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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) - Key issues of Chapters I-IV

I. Introduction

1. The comprehensive data protection package was adopted by the Commission on 25 January 2012. This package comprises two legislative proposals based on Article 16 TFEU, the new legal basis for data protection measures introduced by the Lisbon Treaty.

The first proposal, for a General Data Protection Regulation, seeks to replace the 1995 Data Protection Directive¹. The second proposal, for a Directive of the European Parliament and of the Council on data protection in the field of police and judicial cooperation in criminal matters, is intended to replace Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters².

2. During the first three months of its term, the Presidency, building upon the work of the Danish and the Cyprus Presidency, finalised a first examination of the entire proposal and has conducted in-depth discussions of certain important aspects of the Regulation, notably on introducing a more risk-based approach and more flexibility for the public sector into the text of the Regulation. Both items were also discussed at the JHA Council meeting of 7-8 March 2013.
3. The Working Party on Data Protection and Exchange of Information (DAPIX) has taken account of the discussions at the March JHA Council meeting and has also engaged in further discussions on the right to be forgotten, the right to data portability and profiling as well as on pseudonymisation, codes of conduct and certification. A third examination of the revised draft of the text of Chapters I to IV was conducted at a DAPIX meeting on 13-15 May 2013. On the basis of these discussions, the Presidency has endeavoured to further redraft the text of these key Chapters.

¹ OJ L 281, 23.11.1995, p. 31.

² OJ L 350, 30.12.2008, p. 60.

4. The Presidency is now submitting the text of Chapters I-IV to COREPER with a view of securing broad support for its approach to key issues arising in these chapters by the Council at its meeting on 6 June 2013. The text set out in ADD 1 has obviously not been agreed by delegations and reflects only the Presidency's view of the state of play of negotiations at this stage. The revised draft is subject to a general scrutiny reservation by all delegations. The following delegations have a parliamentary scrutiny reservation: CZ, HU, NL, PL and UK.
5. It is likely that further adjustments will be required to Chapters I to IV and future changes to Chapters V to XI will obviously also have repercussions - specific³ or horizontal⁴ - on the text of Chapters I to IV and may necessitate further changes to the latter chapters. Moreover, the question of implementing and delegated acts has been addressed only on an *ad hoc* basis, without prejudice to the horizontal review of the merits of the empowerments for delegated and implementing acts throughout the Regulation that needs to take place at a later stage.
6. Several delegations still have a reservation on the chosen legal form of the proposed instrument and would prefer a Directive⁵. This question cannot conclusively be settled at this stage. Whilst significant elements of flexibility for the Member States' public sector have been introduced into Chapters I-IV, this question can and will be decided only when the entire text of the draft Regulation is agreed.

³ This is true, for example, for the definition of main establishment in Article 4 (12), which might change as a consequence of changes to Chapter VI.

⁴ Thus changes to the sanctions regime of Articles 78 and 79 may have horizontal consequences to Chapter IV.

⁵ BE, CZ, DK, EE, HU, SE, SI and UK.

II. Key provisions - Chapters I and II

Material and territorial scope

EU institutions, agencies bodies and offices

7. There appears to be a broad agreement that Union institutions, bodies, offices and agencies should be subject to equivalent rules as the revised data protection rules for Member States and that these rules should enter into force at the same time. There are two ways of achieving this. A first possibility is to include 'Union institutions, bodies, offices and agencies' in the scope of this Regulation (by deleting the exemption provided in point (b) of paragraph 2 of Article 2). In view of the legal concerns that have been raised, a preferable solution might involve the Commission committing to a modification of Regulation 45/2001 which would enter into force at the same time as this instrument.

The household exemption

8. Regarding the so-called household exemption, Article 2(2)(d) of the Commission proposal excludes processing of personal data 'by a natural person without any gainful interest in the course of its own exclusively personal or household activity'. Under the 1995 Directive, the processing of personal data 'by a natural person in the course of a purely personal or household activity' has been excluded from its scope. As the criterion of lack of 'gainful interest' and the reference to 'exclusively' gave rise to interpretation difficulties and controversy, both have been deleted and the current draft now refers to processing 'in the course of a personal or household activity'. With a view to reaching a broadly acceptable solution, the Presidency has further redrafted recital 15. At the COREPER meeting of 2 May 2013 a majority of Member States appeared to be willing to accept the redrafted Article 2(2)(d).

The law enforcement exemption

9. The 1995 Data Protection Directive excludes data processing 'in the course of State activities relating to the area of criminal law'. In 2008 the Council adopted a Framework Decision on data protection in the framework of police and judicial cooperation in criminal matters⁶. The Commission proposal excluded processing
- '(e) by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties'*
10. This point (e) of paragraph 2 of Article 2 of the draft Regulation marks the delimitation with the proposed Directive on data protection in the field of police and judicial cooperation in criminal matters. At the COREPER meeting of 2 May 2013, a majority of delegations argued that activities related to ensuring public order should be exempted from the Regulation and brought within the scope of the proposed Directive.
11. Therefore the Presidency has adjusted point (e) of paragraph 2 of Article 2 as follows:
- '(e) by competent public authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences and, for these purposes, the maintenance of public order, or the execution of criminal penalties'.*

⁶ Council Framework Decision of 27 November 2008 on the protection of personal data in the framework of police and judicial cooperation in criminal matters, OJ L 350, 30.12.2008, p.60.

12. Several Member States referred to the role of both public and private bodies in the field of law enforcement and requested recognition of this in the text. In view thereof the Presidency has further revised recital 16, which recognises that certain obligations and rights under the Regulation may, pursuant to Article 21, be restricted by law in such cases (e.g. in the framework of anti-money laundering activities).

Territorial scope

13. The draft Regulation will not only apply to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union but also, under paragraph 2 of Article 3, to

'the processing of personal data of data subjects residing in the Union by a controller not established in the Union, where the processing activities are related to:

- (a) the offering of goods or services, irrespective of whether a payment by the data subject is required, 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.'*

14. The meaning of paragraph 2 has been further clarified in recitals 20 and 21⁷. At the COREPER meeting of 2 May 2013 a large majority of Member States could support this solution.

⁷ Inter alia by including a reference to elements (inspired by the ECJ *Alpenhof* case law: cases C-585/08 and C-144/09, judgment of 7 November 2010, ECR, P. I-12527) which should help to determine whether a particular offer of goods or services is geared towards EU residents.

Definition of consent

15. Data subject consent is an important ground for lawful data processing (Article 6(1)(a)). At the COREPER meeting of 8 May 2013, many delegations stated that the requirement for 'explicit' consent in all cases - which differs from the requirements of the 1995 Data Protection Directive - was unrealistic. The Presidency therefore suggests substituting 'unambiguous' for 'explicit' in the case of processing of personal data other than the special categories referred to in Article 9, for which the term explicit is maintained.
16. In accordance with the view of the vast majority of Member States, paragraph 4 of Article 7 has been deleted. The revised recital 34 clarifies that consent may not be valid where, in the circumstances of a specific case, there is a clear imbalance between the parties and this makes it unlikely that consent has been freely given.

Data processing principles

17. Article 5 sets out the main data protection principles applicable to all forms of data processing within the scope of the Regulation. These principles which are to a significant extent based on those in Article 6 of the 1995 Data Protection Directive, have been redrafted during the discussions in the DAPIX Working Party. A new principle of data security has been added (Article 5 (ee)).
18. Any agreement on the content of these principles is without prejudice to further discussion on specific regimes for the processing of data for historical, statistical or scientific purposes and for archiving purposes as well as on the grounds for lawful processing set out in Article 6, including the regime governing further processing for purposes incompatible with the original purpose.

Articles 80 and 80a: freedom of expression and access to public documents

19. The right to the protection of personal data co-exists with other fundamental rights, notably the right to freedom of expression which is also included in the Charter. The relationship between these rights is recognised in Article 80, which has been further redrafted following the COREPER meeting of 8 May 2013. This article clarifies that the law of Member States shall reconcile the right to protection of personal data with the right to freedom of expression.
20. In order to meet the concerns of several Member States in relation to this matter, Article 80a, which provides for the disclosure of personal data in official documents in the public interest, was drafted. The changes proposed by Sweden, which received a very wide support at the COREPER meeting of 8 May 2013, have been included in the text.

III. Key issues - Chapters III and IV

21. In the course of the first examination of the proposal for a General Data Protection Regulation, several Member States had voiced their disagreement with the level of detail of a number of the proposed obligations in the draft Regulation. At the same time, some others recalled the need to guarantee legal certainty in the proposed Regulation.
22. Building on the work of the Cyprus Presidency, the Council at its March meeting confirmed that the risk inherent in certain data processing operations should be an important criterion for calibrating the data protection obligations of controllers and processors. In that perspective, the Council instructed COREPER and DAPIX to continue work on the risk-based approach, *inter alia*, by:
 - a. further developing criteria for enabling the controller and processor to distinguish risk levels, in order to calibrate the application of their data protection obligations;

- b. further exploring the use of pseudonymous data as a means of calibrating controllers' and processors' data protection obligations.

- 23. In accordance with this mandate, intensive discussions have taken place regarding the text of Chapter IV (on the controllers' and processors' obligations). The revised draft of this Chapter includes a 'horizontal clause' in Article 22 of the Regulation, accompanied by a risk-based redrafting of many provisions of this Chapter (especially articles 23, 26, 28, 30, 31, 33 and 34). This means that the nature, context, scope and purposes of processing activities and the risks arising for the rights and freedoms of data subjects shall be taken into account when determining the appropriate measures to be taken by the controller in compliance with the Regulation. The text now mentions the possible use of pseudonymous data as a means of calibrating controllers' and processors' data protection obligations.
- 24. In line with this risk-based approach, the notification obligations regarding data breaches (Articles 31 and 32) have been adjusted and aligned. This ensures, on the one hand, that companies will not be saddled with excessive administrative burdens and, on the other hand, that data protection supervisory authorities will not be overwhelmed with data breach notifications, while at the same time safeguarding the rights of the data subject.
- 25. In accordance with the outcome of the March Council meeting, the impact assessment and prior consultation processes have been retained (Articles 33 and 34), while the designation of a data protection officer has been made optional, while enabling Union or Member State law to make such designation mandatory (Articles 35, 36 and 37).

26. Following extensive discussions at DAPIX, the articles on codes of conduct (Article 38) and certification mechanisms (Article 39) have been thoroughly redrafted and new articles on monitoring of codes of conduct (Article 38a) as well as on certification bodies and procedures (Article 39a) have been drawn up.
27. Whilst there is broad support for these new and redrafted articles, several Member States consider that there is further scope for incentivising the use of approved codes and of approved data protection certification mechanisms by establishing stronger linkages between these articles and the risk assessment process in earlier articles of Chapter IV. Such links have already been established in Articles 22, 23, 26 and 30.
28. In the course of the discussions on Chapter IV, the criteria for distinguishing different types of risk that may entail different types of obligations on the controllers and processors have been further refined. The text now mentions the use of pseudonymous data as a means of calibrating controllers' and processors' data protection obligations in certain cases.
29. Whereas Chapter IV of the Regulation offers scope for a risk-based approach, the Presidency has also proposed that controllers may have regard to the specific circumstances and context in which the personal data are processed when fulfilling their information obligations. Elements of this approach have been introduced into parts of Chapter III (in particular articles 12, 14 and 14a) with a view to ensuring effective and efficient exercise of data subject rights, while improving certainty and transparency.

30. As regards to the rights of data subjects in Chapter III, the Presidency underlines the importance of enhanced transparency standards which are necessary in order to ensure data subjects are in a position to control processing of their personal data and exercise in an effective manner their data subject rights. These standards and modalities for exercising data subject rights are set out in Article 12. In order to ensure fair and transparent processing, the procedures relating to the information to be provided to the data subject have been adapted and streamlined.

IV. Conclusions

31. *Substantial progress has been achieved in the negotiation of this draft Regulation under the Irish Presidency. The approach to key issues which the Council will be invited to generally endorse is a conditional one in the sense that no part of the draft Regulation can be finally agreed until the whole text of the Regulation is agreed. Moreover, a number of specific issues in relation to the points listed below need to be further addressed. Furthermore, the approach to the issues listed below is without prejudice to the question as to whether the Regulation can provide sufficient flexibility for the Member States' public sector. In view of the above, the Presidency asks COREPER to invite the Council to generally endorse:*

- 1) the material and territorial scope of the Regulation, as set out in Articles 2 and 3;*
- 2) the concept of consent, as defined in Article 4(8) and further specified in Articles 6(1)(a), 7 and 9(2)(a);*

- 3) *the data protection principles as set out in Article 5, subject to future changes regarding historical, statistical or scientific and archiving purposes;*
- 4) *Articles 80 and 80a, governing the relationship between this Regulation and freedom of expression and the right of access to official documents;*
- 5) *as regards the rights of data subjects, the principle of enhanced transparency standards which will increase data subjects control over their personal data and facilitate more effective exercise of their rights under Chapter III;*
- 6) *as regards the obligations on controllers and processors in Chapter IV, the introduction of the risk-based approach, which will take account of the nature, scope, context and purposes of the processing operations and levels of risk arising for data subjects, when determining the measures to be taken; and*
- 7) *the development and application, on a voluntary basis, of approved codes of conduct and certification mechanisms by controllers and processors as a means of demonstrating compliance with the Regulation.*
