COM clarified that the transparency principle concerns data processing in relation to data subjects and is further detailed in particular by the information requirements (Articles 11 and 14) At the request of DE and SE, COM stated that Member States would still be able to adopt/maintain data protection rules under national law within the limits of the Regulation, where provisions of the Regulation refer to national law.

69 NL and FI pointed out that too strict rules on processing for other purposes could lead to new data collections for already collected data.

70 Based on BE and UK suggestion. RO scrutiny reservation on the placement of this new text.

71 UK suggests replacing 'limited to the minimum necessary' by the terms 'not excessive' (from the 1995 Directive) as it is not always possible to know at the point of collection what the 'minimum necessary' constitutes.

72 BE suggestion to delete the words 'as long as', since these create legal uncertainty. BE thought that this test was otherwise impracticable.

73 FR reservation: FR thought the second part of the sentence should be dropped, or alternatively, included in a recital. DE thought that pseudonymised and anonymous data should be mentioned here.

(d) accurate and, where necessary[74], kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay[75];

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed[76]; personal data may be stored for longer periods insofar as the data will be processed (…)[77] for historical, statistical or scientific (…)[78] purposes[79] **pursuant to** Article 83 (…)[80];

(f) [processed under the responsibility (…)[81] of the controller, who shall ensure and be able to[82]demonstrate that the processing of personal data is performed in compliance with the provisions of this Regulation][83].

---

74 Further to the remarks from CZ, DE, FR, RO, SE and UK the words 'where necessary' from the 1995 Directive have been reinstated. COM replied that it had been deleted because of divergent Member State practice, but that the updating duty was only required in reasonable cases.

75 CZ suggestion to add 'personal data established as inaccurate shall not be disclosed unless rectified or marked appropriately'. UK pointed out that the duty to erase only arises once the inaccuracy of the data has been established.

76 FR wishes to reinstate the terms 'or further processed' from the 1995 Directive.

77 UK suggestion to delete the word 'solely' so as to allow for data processing for mixed purposes.

78 Suggestion to delete the word 'research' so as to clarify that also storing of data for historical, statistical or scientific purposes which do not amount to research is possible. This concern was raised by SE and NO.

79 Several delegations (DE, NO, SE and SI) requested clarification as to what would be allowed under this purpose. COM referred to recital 126. FR thought the drafting should be better aligned with that of paragraph b).

80 FR, LT, LV, NO and UK scrutiny reservation: these delegations were concerned about the disproportionate administrative burdens ensuing from such periodic reviews

81 Deleted further to the ES and UK remark that liability is not a condition for data processing, but a consequence thereof.

82 Based on SE and BE suggestion.

83 BE, LU, NO and FR thought turning the existing means obligation into a result obligation was too onerous and not realistic. COM thought the controller should have the burden of proof. FR thinks the revised text should be better adapted to the question of archives. DE scrutiny reservation: the exact consequences of this definition are unclear at this stage. In addition to these concerns, it should be considered firstly, whether all requirements stated in the provision belongs in this Chapter or should rather be moved to Chapter IV and secondly, whether some of the obligations overlap with Article 22 (1).

Article 6

Lawfulness of processing[84]

1. Processing of personal data shall be lawful only if and to the extent that at least one of the following applies:

   (a) the data subject has given consent to the processing of their personal data for one or more specific purposes[85];

   (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

   (c) processing is necessary for compliance with a legal obligation to which the controller is subject[86];

   (d) processing is necessary in order to protect the vital interests[87] of the data subject;

   (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller[88] [89];

---

84 AT and SK scrutiny reservation.

85 DE and SK asked for an explanation as to the addition of 'for one or more specific purposes'. COM referred to Article 8(2) of the Charter. UK suggested reverting to the definition of consent in Article 2(h) of the 1995 Directive.

86 CH and ES queried the relationship to (e) and HU thought that this subparagraph could be merged with 6(1) (e). BE, CZ and LV were of the opinion that other grounds might be used for data processing in the public sector.

87 It may be clarified in a recital that this includes loss or damage to property.

88 COM clarified that this was the main basis for data processing in the public sector. DE and LT asked what was meant by 'public interest' whether the application of this subparagraph was limited to the public sector or could also be relied upon by the private sector. FR also requested clarifications as to the reasons for departing from the text of the 1995 Directive. UK suggested reverting to the wording used in Article 7(e) of the 1995 Directive.

89 The Presidency is of the opinion that subparagraphs (d) and (e) should be inverted.

(f) processing is necessary for the purposes of the legitimate interests[90] pursued by a controller or by a third party[91], except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, **[**in particular where the data subject is a child**]**[92][93]. This shall not apply to processing carried out by public authorities in the **exercise of their public duties**.[94][95]

[(g) processing is necessary for the purposes and under the conditions provided for in Article 9(2) (b) - (j); [96]

(h) processing is necessary for the purposes and under the conditions referred to in Articles 80 to 85.]

2. (…)

---

90 FR and LT scrutiny reservation.

91 In accordance with remarks made by CZ, DE, NL, SE and UK, the Presidency suggests to reinstate the words 'or by a third party' from the 1995 Directive. HU could accept it. COM thought that the use of the concept '***a*** controller' should allow covering most cases of a third party.

92 DE asked whether this would allow an absolute prohibition of processing of children's personal data.

93 Link with Article 8 to be clarified**.**

94 BE, PT and UK had suggested deleting the last sentence.

95 The scope of this provision needs to be clarified in a recital.

96 As the processing of data covered by Article 6 can also take place when the conditions in Article 9 are fulfilled; this provision has been inserted in order to enable processing of non-sensitive data on 'sensitive' grounds. The processing ground in Article 9, 1 (a) is excluded because consent is already stated in Article 6. COM reservation as it thinks that Article 9(1) does not contain grounds for processing but merely indicates the purposes for which data may be processed.

3. The legal basis for the processing referred to in points (c) and (e) of paragraph 1 must be provided for in:

(a) Union law, or

(b) the law of the Member State[97] to which the controller is subject.

(…)[98]

4. Where the purpose of further processing is incompatible[99] with the one for which the personal data have been collected, the processing must have a legal basis at least in one of the grounds referred to in points (a)[100] to (e) of paragraph 1[101]. **[**This shall in particular apply to any change of terms and general conditions of a contract[102].**]**

5. (…)[103].

---

97 UK scrutiny reservation related to the compatibility of this concept with common law.

98 NO thinks paragraph 3 in its entirety should be deleted. The Commission stated that Member States were still allowed to determine more precisely the conditions for the processing of personal data in *leges speciales* which provide the legal basis referred to in Article 6(1) (e) and (3), which could however not be more stringent than EU data protection rules. The Presidency considers that further work is required in relation to this.

99 Inserted to make the text compatible with Article 5(b). LT thought this required further clarification.

100 AT thought that there should be no reference to (1) (b) as the contract itself would be the ground for data processing if its terms allowed for a change of purpose of data processing.

101 ES and LU though it need further clarification which were non-compatible purposes. COM replied that it wanted to improve the situation under the 1995 Directive, which leads to legal uncertainty. DE and PT reservation: they disagreed with this COM explanation. DE, supported by SE and SI, thought that an exception was needed for publicly available data, e.g. in the context of social networks. To that end it would be preferable if a reference to paragraph 1(f) were also to be included here. PRES indicted that this should be clarified in the text. NO thought that the applicability of the right to information under Article 11 should be explicitly mentioned. UK suggested adding that 'processing necessary for historical, statistical, scientific purposes shall always be deemed compatible processing, provided it is conduced with the rules and condition laid down in Article 83'.

102 BE and PL scrutiny reservation. DE thought this last sentence should be rather in a recital. BE queried whether this allowed for a hidden 'opt-in', e.g. regarding direct marketing operations, which COM referred to recital 40. BE suggested adding the words 'if the process concerns the data mentioned in Articles 8 and 9'. HU thought that a duty for the data controller to inform the data subject of a change of legal basis should be added here: 'Where personal data relating to the data subject are processed under this provision the controller shall inform the data subject according to Article 14 before the time of or within a reasonable period after the commencement of the first operation or set of operations performed upon the personal data for the purpose of further processing not compatible with the one for which the personal data have been collected.' The Presidency invites the Commission to clarify this aspect.

103 Deleted in view of reservation by BE, DE, EE, ES, FI, FR, IE, LT, LU, NO, NL, PT, PL, RO, SI, SE and UK.

Article 7

Conditions for consent

1. **Where Article 6(1)(a) applies** the controller **shall be able to demonstrate** that consent was provided **by the data subject** .[104] [105].

2. If the data subject's consent is to be given in the context of a written[106] declaration which also concerns another matter[107]., the requirement to give consent must be presented in a manner which is clearly[108] distinguishable in its appearance from this other matter

3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal [nor shall it affect the lawfulness of processing of data based on other grounds][109] [110].

---

104 LU, NL and UK thought this proposed rules put a heavy regulatory burden on companies. LU wondered about the compatibility with data retention period obligations, with the principle of data minimisation, and with the obligation for a controller to prove that informed consent was given. DE remarked that one would always need to retain some data for logging purposes. SE requested a clarification (e.g. through a recital) that this did not apply in criminal proceedings.

105 COM has confirmed that this was consent as referred to in Article 6(1)(a) and not consent in the context of a contract (Article 6(1)(b)), to which DE remarked that the data subject might be less protected under contractual law.

106 DE suggested adding 'electronic'.

107 AT asks for a clarification what is meant by 'another matter' (e.g. another purpose for the processing of persona data) and asks whether it would not be necessary to consent separately to this new purpose?'

108 As suggested by ES.

109 Amendment to clarify that the controller will always have the option of basing a continued processing of data on an alternative processing ground if the relevant provisions are fulfilled. This situation could thus arise where processing can be continued pursuant to e.g. Article 6 (1), (c). See also Article 17, (1), (b), *a contrario*.

110 BE suggests inserting a provision reading: 'The controller has to fulfil the data subject's request within a reasonable time period'. CZ, LU and SE also thought further clarification was required. AT asked whether the right to deletion would also apply to the results of the processing of the data and to all data of the data subject. It also thought that the format of the withdrawal should be further clarified (the same as for the consent, i.e. written declaration?).

[4. Consent shall not provide a legal basis for the processing, where there is a significant imbalance between the position of the data subject and the controller and this imbalance makes it unlikely that consent was given freely. [111]]

Article 8

Processing of personal data of a child[112]

1. For the purposes of this Regulation, in relation to the offering of information society services directly to a child[113], the processing of personal data of a child below the age of 13 years[114] shall only be lawful if and to the extent that consent as referred to in Article 7[115] is given or authorised by the child's parent or **guardian.**[116].

---

111 BE, CZ, DE, EE HU, IE, LT, SE, SI and PL scrutiny reservation. SI referred to the case of asylum seekers whose data were processed in SI on the basis of their consent. COM indicated that this would be excluded by the Data Protection Regulation as such processing does not rely on a freely given consent and should be based on a statutory basis. BE asked whether paragraph 4 could not be limited to the processing of sensitive data. DE, IE and NL pleaded to reconsider this rule, which it considered to be very broad. DE remarked that the absence of dependence should be considered as part of the requirement of freely given consent. CH would welcome a more precise definition of the term „significant imbalance as it would enhance legal certainty. This is particularly important with respect to the handling of data by public authorities since there is always a certain imbalance in the relations between the citizen and state authorities. HU agreed with the principle but thought its application might be problematic in some cases. FR warned against too much specificity in the recitals and suggested adding: 'and must be replaced by another legal basis such as those provided for in Article 6(1) (a) and (b)'. ES and SK thought consent was never required in the public sector. ES remarked that recital 34 was wrongly drafted. UK suggested deleting paragraph 4 and replacing it by the following recital 'the existence of imbalanced situations should be taken into account in determining whether consent is 'freely given, and informed'.

112 AT and SE scrutiny reservation. CZ and UK reservation: CZ and UK would prefer to see this Article deleted. NO proposes including a general provision stating that personal data relating to children cannot be processed in an irresponsible manner contrary to the child's best interest. Such a provision would give the supervisory authorities a possibility to intervene if for example adults publish personal data about children on the Internet in a manner which may prove to be problematic for the child.

113 Several delegations (HU, SE, PT) asked why the scope of this provision was restricted to the offering of information society services or wanted clarification (DE) whether it was restricted to marketing geared towards children. The Commission clarified that this provision was also intended to cover the use of social networks, insofar as this was not governed by contract law. BE, DE and IE thought that this should be clarified (BE suggested through a recital). HU thought the phrase ' in relation to the offering of information society services directly to a child' should be deleted. UK thought it should be limited to more harmful processing.

114 Several delegations queried the expediency of setting the age of consent at 13 years: FR, HU, NL, LU, LV and SI. RO proposed 14 years. COM indicated that this was based on an assessment of existing standards, in particular in the US relevant legislation (COPPA).

115 It should be clarified that this applies only if consent is the ground for data processing. DE, supported by NO, opined it could have been integrated into Article 7.

116 IT asked how minors could be represented. FR queried whether this implied that for all other rights minors needed to be represented by their parents/legal guardian.

The controller shall make reasonable efforts to obtain (…)[117] consent, taking into consideration available technology[118].

2. Paragraph 1 shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child[119].

3. [The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the methods to obtain verifiable consent referred to in paragraph 1(…)[120].

4. The Commission may lay down standard forms for specific methods to obtain verifiable consent referred to in paragraph 1. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2)][121].

[117] DE suggestion: the burden of proof is regulated in Article 7.

[118] PL, PT, SE and UK queried the verifiability of compliance with this obligation. UK therefore suggested deleting the final sentence.

[119] DE, supported by SE, queried whether a Member State could adopt/maintain more stringent contract law.

[120] The last part of the provision was deleted as several delegations queried the expediency of (using delegated acts for) setting derogations for SMEs to an obligation aimed at protecting children: CZ, DE, EE, ES, FR, LV, PT and SE. DE thought this should be done through Member State law.

[121] LU is not convinced that implementing acts are necessary in this instance. UK suggested deleting paragraphs 3 and 4.

Article 9

Processing of special categories of personal data[122]

1. The processing of personal data, revealing race or ethnic origin, political opinions, religion or philosphical beliefs[123], trade-union membership, and the processing of genetic data or data concerning health or sex life or criminal convictions and offences[124] or related security measures shall be prohibited.[125]

2. Paragraph 1 shall not apply if one of the following applies:

   (a) the data subject has given consent to the processing of those personal data, subject to the conditions laid down in Articles 7 and 8, except where Union law or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject[126]; or

   (b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller in the field of employment law in so far as it is authorised by Union law or Member State law providing for adequate safeguards[127]; or

---

122 AT, PT and LI scrutiny reservation. DE, supported by CZ and UK, criticised on the concept of special categories of data, which does not cover all sensitive data processing operations. CZ pleaded in favour of a concept of risky processing. SK also thought the criterion should be context based and the inclusion of biometric data should be considered. COM opined that the latter were not sensitive data as such. COM referred to the general discussion on an open versus closed list of sensitive data.

123 CY, FR and AT deplored the deletion of the adjective 'philosophical' before 'beliefs', as this made the concept too broad. IE also thought this was too vague. COM referred to the wording used in the Charter. RO pleaded for inserting biometric data.

124 As suggested by FR. EE reservation: this should be left to the Member States. NO, NL and AT reservation: the inclusion of suspicion of criminal offences should be considered. At the request of CY, COM clarified that disciplinary convictions were not covered by the list.FR thought the wording of the 1995 Directive should be copied. LT suggested to add, following 'security measures', the following text: 'or any other kind of data which enable disclosure of personal data indicated in this paragraph'

125 UK questioned the need for special categories of data. NL thought the list of data was open to discussion, as some sensitive data like those related to the suspicion of a criminal offence, were not included. SE thought the list was at the same time too broad and too strict. SI thought the list of the 1995 Data Protection Directive should be kept. FR and AT stated that the list of special categories should in the Regulation and the Directive should be identical.

126 DE questioned whether one needed consent as a specific basis here, referring also to the complicated interaction between Member State and EU law. FR scrutiny reservation. LU thinks that special categories of data and 'normal' data should not be put on the same footing.

127 DE queried whether this paragraph obliged Member States to adopt specific laws on data protection regarding labour law relations; COM assured that the paragraph merely referred to a possibility to do so. COM also stated that labour relations were as a rule based on a contract and therefore the conditions laid down in Article 7 (4) would not apply here.

(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving consent; or

(d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed outside that body without the consent of the data subjects[128]; or

(e) the processing relates to personal data which are manifestly made public[129] by the data subject; or

(f) processing is necessary for the establishment, exercise or defence of legal claims in court proceedings or otherwise[130]; or

(g) processing is necessary for the performance of a task carried out **for reasons of** substantial[131] public interest, on the basis of Union law, or Member State law which shall provide for suitable measures[132] to safeguard the data subject's legitimate interests; or

[128] HU thinks this subparagraph can be deleted as it overlaps with (a).

[129] DE, IE SE and SI raised questions regarding the exact interpretation of the concept of manifestly made public (e.g. whether this also encompassed data implicitly made public and whether the test was an objective or a subjective one). In view of the increased importance of such data (inter alia via social networks), the suggestion was made to draft a separate article on the handling of such data, covering both sensitive and non-sensitive data.

[130] ES suggests adding 'of any kind'. LT requests the deletion of 'or otherwise'.

[131] Addition suggested by AT, DE and SE, as this was the exact term from the 1995 Directive. UK reservation on this reinsertion.

[132] CY queried whether this was the same as 'adequate safeguards'.

(h) processing of data concerning health is necessary for health purposes and subject to the conditions and safeguards referred to in Article 81[133]; or

(i) processing is necessary for historical, statistical or scientific (…)[134] purposes[135] subject to the conditions and safeguards referred to in Article 83; or

(j) processing of data relating to criminal convictions and offences[136] or related security measures is carried out either under the control of official authority or when the processing is necessary for compliance with a legal or regulatory obligation to which a controller is subject, or for the performance of a task carried out for important public interest reasons, and in so far as authorised by Union law or Member State law providing for adequate safeguards[137]. (…)[138].

3. (…)[139].

---

133 DE and EE scrutiny reservation. DE and ES queried what happened in cases where obtaining consent was not possible (e.g. in case of contagious diseases; persons who were physically or mentally not able to provide consent); NL thought this should be further clarified in recital 42. BE queried what happened in the case of processing of health data by insurance companies. COM explained that this was covered by Article 9(2) (a), but SI was not convinced thereof.

134 Suggestion to delete the word 'research' so as to clarify that also storing of data for historical, statistical or scientific purposes which do not amount to research is possible. This concern was raised by SE and NO.

135 ES suggests adding: 'or for preliminary official or administrative investigation to determine biological parentage'.

136 UK, supported by NL and PL suggested adding 'criminal offences' (cf. 1995 Directive). EE was opposed to this as under its constitution all criminal convictions were mandatorily public.

137 NL scrutiny reservation. UK queried the relationship between this paragraph and Article 2(2) (c). COM argued that the reference to civil proceedings in Article 8(5) of the 1995 Directive need not be included here, as those proceedings are as such not sensitive data. DE and SE were not convinced by this argument.

138 ES thought that the last sentence did not belong in this Regulation.

139 Deleted in view of the reservations by BE, CZ, DE, ES, IE, LU, PT, SE, SI, SK and UK.

Article 10

Processing not allowing identification

[If the purposes for which a controller processes data do not require the identification of a data subject, the controller shall not be obliged to acquire **or receive** additional information in order to identify the data subject for the sole purpose of complying with (…) this Regulation.][140] [141].

_____

[140] AT, DE, ES, FR, HU and UK scrutiny reservation. FR and ES had a preference for the modified paragraph 1. UK and IE thought this should be clarified in recitals. Several delegations highlighted the need for devising clear rules on anonymous data and spelling out the conditions under which these are not subject to (some of) the rules of this Regulation.. FR also queried the applicability of this article to photographs.

[141] BE proposed adding a second paragraph 'The processing of data which allows individualising a data subject without identifying him is not subject to Articles 15 to 19 and Article 32'. HU indicated that in case where 'the data processed by a controller do not permit the controller to identify a natural person', such processing cannot be qualified as personal data processing. Therefore the person processing such 'impersonal data' cannot be deemed a 'controller'. For HU the question arises whether such a provision is necessary or whether it is obvious that processors of data relating to unidentifiable natural persons shall not have the obligations and rights of a 'controller'.